HILL WALLACK
ATTORNEYS AT LAW

Quarterly
NEWSLETTER

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IN THIS ISSUE

Message From the Managing Partner

Since our last publication we have all seen events that oppress the mind. Yet intermingled with the horror and gloom are singular acts of heroism, selflessness and hope. If anything has been proven since 9/11, it is that the force of ideas still forge this nation, that belief does not require the blessing of religion to inspire, and that brotherhood transcends race. We at **Hill Wallack** admire the everyday Super Men and Women leading us by example. Thank you.

In this issue, we focus on some of the latest developments in the law which affect our lives. Our lead article, *"The Soldiers' and Sailors' Civil Relief Act and Its Effect on Mortgage Foreclosures"* by Jennifer Scanlon concentrates on the protection for military personnel in their ability to meet financial obligations. Liz Holdren, in *"Grounds for Eviction"* discusses the Anti-Eviction Act. The elements of RICO are outlined by Todd Greene in *"The Soprano's and Family Law"*, while Denise Simon examines child support issues in her article *"Child Support Liens: Deadbeat Parents Cannot Receive Proceeds of Judgments Until their Obligations are Met"*.

Susan Inverso explains the vulnerability of computer record retention in *"Exposure of Computer Records and Computer Systems in the Event of Litigation"*, while Sean Mulligan warns design professionals in *"Limitation of Liability Clause in their Contract Can Save a Design Professional Thousands of Dollars"*. Anthony Velasquez explores public contract laws in his article *"Shortcomings of the Single-Prime Law"*. Andrew Jacobson, in *"Federal Fair Housing Act Presents Risks for Unwary Community Associations"*, discusses the current issues affecting disabled citizens. In his debut article, one of our new associates Keith Bannach brings us up-to-date on the benefits of using arbitration to resolve disputes in *"Arbitration of Employment Disputes in Employment Agreements"*.

We hope that our *Quarterly* Newsletter is a valuable resource to our readers as we strive to provide informative articles which address topics related to your needs and interests. We welcome your suggestions for our future issues and we encourage you to contact the authors with any questions relating to the articles contained in this issue. Please feel free to e-mail your comments or suggestions on future topics of interest to info@hillwallack.com.

- Robert W. Bacso

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The Soldiers' and Sailors' Civil Relief Act and Its Effect on Mortgage Foreclosures

by Jennifer A. Scanlon

Since the tragic events of September 11, 2001, more attention is being drawn to the individuals who serve in our armed forces. As our nation engages in war and the deployment of military personnel, it is important to note that many of those members who are mobilized and called to active duty leave behind mortgaged real estate. Because the requirements of military service can compromise the service person's ability to meet financial obligations, many may turn to the Soldiers' and Sailors' Civil Relief Act ("SSCRA") for protection.

The purpose of the SSCRA is to, in certain cases, suspend enforcement of civil liabilities of those persons serving in the United States military "in order to enable such persons to devote their entire energy to the defense needs of the Nation..." Although active duty in the armed forces may provide a safe haven against legal action, the protection is only temporary and, in some cases, requires a showing that, the person's participation in active military duty has materially affected that person's ability to comply with their financial obligations. Moreover, the SSCRA only provides relief from obligations incurred prior to the period of military service.

"Although active duty in the armed forces may provide a safe haven against legal action, the protection is only temporary…"

With respect to mortgaged real estate and its resulting obligations, there are three stages at which military personnel may seek relief from those obligations by virtue of their participation in active duty: (1) prior to default, (2) following default and during foreclosure, and (3) following foreclosure.

Prior to Default

Pursuant to Section 526 of the SSCRA, a creditor may not, at any time during an obligor's service in the military, charge more than 6% interest on an obligation which was incurred by that individual prior to his or her entry into service, regardless of the amount of interest agreed upon by the parties or as stated in the contract giving rise to the obligation. The creditor may, however, obtain relief from this provision by making application to a court and showing that the ability of the service member to pay the higher rate is not materially affected by reason of that person's service.

In addition to the availability of a lower interest rate during active duty, a person may seek to avoid making payments on an obligation entirely during the period of active duty. Pursuant to Section 590 of the SSCRA, a person may, at any time during his or her period of military service or within six months thereafter,

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Grounds for Eviction

by Elizabeth K. Holdren

In New Jersey, under the Anti-Eviction Act, a residential tenant may not be refused the ability to have a lease renewed, or be evicted, absent good cause. In fact, the New Jersey Supreme Court has specifically held that foreclosing banks also may not evict a tenant in the property being foreclosed, regardless of whether the tenancy was established before or after the execution of the mortgage, absent good cause. Thus, a tenant may never be evicted unless the tenant violates his obligations under the lease, or the building is removed from the rental housing market. Essentially, a tenant may be a tenant for life if he so chooses; however, there are two exceptions where a residential tenant is not protected by the Act. The first is where the owner of the property occupies the premises where there are not more than two rental units. The other is where a transient guest or seasonal tenant occupies a hotel, motel, or other guest house. In all other situations, the tenant is protected by the Anti-Eviction Act.

"... a tenant may never be evicted unless the tenant violates his obligations under the lease..."

Failure to Make Rental Payments

There are sixteen grounds under which a landlord may evict a tenant for "good cause" under the Anti-Eviction Act. A landlord may not evict a tenant unless one of these specific grounds are met, and then only if all of the procedural requirements are followed. The first ground is non-payment of rent. Generally, "rent" is defined as the consideration paid by a tenant for the use or occupancy of the property. However, the parties may also agree as to what charges constitute rent. In this regard, expenses such as late charges, charges for bounced checks, filing and service costs for court, and counsel fees can sometimes be pursued, provided that they are characterized as "additional rent" in the lease. Also, a judgment will not be entered, allowing the landlord to evict the tenant, if the tenant pays all of the rent due and owing prior to the close of business on the court date.

A tenant may also be evicted for failure to pay rent after the tenant was provided with a valid notice of an increase. Here, the landlord must assure that the increase is not unconscionable, and that it complies with all rent control laws. A related cause to evict arises when a tenant habitually pays his rent late. A finding of habitual late payment of rent requires the tenant to have made at least two late payments following service of the appropriate notice upon the tenant. A landlord may also evict a tenant who refuses reasonable changes in the terms and conditions of the lease at the end of its term, including a reasonable increase in rent.

Additionally, a landlord may bring an action to evict a tenant who is considered disorderly. This action typically involves noise or other conduct disturbing to the peace and quiet of other tenants. Also, if a tenant causes or allows damage to the property, he may be evicted.

