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R E P R I N T

Recounts, Rechecks and Election Contests

Title 19 and the Post-Election Environment

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The purpose of an election is not to declare a victor. Rather, it is to convince the losers that they lost and lost fairly.¹ Title 19, the body of statutory election law in New Jersey, contains a comprehensive regime for ensuring that election results can be adequately analyzed to dispel any doubt regarding an election outcome. There are two separate sections of Title 19 that permit the scrutiny of election results, and that are designed to instill confidence in the outcome of elections: the statutory provisions for recounts, and the statutory provisions for election contests.

Recounts of Votes Cast in an Election

The recount process pursuant to N.J.S.A. 19:28-1, *et seq.*, permits a second look at the official election results when there is reason to believe an error has been made in counting the votes of that election. A candidate in the election, or any 10 voters, may make an application to the New Jersey Superior Court in the county where the election took place, for a recount of the votes cast in the election.² The application for a recount must be filed within 15 days following the election.³ The party filing the recount application must deposit a court-ordered sum, not to exceed \$25 per election district being recounted, "as security for the payment of the costs and expenses of the recount in case the original count be confirmed."⁴ If the recount results in a change of the declared election winner, or an alteration in any election district of more than 10 votes or 10 percent of the total vote cast in the election district, then the recount applicant will have their deposit returned, and the costs and expenses of the recount are paid by the state or political subdivision that held the election in question.⁵

The recount is conducted by the county board of elections.⁶ The method of conducting a recount of paper ballots (*i.e.*, absentee, provisional, emergency) is simple and straightforward; the board recounts the ballots by hand, and re-tabulates the results. The recount of machine-cast ballots, known as a recheck, simply involves the reprinting of the tally sheets from the voting machines at issue.⁷ If the recount process

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changes the result of the election, the superior court will order the revocation of the certificate of election issued to the putative winner, and the issuance of another certificate to the actual winner of the election.⁸

However, as a practical matter, it is an exceedingly rare case where a recount changes the election results. The recount and recheck are strictly a mathematical exercise. The election results on election night represent a set of numbers, reflecting the vote tallies for various candidates and/or public questions. The recount is merely an attempt to confirm that those sets of numbers are accurate. To use a sports analogy, the recount is a look at the video replay when the decision is nearly too close to call.

If the vote tallies shift as a result of a recount, invariably the numbers barely change at all. A recount almost never results in a change in the election results. For that dramatic outcome to occur, a party needs to file a lawsuit challenging the election results.

Election Contests—Challenging the Election Results

Election results may be challenged in court by any voter in the election at issue upon the filing of a unique pleading—the election contest petition. New Jersey courts have a long tradition of election contests, dating back to the birth of the Republic.⁹ Indeed, the first congressional races following the ratification of the U.S. Constitution resulted in the infant nation's first election contest, right here in New Jersey.¹⁰

Since "it is the firmly established policy of this State that the public interest manifestly requires that election contests be promptly tried,"¹¹ the election contest has a vanishingly short statute of limitations.

[T]he time frames are condensed in deference to the need to have the

election results certified and an officeholder sworn in.¹²

[T]he election contest statute is designed to provide a speedy and efficient mechanism for a challenge to be brought and completed.¹³

Any contest petition challenging the results of a primary election must be filed within 10 days following the primary election.¹⁴ Any contest petition challenging the results of a general election must be filed within 30 days following the general election.¹⁵

The election contest statute of limitations also includes a discovery rule. If the grounds on which the election is being challenged are discovered from election materials filed subsequent to the election, the contest petition may be filed 10 or 30 days, respectively, after the election materials are filed.¹⁶

Finally, a contest petition can be filed within 10 days following the conclusion of a recount.¹⁷

The election contest petition must set forth one of several prescribed statutory grounds on which the election is being challenged.¹⁸ Among the grounds upon which a contest petition must depend are:

1. malconduct, fraud or corruption by election workers or county board of elections members, sufficient to change the election result;
2. that the election winner was ineligible to serve in the office;
3. that the winner was disenfranchised as a result of criminal conviction at the election;
4. that the winner bribed or attempted to bribe any election official in furtherance of his or her election;
5. receipt of a number of illegal votes, or rejection of a number of legal votes, sufficient to change the election result;

6. any error in counting votes or declaring the election result, sufficient to change the election result;
7. any other cause that shows that another person was legally elected;
8. spending any money or incurring any liability in violation of campaign finance laws;
9. that a nomination petition was not filed in good faith or with a lawful affidavit.¹⁹

In an election involving the entire state, or more than one county, the contest petition is filed in the New Jersey Superior Court by 25 voters or the defeated candidate.²⁰ In all other elections, the contest petition is filed in the superior court by 15 voters or the defeated candidate.²¹ The contest petition must be verified by oath by two of the petitioners or the defeated candidate, which may be made on information and belief, and the petition must be filed along with a \$500 deposit with the court.²² When the grounds for the election contest includes illegal votes received or legal votes rejected, the names of the voters and their election districts must be set forth in the petition, if known.²³

Because of the strong public policy in favor of resolving election contests promptly, the court hearing must be scheduled at least 15 days, and no more than 30 days, after the filing of the contest petition.²⁴ At trial, the procedure is similar to "a civil action so far as practicable, ... under the control and direction of the court, which shall hear and determine the matter without a jury."²⁵ The court enjoys the power to require amendments to the contest petition, and to allow adjournments for up to 30 days, but the reason for such adjournment must be submitted by affidavit.²⁶

