HILL WALLACK
ATTORNEYS AT LAW

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IN THIS ISSUE

Message From the Managing Partner

In this winter issue of our firm's *Quarterly,* we would like to give you insight into the firm's diverse legal experience and the multiple resources we have available to meet your legal needs. We continue to keep our clients apprised of relevant and timely legal issues that have arisen.

Our lead article *"Reasonably Probable Zoning Changes in Condemnation Proceedings"* by Todd Greene concentrates on fair compensation for property taken through eminent domain. Nicole Perdoni-Byrne, in *"Uniform Fraudulent Transfer Act: Debtors Beware",* discusses a debtor's fraudulent transfer of property to remove the property from their creditors' reach. Len Collett interprets the terms of employment in New Jersey in his article, *"Deciphering The Employer/Employee Relationship...";* while Christy Saveriano examines the relationship between an independent contractor and homeowner in her article *"When You are Responsible for the Acts of An Independent Contractor: What You Need to Know".*

Finally Eric Kelner explains some rights and remedies of a secured creditor for a motor vehicle in *"Possession is Nine Tenths of the Law Except for Motor Vehicle Replevins".*

We hope that our *Quarterly* Newsletter is a valuable resource to our readers as **Hill Wallack** endeavors to provide informative, but interesting articles which deal with topics that are related to both 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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Reasonably Probable Zoning Changes in Condemnation Proceedings

by Todd D. Greene

The New Jersey State and the Federal Constitutions mandate that the government pay just compensation for property taken through eminent domain. Just compensation is based on fair market value of the property as of the date of taking. Fair market value has been defined as the amount of money which a purchaser willing, but not obligated to buy the property, would pay to an owner willing, but not obligated, to sell it. A primary step for arriving at the market value of a property is to determine its "Highest and Best Use." One of the most pivotal determinants of a property's Highest and Best Use is its zoning designation. However, a property owner may not necessarily be bound by a property's current zoning designation. Our courts have held that where there is a reasonable probability of a zoning change, a landowner can introduce evidence of the probable change provided that the change will impact the Highest and Best Use and the market value of the property.

To understand how zoning can affect market value, one must first comprehend the concept of "Highest and Best Use." According to *The Appraisal of Real Estate,* Highest and Best Use may be defined as the reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported and financially feasible and that results in the highest value. Fundamentally, the concept of Highest and Best Use applies to land alone because the value of any improvement is considered to be the value *it contributes to the land.* Land is said to have value, while improvements contribute to the value of the property as a whole. Highest and Best Use is a fundamental concept in real estate appraisal because it focuses market analysis on the subject property and allows the appraiser to consider the property's optimum use in light of market conditions on a specific date. For example, a property in a commercial area may currently be used as of the date of taking as a parking lot. However, an appraiser might determine that the land's Highest and Best Use is as an office building.

Yet, the reasonableness of a use of condemned property, especially its Highest and Best Use, must be considered in light of applicable zoning restrictions. For example, zoning may keep the owner of the aforementioned parking lot from developing an office or other more valuable use of the property. Thus, a condemned property should be evaluated under the limitations of current zoning. However, consideration should also be given to the impact upon market value of the likelihood of a change in zoning.

If a property's proposed use is the subject's Highest and Best Use, but due to zoning restrictions the prospective use is not permitted, the condemnee may be entitled to show that there will be a change in zoning which would impact on the market value of the property. To be admissible, however, the change in zoning cannot be mere speculation. There must be a reasonable probability of change.

In *State v. Gorga,* the New Jersey Supreme Court enunciated a two step approach for evaluating the admissibility of evidence of a probable zoning change. The Court acknowledged that both "probable" and "remotely possible" zoning amendments could affect the price agreed on by hypothetical buyers and sellers. It reasoned, however, that allowing consideration of all zoning changes that were merely possible could lead to "unbridled speculation" regarding the changes affecting the future use of condemned

property. This quandary prompted the Court to establish one standard for admissibility and another for the substantive consideration of such evidence. The Court stated:

> If as of the date of taking there is a reasonable probability of a change in zoning ordinance in the near future, the influence of that circumstance upon the market value as of that date may be shown, but that before allowing a jury to consider the issue, the trial court should first decide whether the record contains sufficient evidence of a probability of a zoning change to warrant consideration by the jury.

Accordingly, a jury need not be required to find that the zoning change is probable. Rather, the jury's critical inquiry is the reasonable belief of a buyer and seller voluntarily negotiating over the property's fair market value that a change may occur and will have an impact on the property's value, regardless of the degree of probability.

In determining "just compensation", proper property valuation is paramount. All aspects of fair market, including probable zoning changes, must be investigated. The assistance of competent counsel is essential for balancing the right of the condemning authority to take and the property owner's right to just compensation.

"…Highest and Best Use may be defined as the reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported and financially feasible and that results in the highest value."