In the event there is a substantial violation of the reasonable rules and regulations of the landlord, he may bring an action to evict the tenant. Landlords should be aware, however, that there are 5 defenses to this cause of action: (1) there was no written warning from the landlord to the tenant; (2) the tenant's violation was not substantial; (3) the rules and regulations of the landlord are unreasonable; (4) the rules and regulations were not accepted in writing by the tenant or made part of the lease; and (5) the landlord is barred from asserting the breach by virtue of his accepting the rent with knowledge of the breach. If the tenant shows any one of these defenses, the court will not allow the eviction. Similarly, a cause to evict arises when there is a substantial violation of a reasonable covenant in the lease by the tenant.

A landlord may bring an action to evict a tenant where the landlord seeks to abate housing, health code, or zoning violations in the premises. This situation arises when the landlord has

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The Soprano's and Family Law: Civil RICO in Divorce

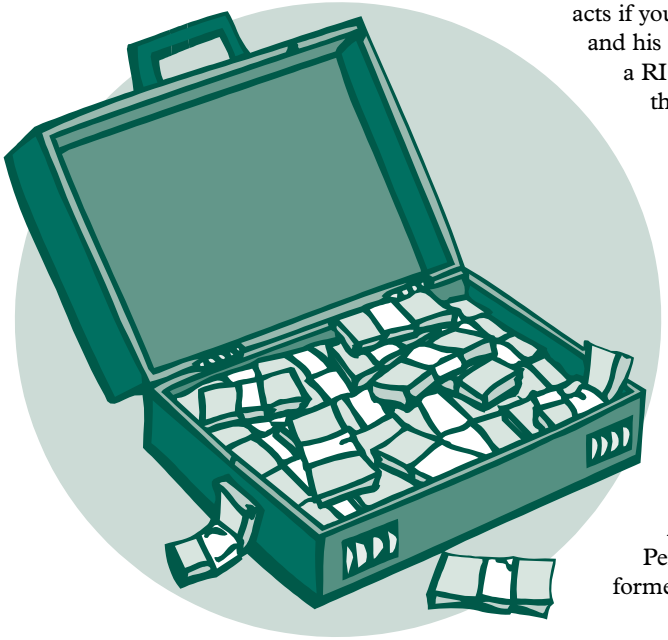
by Todd D. Greene

Mentioning the Racketeer Influenced and Corrupt Organizations Act ("RICO") conjures up images of organized crime figures and phony businesses used for money laundering. As the Act's name indicates, the legislative intent of RICO was to thwart organized crime. RICO, however, has recently been used as a means of combating attempts to minimize or escape child and spousal support obligations.

In *Perlberger v. Perlberger,* a case emanating from the U.S. District Court in Pennsylvania, a wife and daughter brought a civil RICO action against the former husband/father and his accountants. The allegations made in Ms. Perlberger's Complaint were that her husband and his accountants participated in a scheme to conceal the value of her husband's assets and income during their divorce proceedings. Thus, Mr. Perlberger's alimony and child support obligations were less than what should have been awarded.

Elements of RICO

In order to bring an action under RICO, a plaintiff must demonstrate (1) a violation of the RICO statute; (2) that caused an injury to the plaintiff; and that (3) the RICO violation was the proximate or legal cause of the plaintiff's injury. Thus, to recover under the statute, Ms. Perlberger had to prove that her ex-husband and his accountants committed an act which violated RICO; that Ms. Perlberger suffered harm as a result of the RICO violation; and that Mr. Perlberger's and his accountants' actions were cause of Ms. Perlberger's damages.



To establish a violation of the RICO statute, Ms. Perlberger had to prove that her former husband and his accountants formed a "RICO enterprise." In addition, she had to prove that the enterprise engaged in a "pattern of racketeering activity" defined as the occurrence of at least two "predicate" acts of racketeering activity within a ten year period. Some examples of predicate acts include fraud, mail fraud and forgery. Furthermore, Ms. Perlberger had to demonstrate that her former husband and his accountants either directly or indirectly participated in the RICO enterprise.

Perlberger Meets Soprano

It is easy to understand the concept of a RICO enterprise and predicate acts if you think of the *Sopranos.* Tony and his partners in Badabing! have a RICO enterprise. Assuming that Tony uses Badabing! to launder money from his other "businesses," his fraudulent conduct would constitute the required predicate acts.

Applying the *Sopranos* analogy to the *Perlberger* case, Mr. Perlberger would be Tony and his accountants would be the equivalent of Tony's partners in Badabing! As for predicate acts, Ms. Perlberger alleged that her former husband and his accountants engaged in mail and wire fraud by hiding Mr. Perlberger's assets and income. According to Ms. Perlberger, the accountants prepared fraudulent financial statements which undervalued her former husband's law firm. In addition, they assisted Mr. Perlberger in transferring his assets to another individual. As a result, Ms. Perlberger asserted that, by minimizing the income reported during his divorce action, Mr. Perlberger was able to decrease his ultimate support obligations.

"... the legislative intent of RICO was to thwart organized crime."

RICO's Applicability

Not surprisingly, one of the defendants' primary arguments to Ms. Perlberger's claims was that the RICO Act should not apply to cases involving family law matters. According to the defendants, RICO should be relegated to combating crimes usually associated with the activities of racketeers; the Act should not be used to assist individuals dissatisfied with divorce decrees. In support of their argument, the defendants asserted that no plaintiff in Pennsylvania has ever used RICO to attack a divorce decree, child support order or alimony award. The court likewise could not find any published judicial opinions from Pennsylvania applying RICO in this manner. It did, however, find a number of Federal cases where RICO claims relating to family law matters were heard and the *Perlberger* Court followed suit.

Although Ms. Perlberger's RICO action was permitted, the Court eventually ruled that she did not submit any evidence to establish that the accountants committed the

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Child Support Liens: Deadbeat Parents Cannot Receive Proceeds of Judgments Until Their Obligations Are Met