If and when voters are called to testify at trial, the court may compel them

to disclose how they voted.²⁷ However, this power to compel a voter to reveal how he or she cast a vote belongs to the court, and the court alone.²⁸

[T]he statute empowers the court, and only the court, to compel a challenged voter to reveal his vote.²⁹

The court must ultimately determine whether the declared winner of the election was, in fact, duly elected, and whether they shall retain their certificate of election.³⁰ Depending on the outcome at trial, the court can revoke the winning candidate's certificate of election, or vacate the election results,³¹ or order the true winning candidate (*i.e.*, the winner in court) into office.³² In a loser-pays arrangement not seen in many other contexts across American jurisprudence, each party to an election contest is liable for their respective costs.³³

The foregoing collection of statutory rules and requirements govern a curious pleading, the election contest petition, and result in the "right of a defeated candidate to contest the outcome of an election [being] carefully circumscribed."³⁴ Although the contents of the contest petition are statutorily prescribed, the legal sufficiency of the contest petition has been thoroughly litigated over more than a century in New Jersey courts. For the first time in a generation, the New Jersey Supreme Court recently handed down a decision regarding the legal sufficiency of election contest petitions.

In *In re the Contest of the November 8, 2005 General Election for the Office of Mayor of the Township of Parsippany-Troy Hills*, Justice Helen E. Hoens delivered an insightful and comprehensive history of Title 19 in general, and the election contest statute in particular.³⁵ While acknowledging that New Jersey's

"election laws provide us with the framework within which our Legislature has directed an election contest must proceed,"³⁶ the Court was confronted with the issue of "what standard governs the adequacy of an election contest petition that is challenged through a motion to dismiss."³⁷

The election contest petition at issue in *Parsippany* was challenged as legally insufficient on its face, and thrown out by the trial court on a motion to dismiss. Upon reviewing the century-and-a-half evolution of the election contest statute, and case law construing it over the years, the Court ultimately ruled that "[v]iewed in this context, the petition was sufficient to withstand the motion to dismiss for failure to state a claim."³⁸ But, the core of the Court's decision was its clarification of the pleading standard for a contest petition.

An election contest petition is not a complaint, the purpose of which is to give one's adversary notice of the claim...It is, instead, a petition that takes the place of a pleading to initiate the election contest, which must set forth one of the permitted grounds, and which must otherwise comply with the statutory requirements.³⁹

According to the *Parsippany* Court, the election contest petition is not a mere complaint "to be tested against liberal notice pleading concepts."⁴⁰ It is a creature of state statutory law, and must be shaped according to those legislative dictates. The content of the election contest petition is defined by its statutory source, and must abide by the requirements imposed by the Legislature to be legally sufficient.

Handed down by the New Jersey Supreme Court more than two years after the mayoral election at issue, the

Parsippany case represents the lengthiest election contest in state history. The decision also represents the first pronouncement from the Court regarding election contest petitions in many years. The *Parsippany* case settles questions over the legal sufficiency of contest petitions that have remained unaddressed for decades, and that lawyers and courts alike have stumbled across. The *Parsippany* Court resolved lingering issues surrounding the preparation of election contest petitions, and practitioners involved in these cases are well-advised to consult the decision before commencing this unique and exciting litigation. ☺

Endnotes

1. Pete Slover, *Some Texas Counties Are Clinging to the Chad*, *Dallas Morning News*, March 8, 2004.
2. N.J.S.A. 19:28-1.
3. *Id.*
4. N.J.S.A. 19:28-2.
5. *Id.*
6. N.J.S.A. 19:28-3.
7. N.J.S.A. 19:52-6.1.
8. N.J.S.A. 19:28-4.
9. John M. Carbone, *The History of Contested Elections in New Jersey*, *New Jersey Lawyer*, April 2001, at 47.
10. *Id.*
11. *Jones v. Mitchell*, 194 N.J. Super. 387, 391 (Law Div. 1983) (*quoting Lynch v. Acquilone*, 32 N.J. Super. 513, 518 (App. Div. 1954) (*citing In re Smock*, 5 N.J. Super. 495, 504 (Law Div. 1949))).
12. *In re the Contest of the November 8, 2005 General Election for the Office of Mayor of the Township of Parsippany-Troy Hills*, 192 N.J. 546, 560 (2007).
13. *Id.* at 571-72.
14. N.J.S.A. 19:29-3.
15. *Id.*
16. *Id.*
17. *Id.*

18. N.J.S.A. 19:29-1.
19. *Id.*
20. N.J.S.A. 19:29-2.
21. *Id.*
22. *Id.*
23. *Id.*
24. N.J.S.A. 19:29-4.
25. N.J.S.A. 19:29-5.
26. *Id.*
27. N.J.S.A. 19:29-7.
28. *Parsippany, supra*, 192 N.J. at 566, 569.
29. *Id.* at 569.
30. N.J.S.A. 19:29-8.
31. N.J.S.A. 19:29-9.
32. N.J.S.A. 19:29-10.
33. N.J.S.A. 19:29-14.
34. *Parsippany, supra*, 192 N.J. at 550.
35. *Id.* at 561-66.
36. *Id.* at 559.
37. *Id.* at 558.
38. *Id.* at 571.
39. *Id.* at 569.
40. *Id.* at 570.

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