Todd D. Greene *is an associate of* ***Hill Wallack*** *and member of the* ***Administrative Law/Government Procurement Practice Group.*** *His principal area of practice is in the areas of economic and business development with a particular emphasis on municipal law and government affairs.*

Uniform Fraudulent Transfer Act: Debtors Beware

by Nicole Perdoni-Byrne

Creditors, in an attempt to be made whole for outstanding debts incurred by debtors, will attempt to collect against real property or personal property held by debtors as provided for by law. The Uniform Fraudulent Transfer Act, *N.J.S.A. 25:2-20 et seq.* (the "Act") deals with the transfer by debtors of real property and personal property deemed to have been consummated in a fraudulent manner. The Act was passed to protect creditors who would otherwise rightfully be entitled to collect on a debtor's property, but are unable to as a direct result of the debtor's transfer of such property in order to deliberately remove the property from their creditors' reach. The Act attempts to protect creditors from debtors who willfully attempt to cheat creditors from what the law entitles creditors to.

When A Transfer is Deemed To Be Fraudulent

Section 25:2-25 of the Act sets forth when a transfer is deemed fraudulent, whether a creditor's claim arose before or after a transfer was made. Subsection (a) states that such a transfer is fraudulent when the actual intent of the transfer is to hinder, delay or defraud any creditor. The Court in *Gilchinsky v. National Westminster Bank N.J., et al.,* stated that in determining actual intent, the courts look to whether the "badges of fraud" are present. These are factors that, by their mere presence, may infer actual intent because they so frequently occur in fraudulent transfers. Some of these factors, as more fully set forth in Section 25:2-26 of the Act, are (i) the transfer was to an insider; (ii) the debtor retained possession or control of the property transferred after the transfer; (iii) the transfer was of substantially all of the debtor's assets; (iv) the debtor removed or concealed assets; and (v) the debtor was insolvent or became insolvent shortly after the transfer was made. The Court in *Gilchinsky* determined that these factors should be balanced along with any other relevant factors concerning the transfer when concluding whether there was actual intent to fraudulently transfer property. While it is clear that each factor enumerated in Section 25:2-26 need not exist in order to legitimately infer actual intent, a combination of several of these factors in one transfer provides conclusive evidence of actual intent. In *Gilchinsky,* the debtor's transfer was deemed fraudulent by the Court because: 1) the transfer was to an insider; 2) the debtor transferred money to an account over which she retained control; 3) the transfer was made after the debtor was sued; 4) the debtor transferred substantially all of her assets; 5) the transfer effectively prevents assets from being attached by the creditor; 6) the transfer occurred after the debtor incurred a substantial debt to the creditor; and 7) the debtor was insolvent. A cause of action under subsection (a) must be brought by the creditor against the debtor within four years after the transfer was made, or if later, within one year after the transfer was discovered by the claimant, or the cause of action is extinguished.

Subsection (b) of Section 25:2-25 states that a transfer may also be deemed to be fraudulent when it is made without receiving a reasonably equivalent value in exchange for the transfer. Reasonably equivalent value for purposes of this subsection is deemed to have been given if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, non-collusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust or security agreement. To be a fraudulent transfer this requirement must also be coupled with either (a) the debtor being engaged in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business; or (b) the debtor intended to incur debts beyond the debtor's ability to pay as they become due. Pursuant to Section 25:2-23, a debtor is presumed to be insolvent when a debtor is not paying his debts as they become due. A cause of action under subsection (b) must be brought against a debtor within four years after the transfer was made or the cause of action is extinguished.

Remedies Afforded To Creditors

Creditors, as the party seeking to set aside the conveyance purported to be fraudulent, bear the burden of proving actual intent to defraud the creditor. If successful, a creditor may obtain the remedies set forth in Section 25:2-29 of the Act. Such remedies include avoidance of the transfer to the extent necessary to satisfy the creditor's claim. Subject to equity principles and in accordance with applicable rules of civil procedure,

"The Act attempts to protect creditors from debtors who willfully attempt to cheat creditors from what the law entitles creditors to."

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Deciphering The Employer/Employee Relationship: Not As Easy As It Seems

by Len F. Collett

"…the law prohibits termination based upon various forms of discrimination…"

New Jersey Is An At-Will State, So What?

New Jersey is an at-will employment State. This means that employees remain employed at the will of the employer. Employers are given a wide amount of discretion in either hiring or firing employees. In fact, an at-will employee can be terminated at any time and for any reason, even for no reason at all, except that an employee may not be terminated where the termination is prohibited by law. For example, the law prohibits termination based upon various forms of discrimination, as well as terminations in retaliation for an employee's whistle blowing activity.

What Rules do Apply to Employees?

Despite an employer's general freedom to hire and fire employees at his or her pleasure, the terms of employment for all employees in New Jersey are subject to various laws enacted by the Legislature as well as rules promulgated by the Department of Labor. For example, in general, the Fair Labor Standards Act requires that most employees in the United States be paid at least the federal minimum wage and overtime pay at time and one-half the regular rate of pay after 40 hours in a work week. However, the Act provides some specific exemptions from these requirements for employees employed by certain establishments and in certain occupations. Further, state labor laws also regulate the hours and wages of employees, and an employer must comply with the most stringent of the state or federal provisions.

Nonetheless, there are, of course, exemptions to these wage and hour laws that permit, under specific circumstances, employers to exempt employees from overtime requirements or to pay an employee below the minimum wage.