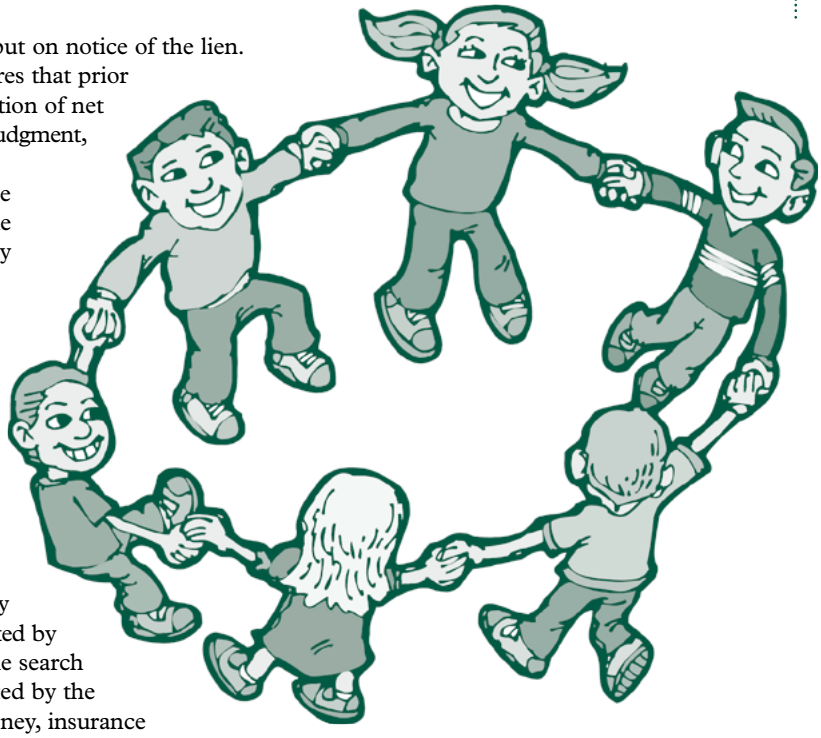
by Denise A. Simon

The New Jersey law which prevents parents who owe child support arrears until they are current on the obligation has been implemented throughout the state judiciary system over the past year. The law, which took effect on August 14, 2000, allows a court to place a lien on a judgment, arbitration award, inheritance or a workers' compensation award if the recipient owes any back child support obligation. The lien then has priority over all other levies and garnishments with the exception of unpaid New Jersey State income taxes. The lien applies to "net proceeds" of a settlement, which the legislature defined as any amount of money in excess of $2,000, payable to the prevailing party. In calculating net proceeds, the law provides that the costs in prosecuting a suit, including attorney's fees and court fees, are to be deducted from an award or inheritance. The law also acknowledges that payments to the State Medicaid program or the Division of Unemployment should be made prior to determining the net proceeds of an award.

"In calculating net proceeds, the law provides that the costs in prosecuting a suit, including attorney's fees and court fees, are to be deducted from an award or inheritance."

Procedure to Initiate a Lien

To initiate the lien, it must be docketed as a child support judgment with the court clerk's office. This creates a searchable record so that attorneys are put on notice of the lien. The law requires that prior to the distribution of net proceeds of a judgment, settlement or inheritance, the attorney for the prevailing party must initiate a search through a private judgment search company to determine the existence of a child support lien. If the prevailing party is not represented by an attorney, the search must be initiated by the opposing attorney, insurance company or agent. The amount of child support judgment must be paid out of the net proceeds prior to final payment being forwarded to the client.



Beginning on May 7, 2001, the Division of Workers' Compensation has child support lien search capability via access to the Division's data system. Child support lien information is downloaded monthly from the New Jersey Administrative Office of the Courts to the Division of Workers' Compensation. Current child support arrearage data is available daily via an online computer linkage between the Division and the AOC. The Division matches the information received on child support debtors with information it retains for individuals who have filed workers' compensation claims. In most workers' compensation courts throughout the state, judges are routinely running the search prior to putting settlements through or prior to commencing a trial. The judge of compensation shall in turn incorporate in the decision an order requiring the employer or the employer's insurance carrier to contact the Probation Division to satisfy the child support judgment out of the net proceeds of the award. In the event no child support judgment is found, the net proceeds of any settlement or judgment may be distributed immediately. Such a system does not exist in state judiciary. The judiciary is not required to review the existence of such liens. Attorneys are therefore held accountable for instituting the private company search.

Thus, in today's day and age, deadbeat parents may not be able to escape their responsibilities and obligations. While the implementation of this new system has created a burden on the legal system, it provides an efficient manner in which to protect the children in the State by mandating that the proceeds of awards be first applied to child support arrearages.

Denise A. Simon *is an associate of* ***Hill Wallack*** *where she is a member of the* ***Litigation Division*** *and the* ***Workers' Compensation Practice Group.***

Exposure of Corporate Records and Computer Systems in the Event of Litigation

by Susan E. Inverso

While computers have become the key method of records retention in virtually every industry within the State of New Jersey, many corporate decision-makers are unaware of the vulnerability of their enterprise with regard to litigation. It is essential that all business owners consider the legal requirements of record retention and establish a compliance program to guard against allegations of wrong-doing. New Jersey business owners must be aware that they will only be protected from costly litigation by fully complying with the legal requirements for electronic record keeping.

Many business owners do not consider their compliance and how their business will be affected in the event of litigation. In litigation, information in the possession of the company, including electronic information, is discoverable. At the outset, an attorney should request a copy of the company's records retention policy manual. Then, the attorney may request specific details as to the methodology and implementation of any technology, including information regarding any records retention audits. It largely will be the responsibility of the personnel in charge of records retention and disposal to respond to these requests, whether through written questions or oral testimony. Therefore, it is essential that those responsible for records retention be well aware of the requirements of the law. Only through diligent records management can a business successfully defend a claim of liability or spoilation of evidence. It is up to the company to show that it is in compliance with its records retention policy, and such a responsibility cannot wait until the company has been sued.

Many companies, unfortunately, are not sufficiently familiar with the information that they possess. Even if a company is computer savvy, it may not be aware of the full extent of the

backups on its computer system. And if a company is not sufficiently aware of the information contained within its computer system, it may be unable to comply with its records retention policy.

Creation and Enforcement of a Records Retention Policy

Initiating a records retention policy is crucial to the operation of even the smallest company. Most large corporations will have policies and, within the company, a records management group must be established to insure compliance with these policies. As such may be a difficult task, it requires the cooperation of the employees of the company. Compliance with a records retention policy is not simply the work of the records management group, but of every company employee.

A company's records retention policy must be enforced to the fullest extent permitted by the policy. Unless a company can demonstrate strict compliance with its records retention policy, it cannot use such policy to claim it possesses no documents. For example, how would it look to a jury if a company still has in its possession a 20 year old document. The implication can be devastating. The company could at the very least be exposed to further and unwanted investigation into its practices and procedures and at the worst, may be unnecessarily exposed to liability. Thus, even if a company has nothing to hide, document mismanagement and noncompliance with a records retention policy may result in unnecessary costs to the company.

Obstacles to Compliance

There are two main obstacles which stand in the way of compliance with a records retention policy: first, software which is not cognizant of or addressed towards records retention issues; and second, inadequate employee training with regard to records retention issues.

In discussing records retention policies and the difficulty of compliance in the modern workplace, a business must consider all of the electronic data utilized, document imaging, document management, electronic mail (e-mail), word processing, accounting and backups.

With document imaging, for example, consider that documents with different retention schedules may be saved on the same permanent media (such as a compact disc). This may prevent a company from disposing of documents in compliance with its records retention policy as it would either have to wait until the latest retention date to dispose of the permanent media or have to undertake the costly and time-consuming task of selectively destroying or resaving documents on the permanent media. Another problem encountered with

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A Limitation of Liability Clause in their Contract Can Save a Design Professional Thousands of Dollars

by Sean P. Mulligan

Most design projects or commercial undertakings include negotiating contracts that protect both parties' interests. Significant considerations include who will bear the burdens of risk involved in the project, the completion date and default remedies. Few parties consider placing a cap on the amount of damages that a party can recover in the event of a claim of negligence in the services provided by the design professional.

Limitation of Liability Clauses Have Been Upheld By The Courts

The design professional's potential liability regarding delay claims, related damages and damage to property or person may exceed hundreds of thousands or even millions of dollars. Much of this liability can be contracted away by using a limitation of liability clause. Limitation of liability clauses have been upheld by various state courts throughout the country. Traditionally, New Jersey Courts have upheld clauses limiting liability so long as the clause did not violate public policy and was clear in its terms, and the parties forming the contract had equal bargaining power. Public policy concerns generally focus on whether the amount of liability to which a claim against the design professional is limited is reasonable when compared to the work undertaken.

The leading case in New Jersey regarding the enforceability of limitation of liability clauses is *Marbro v. Borough of Tinton Falls.* In *Marbro,* the Township of Tinton Falls hired Fellows, Read & Associates ("FRA") to design improvements to a local park. Complications arose, and suit was filed by Marbro against the Township. The township in turn filed a third party complaint against FRA. FRA moved for summary judgment as to the amount of damages that could be recovered against it on the basis of a limitation of liability clause. The court granted the motion and limited the liability of FRA to the amount of its fee in accordance with the contract.

The court held that the limitation of liability clause was reasonable and did not violate public policy because the cap on damages was sufficiently high to motivate FRA to comply with its contractual obligations. In other words, the court would have voided the clause if the damage cap had been low enough to drastically minimize the consequences of a breach of the contract by FRA.

A Limitation of Liability Clause Can Be Used as Part of the Negotiation Process

Some construction parties will undoubtedly balk at the inclusion of a limitation of liability clause in their contracts. Certainly, business concerns will impact on how aggressively a professional should seek to include such a clause in its contract. However, even if a party refuses to include the limiting clause, it can be used as leverage in negotiating another concession or some other advantage. Nevertheless, experience has shown that many parties, including sophisticated business entities, have allowed design professionals to include limitation of liability clauses in their contracts. Not only does such a clause protect assets and insurance policies, it undoubtedly makes the design professional a less tempting target. A potential plaintiff will certainly seek redress more aggressively from a "deep pocket" than a design professional whose liability is limited to the amount of his fee.

Hill Wallack attorneys are experienced in drafting the proper contractual wording to safeguard the design professional in a manner that should be upheld by the courts. One simple clause is worth the effort to potentially save thousands of dollars.

Sean P. Mulligan *is an associate of* ***Hill Wallack*** *where he is a member of the* ***Litigation Division*** *and the* ***Construction Industry Practice Group.*** *He concentrates his practice in the representation of architects, engineers and design professionals and their professional liability insurance carriers.*

SPOTLIGHT

NEW ASSOCIATES

Keith B. Bannach has become an associate with the firm in the **Litigation Division** where he is a member of the **Trial & Insurance Practice Group.** He concentrates his practice in the representation of insurance companies in defense of diverse claims. After graduating from the United States Naval Academy, Mr. Bannach served in the United States Marine Corps, attaining the rank of Major. He received his law degree from University of Wisconsin-Madison Law School and is admitted to practice in New Jersey.

John Fitzgerald O'Connell has become an associate with **Hill Wallack** in the **Real Estate Division.** His principal areas of practice are in commercial real estate, economic and business development with a particular emphasis on municipal law and government affairs. After his commission as a Naval Officer and Aviator in the United States Navy, he was selected by his Commanding Officer to attend the prestigious Navy Fighter Weapons School (TOPGUN) based on performance and leadership qualities exhibited during Desert Storm. He currently holds the rank of Lieutenant Commander in the United States Naval Reserve.

John Michael Carbonara has joined the firm in its **Administrative Law/Government Procurement Practice Group.** He has a practice concentration in administrative, environmental and regulatory compliance. Mr. Carbonara earned his law degree from Rutgers University School of Law - Camden. He previously served as Judicial Law Clerk to The Honorable Maria Marinara Sypek and is admitted to practice in New Jersey and Pennsylvania.

Luis Carrillo joined the firm in its **Land Use Division** which includes the firm's **Land Use Applications, Land Use Litigation** and **Environmental Applications Practice Groups.** Mr. Carrillo is a graduate of Seton Hall University School of Law - Newark and is admitted to practice in the State of New Jersey. He previously served as Judicial Law Clerk to The Honorable Douglas T. Hague.

Kelly O'Neill-Côté has joined the firm in its **General Litigation Division** and **Domestic Relations Practice Group.** She will concentrate her practice in family law and chancery practice, municipal law and general litigation. Ms. O'Neill-Côté earned her law degree from the University of Dayton School of Law. She previously served as Judicial Law Clerk to The Honorable Donald A. Smith and is admitted to practice in the State of New Jersey.

Len F. Collett has become an associate with **Hill Wallack** in the **Administrative Law/Government Procurement Practice Group.** He concentrates his practice in administrative, environmental and regulatory compliance. Mr. Collett earned his degree from Rutgers University School of Law - Camden. He previously served as Judicial Law Clerk to The Honorable Paulette Sapp-Peterson and is admitted to practice in the State of New Jersey.

Henry T. Chou joined the firm in its **Land Use Division.** Mr. Chou is a graduate of Rutgers University School of Law - Camden and is admitted to practice in New Jersey and Pennsylvania. He previously served as Judicial Law Clerk to the Honorable Lawrence M. Lawson.

Alan M. Minato has joined the firm in its **Banking & Secured Transactions Practice Group.** Mr. Minato concentrates his practice in all matters of banking and secured transactions, including: acquisition finance, construction financing and refinancing, loan modification, restructuring, loan documentation, workouts, foreclosures and closings. He earned his law degree from Rutgers University School of Law - Camden and is admitted to practice in New Jersey and Pennsylvania.

Stephen R. Banks has joined the firm in its **Workers' Compensation Practice Group.** Mr. Banks concentrates his practice in handling defense litigation, personal injury and workers' compensation. He earned his law degree from Widener University School of Law and is admitted to practice in New Jersey.

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APPOINTMENTS & RECOGNITION

Hill Wallack is honored to recognize the following partners who are serving on Governor-Elect Jim McGreevey's transition teams. ***Robert W. Bacso,*** Managing Partner of the firm has been chosen to serve on the Department of Transportation's Transition Team. ***Patrick D. Kennedy,*** partner-in-charge of the **Administrative Law/Government Procurement Practice Group** is serving on the Department of Environmental Protection and Authorities Transition Teams. ***Ronald L. Perl,*** partner-in-charge of the **Community Association Practice Group** is serving on the Community Affairs Transition Team. ***Judith A. Yaskin,*** counsel to the firm's **Constitutional Law Practice Group** is participating on the Public Advocate Transition Team and ***Mark E. Litowitz,*** counsel to the firm's **Workers' Compensation Practice Group** is serving on the Department of Labor Transition Team.

Henry A. Hill, partner-in-charge of the **Land Use Division,** was recently appointed as Trustee to the

Richard J. Hughes Foundation. The Richard J. Hughes Foundation was formed to honor the remarkable service to the people of New Jersey of Richard J. Hughes, former Governor and Chief Justice of the New Jersey Supreme Court. The purpose of the Foundation is to promote activities within New Jersey and embody the hallmarks of his governance and his life, civic responsibility, justice and the spirit of camaraderie.

Edward H. Herman, a partner with **Hill Wallack** has been appointed Municipal Court Judge in the Borough of Highland Park in Middlesex County. Mr. Herman is a member of the firm's **Litigation Division** and partner-in-charge of the **Workers' Compensation Practice Group.** His principal area of practice is in the representation of major self-insured corporations, insurance companies and clients of third-party administrators in the defense of workers' compensation claims, as well as defense of tort liability and environmental litigation.

Ronald L. Perl, a partner with **Hill Wallack** and partner-in-charge of its **Community Association Law Practice Group,** recently received the Community Association Institute (CAI) Member of the Year Award at CAI's annual awards dinner. CAI is a national non-profit association created in 1973 to educate and represent America's 205,000 residential condominium, cooperative and homeowner's associations together with the related professional and service providers.

Ronald L. Perl was also recently elected as Secretary of the Community Association Institute Research Foundation. The Community Association Institute Research Foundation is a national, non-profit 501(c)3 organization founded in 1975. The Foundation is the driving force for common interest community research, development and scholarship.

Marc H. Herman, an associate at **Hill Wallack** has been appointed Second Vice President of the Solomon Schechter Day School of Raritan Valley in East Brunswick. His position entails the responsibility for Tuition Assistance Programs of the School in addition to the responsibilities of being an elected executive of the school.

Anthony L. Velasquez, an associate at the firm was recently appointed to the Board of Directors of the Administrative Law Section of the New Jersey State Bar Association. Mr. Velasquez is a member of the firm's **Administrative Law/ Government Procurement Practice Group** and concentrates his practice in administrative, environmental and regulatory compliance.

Meridith F. M. Mason, an associate with the firm and member of the Editorial Board Committee of *New Jersey Lawyer,* was recently featured as a special editor for its legal writing issue. This issue concentrates on aspects of legal writing in both litigation and non-litigation practice, including securities work and wills and trusts disposition, and is the first issue of the magazine dedicated to legal writing in 10 years.

Alan M. Minato, an associate with the firm has been appointed to the Asian American Advisory Council to the Camden County Board of Freeholders. This appointment is effective for a three year term. The Council works in conjunction with the Board of Freeholders to examine and further the issues affecting Asian Americans in the Camden County area.

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SEMINARS

Thomas F. Carroll, III, Stephen M. Eisdorfer, and ***Kenneth E. Meiser,*** partners of the firm who are members of the firm's **Land Use Division,** were featured speakers at the National Business Institute Seminar, entitled *"Land Use Planning and Eminent Domain in New Jersey".* The program addressed recent case law developments, implications of the State Development and Redevelopment Plan, implementation of the Residential Site Improvement Standards, and the impact of federal fair housing laws and legislative initiatives.

Lawrence P. Powers, partner-in-charge of the **Construction Industry Practice Group** was recently a featured speaker during a seminar sponsored by Lorman Education Services "Architect/Engineer Liability and Practice".

Anne L. H. Studholme, an associate at **Hill Wallack** recently represented the firm at the Mercer County Bar Association Young Lawyers Division "Law Day" program for area high school students at the Mercer County Civil Courts Building in Trenton. Ms. Studholme spoke and answered questions about the structure of civil law and discussed the daily work of an attorney.

Michelle M. Monte, an associate at **Hill Wallack** and member of the **Creditors' Rights/ Bankruptcy Practice Group,** was a featured speaker during a seminar sponsored by the New Jersey Institute for Continuing Legal Education *"Mortgage Foreclosure for Paralegals".*

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For further information, please contact: **Monica DiMucci,** Marketing Coordinator at (609) 734-6369 or via e-mail at info@hillwallack.com.

Shortcomings of the Single-Prime Law

by Anthony L. Velasquez

In January 2000, the New Jersey legislature passed numerous amendments to the public contract laws which have altered the way construction professionals do business with public entities. Commonly referred to as the "Single-Prime Law", public entities are now permitted to seek only single, over-all bids from prime contractors, who will then subcontract the major portions of work, such as plumbing, gas, electrical, structural steel, ornamental iron, HVAC and other general work to sub-contractors.

Prior To The Enactment of A Statute

The utilization of prime contractors is nothing new to public contracting; however, the ability of public entities to seek *only* prime contractors is a novelty. Prior to this law's enactment, a public entity was required to allow specialized trades to bid for the major portions of work. Thus, if an electrician did not want to team up with other contractors, it could submit a bid for merely the electrical portion of the contract. On bid opening, the public entity was required to tally two categories: (A) the bids submitted by prime contractors for all work; and (B) the bids submitted for each of the separate portions of work. If the total of the lowest bids for each of the separate portions of work was less than the lowest bid by a prime contractor for all work, the public entity would be required to award the contract to the separate contractors. Local public entities do not have the discretion afforded to the State and must award the contract to the lowest bidder. In contrast, the State could consider factors other than price when awarding the ultimate contract.

With the advent of the Single-Prime Law, a public entity may now preclude a specialized contractor from bidding on a smaller portion of the contract. If a public entity wishes to solicit only prime contractor bids for a project involving multiple facets of work (plumbing, steel, electrical, etc.), an electrician who does not team up with a prime contractor is prohibited from submitting a bid for only the electrical portion of work and, thus, is eliminated from being considered for the contract. The rationale behind the law is that the contract is administratively easier to manage with just one prime contractor. It has also been argued that there is less public oversight required for a single-prime contractor than with multiple contractors doing separate tasks.

"Prior to this law's enactment, a public entity was required to allow specialized trades to bid for the major portions of work."

However, this law's limitations have created numerous problems for smaller contractors, who find themselves at the mercy of larger prime contractors to be included in public bid proposals. For those specialized contractors lucky enough to be selected as a "sub" by a prime, they find less room for negotiation and almost no interaction with the contracting public entity. This often results in misunderstandings on actual construction, requiring subsequent replacement or re-construction.

Control Is An Issue

Additionally, when utilizing only prime contractors, the public entity has less direct control over the subcontractors. Indeed, with regard to local government entities and school districts, there appears to be an absence of any rules or regulations that govern the qualifications of subcontractors. The Single-Prime Law mandates that all subcontractors utilized by prime contractors must be "named and qualified." However, with the exception of the rules for "bidder classification" that govern State contracts, there exist no rules for subcontractor qualification. This issue is currently being tried before the courts, in an effort to force the promulgation of subcontractor qualification standards. Without guarantees as to a subcontractor's education, training and experience, the public may be left with sub-par construction necessitating premature repair or replacement in addition to possible public safety hazards. These costs may outweigh the anticipated benefit of having to administer only one contract as opposed to separate contracts for the multiple facets of work.

Until the responsible administrative agencies or the courts decide upon proper qualifications for subcontractors, all contractors interested in bidding upon public contracts being solicited under the Single-Prime Law should pay special attention to the qualifications set forth for subcontractors. In this regard, it is advised that professional legal counsel be retained at the outset of the bidding process so as to avoid being declared ineligible to participate in the contract.

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Federal Fair Housing Act Presents Risks for Unwary Community Associations

by Andrew L. Jacobson

Title VIII of the Civil Rights Act of 1968 prohibits discrimination relating to the sale, rental or financing of dwellings based upon race, color, religion, sex or national origin. The Fair Housing Amendments Act of 1988 (FHAA) amended this law, in part, by adding prohibitions against discrimination in housing based upon handicap and familial status and by adding provisions which allow money damages where discriminatory housing practices are found.

In the context of community association living, the FHAA prohibits such discrimination and exposes common interest ownership associations to potential liability, including money damages and fines, even if there is no intent to discriminate. A particular area of concern for associations is that of accommodating the needs of disabled residents. One frequent issue which arises is whether an association must reserve a designated parking space for an owner or resident who claims to be handicapped.

Disabled Entitled to Reasonable Accommodations

The FHAA requires that the association make a reasonable accommodation to a handicapped person who seeks to make access to his or her home easier. Even when parking is limited and every owner wants a parking space close to home, the association must attempt to meet the needs of the disabled owner.

Two federal cases highlight the potential liability of associations in handling such requests. In *Jankowski Lee & Associates v. Cisneros,* a tenant in an apartment complex, who had been diagnosed with multiple sclerosis, requested that he be assigned a parking spot that was large enough and close enough to his apartment to accommodate his disability. The tenant required such a parking space because he could not get in and out of his car if parked in a narrow spot, and he was not able to walk long distances without resting. The property manager denied the tenant's request because, in her opinion, he did not appear disabled. The administrative law judge found that the owner of the building, the property manager and the managing partner of the building had violated the FHAA for denying the tenant's request for the accommodation and awarded the tenant $2,500 in damages, assessed a civil penalty of $2,500 and required that a parking spot be provided to the tenant that was as close as possible to the apartment.

In affirming the determination of the administrative law judge, the court concluded that the property manager's perception that the tenant was not impaired was irrelevant. The court stated, "[i]f a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue" to determine the existence of a bonafide disability.

Thus, if a homeowner or a tenant requests the assignment of a parking space on the basis of a disability which is not readily apparent, the association or property manager should elicit additional information and obtain documentation regarding the claimed disability. If additional information is not sought and the association denies the request based solely on its perception, the association may risk liability for discrimination under the FHAA if the individual subsequently demonstrates a handicap.

Restrictive Covenants No Defense

While a community association's master deed is regarded as the controlling legal document governing the rights and duties of the association's board and condominium owners, reliance upon the covenants of the master deed would not be a defense for denying assignment of a parking space based upon a disability in the event such accommodation is requested and deemed necessary. In a New Jersey case, *Gittleman v. Woodhaven Condominium Association,* a condominium's board of trustees sought amendment of the master deed by the owners to allow the assignment of a parking space to a homeowner who had difficulty walking. However, the amendment failed, and the assignment was denied as being barred by the master deed. The court agreed that the parking spaces were common elements for the non-exclusive use of the homeowners, and that the master deed precluded the association from granting an exclusive parking space without the prior approval of at least two-thirds of the unit owners.

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Arbitration of Employment Disputes in Employment Agreements: *Didn't We Agree to That?*

by Keith B. Bannach

Considering the many benefits of using arbitration to resolve disputes, more and more employment agreements contain provisions for arbitration as the exclusive forum of dispute resolution. These agreements require the use of arbitration to resolve either specifically designated issues or all disputes arising out of the employment relationship. Disputes include advancement, job assignments, pay or benefits, and even termination. Arbitration is beneficial to employers and employees alike as a means of resolving employment disputes more quickly and with less cost than traditional litigation. However, two recently decided New Jersey cases have mandated that certain rights must be clearly and unmistakably identified as being within the agreement to arbitrate. Unless the employment agreement satisfies the new strict requirements, the benefits of arbitration may be available only if both the employer and employee consent to arbitration *after* the dispute arises.

The Benefits of Arbitration and the Arbitration Process

Arbitration - like the traditional court system - is simply a forum in which to resolve disputes. It is an efficient and flexible forum to resolve most types of disputes. Being less formal than court proceedings, arbitration often proceeds more quickly and with less expense than traditional litigation. Arbitration also permits the parties, with assistance from the arbitrator, to design creative and more effective solutions than court ordered injunctions or monetary damages alone.

Courts favor arbitration because it reduces the existing backlog of filed cases and permits the judges to allocate more judicial resources to the remaining cases. A complaint filed in the New Jersey Superior Court can take years to resolve. New Jersey, like many other states, requires certain cases filed in the court system to be submitted to some form of Alternative Dispute Resolution ("ADR") before being assigned to a judge for adjudication.

"Arbitration…permits the parties, with assistance from the arbitrator, to design creative and more effective solutions than court-ordered injunctions or monetary damages alone."

Although arbitration is less formal than litigation, the parties still present their case to a neutral arbitrator, or panel of arbitrators, for a decision - a process similar to traditional litigation. If not agreed to prior to the dispute, a party may request arbitration. A "binding" arbitration decision is final, although the parties may also agree to "non-binding" arbitration prior to the arbitration process. If all parties agree to arbitrate the dispute, they then select the hearing location and arbitrator(s), whereafter a schedule establishing times for each party to present their case is established. At the arbitration hearing each party presents its case, including testimony of key witnesses and other evidence. Thereafter, the arbitrator(s) has a certain period of time to make a decision and award, usually in writing.

The arbitration award may be converted into a formal judgment to allow enforcement similar to a court ordered judgment. Additionally, although the arbitration award may be final, a party may appeal alleged errors in the arbitration process itself, providing another level of protection of each parties' entitlement to a fair hearing.

Arbitration of Claims Alleging Violation of the New Jersey Law Against Discrimination

An agreement to arbitrate is simply an agreement to use arbitration as the exclusive forum to resolve disputes. In legal terms, it is a waiver of the right to bring suit in court or other administrative body concerning a particular dispute. Such an agreement poses unique issues when one party, typically the employee, is asked to waive specially protected rights, such as the right to bring claims arising under state or federal laws. These "statutory" rights include claims alleging violation of the New Jersey Law Against Discrimination ("LAD") or the Federal Americans with Disabilities Act, among others. As these "statutory" rights were enacted to address problems identified by law makers, special protection is afforded an individual's entitlement to these rights. Specifically, an individual's waiver of these rights must be knowing and voluntary.

Two recent New Jersey cases reaffirm the longstanding rule that an employee's waiver of the right to sue an employer alleging violations of statutory rights, including LAD, must be unambiguous and knowing. In both of these cases, the agreement to arbitrate was found to be not sufficiently specific, and the courts have refused to uphold the respective agreements to arbitrate. The New Jersey Supreme Court in *Garfinkel v. Morristown Obstetrics & Gynecology Assoc., P.A.* acknowledged that parties may voluntarily agree to arbitrate disputes through an employment contract or other agreement, noting

that arbitration is a favored means of resolving disputes. However, the *Garfinkel* Court stated that arbitration agreements in an employment agreement must incorporate specifically "any dispute" language which represents an *all inclusive* agreement to arbitrate all disputes, including those arising from statutory rights. Preferably, it was suggested, the agreement should specifically identify the options available and types of statutory or other rights being waived. Without such all inclusive or specific language, courts will not find a knowing waiver of an employee's right to sue pursuant to a statutory right, and thus the arbitration agreement will not be enforced.

Shortly thereafter, the Appellate Division decided *Grasser v. United Healthcare Corp.* and established a more strict standard by holding that any "waiver [of rights] and agreement to arbitrate must be explicit and must refer specifically to arbitration of [ ] disputes and claims of LAD violations. . . . Waiver provisions which are not clear and explicit will not be enforced." In both cases, the courts focused on the specific language of the agreements involved and held that the agreements lacked a clear and unambiguous waiver of the employee's right to sue for alleged violations of the LAD.

In *Grasser,* the employee signed an "acknowledgment" indicating that "arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a *legal claim.*" The *Grasser* court determined that the "acknowledgment — the only document signed by plaintiff" was not specific enough concerning the requirement to arbitrate LAD, or similar federal anti-discrimination claims, because it did not specifically mention these "statutory" rights. The court opined that it "is neither obvious nor inevitable to an average reader without legal training or above average sophistication" that the provision had an extensive reach sufficient to apply to LAD claims. Thus, New Jersey requires that an agreement to arbitrate a statutory claim must be specifically and unmistakably detailed in an agreement to which the employee knowingly agrees.

Collective Bargaining Agreements?

There is currently no case in New Jersey which addresses whether an individual employee is bound by a collective bargaining agreement's requirement to arbitrate LAD or similar statutory employment claims. However, it is doubtful that an employee would be required to arbitrate such claims pursuant to a collective bargaining agreement in light of the stringent holdings of *Garfinkel* and particularly *Grasser.*

Both *Garfinkel* and *Grasser* emphasize the importance of identifying the *actual intent of the individual parties* to determine if there was an agreement to arbitrate these statutory rights. The holdings deny imputing knowledge of the waiver, and require actual knowledge of, and agreement to, the waiver by the individual. The *Grasser* court stated "[o]ur courts will not indulge an assumption that an employee would probably know, or should have known, that vague or non-specific language is intended to include termination disputes and/or LAD violations."

Conclusion

Garfinkel and *Grasser* have significantly revised what is required to constitute valid arbitration and waiver clauses. Many employment agreements created prior to these cases will likely fall short of these new requirements. At Hill Wallack, we are ready to assist you in reviewing your existing employment agreements, or to draft new agreements, to ensure they meet these new stringent requirements and your company's employment needs.

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Grounds for Eviction cont. *(continued from page 3)*

been cited by the local or state housing inspectors, and the landlord: (1) seeks to permanently board up or demolish the premises because there are substantial violations affecting the health and safety of tenants, and it is economically unfeasible to eliminate the violations; (2) the landlord cannot feasibly eliminate substantial violations affecting the health and safety of tenants without removing the tenant; (3) the landlord seeks to eliminate an illegal occupancy which cannot be corrected without removing the tenant; or (4) if a governmental agency seeks to retire the premises for urban renewal or land clearance in blighted areas.

Change In Use of Property

A landlord, who wishes to permanently retire a building from residential use, may evict the tenants for that reason. However, the landlord must retire the entire building from all residential uses and also send proper notices to the tenants. A landlord may also bring an action to evict a tenant where the landlord is converting the property from a rental market to a condominium or cooperative. Again, to qualify for this ground, the landlord must comply with certain notice requirements and also a number of statutes.

A landlord can evict a tenant if the landlord owns three units or less and he seeks to occupy the unit; or if he has contracted to sell the unit to a buyer who wishes to personally occupy it, and the contract calls for the unit to be vacant at the time of closing. A tenant is also subject to eviction if he occupies the premises by reason of employment as a janitor, superintendent, or some other capacity and the employment is being terminated.

Legal Violations

Tenants who violate certain laws may be evicted solely due to that fact. Generally, a landlord may evict a tenant if the tenant has been convicted of, or pleaded guilty to, a drug offense. However, this section applies only if the conduct of the tenant is performed within or upon the leased premises or the rental complex. Also, if the tenant successfully completes or has been admitted to and is currently completing a drug rehabilitation program while on probation, he may not be evicted based upon this cause. This section also applies to tenants who knowingly harbor a person who has been convicted or so pleaded unless that person is a juvenile.

Another cause which is brought about by the violation of a law by the tenant occurs when a tenant has been convicted of or has pleaded guilty to an offense involving an assault or terroristic threat against the landlord, a member of the landlord's family, or an employee or agent of the landlord. This section also applies to tenants who knowingly harbor such a person.

Finally, a landlord may also bring an action to evict a tenant where the tenant has been found, by a preponderance of the evidence, liable in a civil action for violation of what would have been an offense under the "Comprehensive Drug Reform Act of 1987". This section allows for the removal of a tenant without the need for a guilty verdict or plea in criminal court of a drug offense.

Under each of the stated grounds, all procedural requirements must be met to successfully remove a tenant. Furthermore, all of the grounds for eviction, except non-payment of rent, require service of at least one notice upon the tenant. These notices are required to be in a specific form and require different time periods to lapse before the commencement of the action. Also, some grounds require a preliminary notice, called a "Notice To Cease" to be served upon the tenant.

As demonstrated above, the removal of a tenant in New Jersey is no longer a simple process. To ensure that you are entitled to evict a tenant and to ensure that all procedural requirements are satisfied, it is recommended that you consult with an attorney.

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...Civil RICO in Divorce cont. *(continued from page 4)*

alleged predicate acts. Rather, the accountants were found to have operated independently of Mr. Perlberger and could not have directly or indirectly participated in the alleged RICO enterprise. Since Ms. Perlberger did not provide the facts necessary to link the accountants to the RICO enterprise, she failed to establish an essential element of her RICO claim. As a result, her RICO case against the accountants was dismissed.

Perlberger and similar Federal cases represent a novel approach to the application of RICO and a new era in family law. While the plaintiff was not ultimately successful in her RICO claims, the *Perlberger* court's unwillingness to dismiss such claims out-of-hand supports the utilization of RICO in domestic relations matters. In addition, *Perlberger* is illustrative of how complex a RICO claim is to formulate. Therefore, it is essential that knowledgeable legal counsel be consulted to determine if a RICO violation can be asserted.

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Exposure of Corporate Records... cont. *(continued from page 6)*

document imaging is that some companies destroy only the index or only the documents, but not both. Such practice is insufficient. The index may prove almost as valuable, or perhaps more so, than the documents themselves.

With document management, some companies run into the similar problem of only disposing of either the documents or the indices. Once again, this practice is insufficient. Both the documents and the indices must be disposed of, or the company may not be able to claim that the documents have actually been destroyed and that it has complied with its records retention policy. This can be an easy problem to solve. Most document management systems can be easily programmed to comply with a company's records retention policy. The fact is, though, that many are not.

With e-mail systems, while they are usually purged on a regular basis, individual employees may save their e-mails, and backups often exist of all e-mails on the system. Further, information is often not deleted from a hard drive until the space which is occupied is overwritten. All employees granted access to e-mail program should be made cognizant of the corporate policy on e-mail retention.

Sometimes the backup may be periodically archived in an off-site location, and often the backups are kept for a longer period than the records lifetime of some of the information. Occasionally, backups are kept permanently in violation of a company's records retention policy. A company is not in compliance with its records retention policy if it is saving backups of information beyond the set retention schedule. Companies should have just as strict, well-documented procedures for the destruction of its backups (or other documents) as it does for the preservation of those same backups (or documents). Generally, large corporations receive a Certification of Destruction from a certified destruction agent in order to demonstrate that materials have been disposed of properly.

A related issue is the existence of off-site work within the company. For example, many companies allow and even encourage their employees to work at home (whether in the form of documents or electronic information). Many times these employees have their own home computers or portable laptop computers. Either way, most companies do not take steps to insure that the employees are complying with the company's records retention policies. If the company does not keep track of information which the employee takes home, the failure to track such information may have tremendous consequences. Another problem may arise when former employees retain information long after they have ceased working for the company. This is an extremely difficult problem to solve, but it must be attempted to any extent possible for the same reasons. While this is not to say that employees should not be allowed to work outside the company's facilities, the company should have a procedure to keep track of such information. Such procedure should be documented, and all employees should be trained in its requirements; otherwise, the company may not be in compliance with its records retention policy.

In conclusion, the time, effort and expense necessary to strictly maintain a records retention policy serves not only to organize a company's records, but also to protect the company in the event of litigation. In the event a business owner is not cognizant of the state's requirements or has not established a records retention policy within the business, immediate measures should be taken. It is always wise to have legal counsel review such measures to ensure legal compliance.

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Federal Fair Housing Act... cont. *(continued from page 11)*

Nonetheless, it found the association liable for discrimination. The court reasoned that under the FHAA and the New Jersey Condominium Act, the association could not enforce provisions of the master deed that have discriminatory effects and must regulate use of the common elements to comply with the FHAA. The court held that "[t]he Association cannot seek to avoid liability under the FHAA by using the terms of the Master Deed as a shield."

The *Gittleman* case, in essence, resolves the dilemma for community associations faced with a request by a homeowner for a reasonable accommodation that is prohibited by the governing documents, but that is mandated by the FHAA. The court clearly found that the association must provide the accommodation in compliance with the FHAA. Associations must reasonably accommodate requests by handicapped individuals to enable them to fully enjoy the facilities. Parking is only one issue that associations face regarding compliance with the FHAA, but other situations may also arise. When faced with a request by a homeowner for an accommodation, an association should consult counsel for advice to ensure that it meets its obligations under both the FHAA and the governing documents.

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The Soldiers' and Sailors' Civil Relief Act... cont.

(continued from page 2)

apply to a court for relief from any obligation or liability incurred prior to the period of military service. In the case on an obligation secured by a mortgage, the court may grant a stay of the enforcement of such obligation during the applicant's period of military service, unless the court finds that the applicant's ability to comply with the terms of the obligation has not been materially affected by reason of his or her service.

During Default and Foreclosure

Pursuant to Section 532 of the SSCRA, an individual in military service can apply to the court to stay any proceeding commenced in any court during the period of military service to enforce, by reason of nonpayment or other breach, a mortgage upon property owned by a person in military service. This applies only to obligations which originated prior to such person's period of service. The court must stay the proceeding unless, again, the court finds that the military personnel's ability to comply with the terms of the obligation has not been materially affected by that military service.

Following Foreclosure

In addition to the pre-foreclosure remedies and the stay of foreclosure remedies discussed above, a person serving in the military has certain protections just before and after default judgment has been entered against him or her. First, pursuant to Section 520(1) of the SSCRA, prior to obtaining a default judgment, a plaintiff must file an affidavit setting forth facts that shows that a defendant is not in military service. If a plaintiff is unable to do so, a judgment cannot be entered without securing an order of the court specifically allowing the judgment to be entered.

Second, pursuant to Section 520(4) of the SSCRA, a person in military service who has had a judgment entered against him or her during the period of such service or within thirty days thereafter, may make application to the court to have that judgment vacated. The application must be made within ninety days after the termination of such service. In order to have the judgment vacated, however, the applicant must show (1) that he or she was prejudiced by reason of his or her military service in making his or her defense, and (2) that he or she has a meritorious defense to the action.

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