One example of an employment relationship that is not subject to all of the laws and regulations governing the terms of wages and hours of the employee is the Seasonal Employee.

Seasonal Employees in New Jersey

Regulations adopted by the New Jersey Department of Labor govern the terms and conditions of employees who work in seasonal amusement occupations. These employees must be paid the minimum wage as required by New Jersey law, but New Jersey's overtime pay requirements do not apply to these seasonal employees. Generally, an employer must pay at least 1 1/2 times an employee's regular hourly wage for each hour of working time in excess of 40 hours in any week. Thus, New Jersey's "seasonal amusement occupation" rules serve to permit an employee to work beyond a 40 hour work week without having a right to overtime wage payments.

To qualify as a "seasonal amusement occupation," an establishment must be exclusively an amusement or recreational establishment:

1. That does not operate for more than seven months in any calendar year; or
2. During the preceding calendar year, the establishment's average receipts for any consecutive six month period were not more than one third (33 1/3%) of its average receipts for the other six months of that year.

Despite this straight-forward description of what constitutes a

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SPOTLIGHT

NEW ASSOCIATES

Lance S. Forbes has become an associate with **Hill Wallack** 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. He received his law degree from Rutgers University School of Law and is admitted to practice in New Jersey, the Commonwealth of Pennsylvania and before the U.S. District Court for the District of New Jersey. He is a member of the American Bar Association and the Burlington County Bar Association and is a resident of Moorestown, NJ.

Cherylee O. Judson has become an associate with the firm in the **Litigation Division** where she is a member of the **Trial & Insurance Practice Group**. She has a practice concentration in the representation of insurance companies in defense of diverse claims. She received her law degree from Villanova University School of Law. Ms. Judson is admitted to practice in New Jersey, Pennsylvania and the U.S. District Court, District of New Jersey and is a resident of Westhampton, NJ.

Jae H. Cho has joined **Hill Wallack** in its **General Litigation Division**. He concentrates his practice in trusts and estates and general litigation. Mr. Cho earned his law degree from Syracuse University College of Law. He previously served as a Judicial Law Clerk to The Honorable Howard H. Kestin, P.J.A.D. A resident of Princeton, NJ, he is admitted to practice in New Jersey and New York.

Brian J. McIntyre has joined the firm as an associate in the firm's **Community Association Law Practice Group**. Mr. McIntyre concentrates his practice in the areas of community association, commercial law and assessment collection. He earned his law degree from Seton Hall University School of Law and is admitted to practice in New Jersey and New York. He served as Judicial Law Clerk to the Honorable Rosemary Ruggiero Williams, P.J.Ch., General Equity. Mr. McIntyre is a resident of Ewing, NJ.

John R. Tatulli has joined **Hill Wallack** in its **Land Use Division** which includes the firm's **Land Use Applications, Land Use Litigation** and **Environmental Applications Practice Groups**. Mr. Tatulli is a graduate of New York Law School and is admitted to practice in New Jersey, the United States District Court, District of New Jersey and admission pending in New York. He previously served a fellowship with the Center for New York City Law and is a resident of West Long Branch, NJ.

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SEMINARS

Thomas F. Carroll, III, and ***Anne L. H. Studholme,*** were recently featured speakers at the CLE International Eminent Domain Conference. Mr. Carroll served as the program co-chair and spoke on the State of Eminent Domain in New Jersey while Ms. Studholme discussed an increasingly common situation: where the condemning authority has a "thumb on the scale" in determining the property's value related issues. Mr. Carroll is a partner and Ms. Studholme is an associate of the **Land Use Division** which includes the firm's **Land Use Applications, Land Use Litigation** and **Environmental Applications Practice Groups**. They concentrate their practice in the development application process and the litigation required in the course of land development. Mr. Carroll has significant experience in the land development application and permitting process, and has a practice concentration on the litigation of land use matters at the trial level and in the appellate courts. He is past Chair of the Land Use Section of the New Jersey State Bar Association. A resident of West Windsor, NJ, he has authored numerous articles and presented seminars concerning land use issues. Ms. Studholme also has a practice concentration on federal

civil litigation, complex litigation and legal malpractice. A graduate of Princeton University, she earned her law degree from University of North Carolina, Chapel Hill, and is admitted to practice in New Jersey and North Carolina.

Julie Colin, a partner with **Hill Wallack** has been appointed to the New Jersey Defense Association Subcommittee on Employment Law. A partner and member of the **Litigation Division** and **Employment Law Practice Group,** Ms. Colin, concentrates her practice in employment law, personal injury including products liability, employment discrimination and premises liability with expertise in trial work including jury trials in defense litigation, personal injury commercial litigation and workers' compensation. A *cum laude* graduate of Seton Hall University Law School, she is a member of the New Jersey State and Mercer County Bar Associations. The New Jersey Defense Association establishes a communication link among New Jersey Defense Attorneys, Insurance Claim Professionals, self-insurers and other corporations who devote a substantial portion of their time to the defense of damage suits or to claims administration.

Nielsen V. Lewis, a partner at **Hill Wallack,** was a featured panelist at the recent New Jersey Institute of Continuing Legal Education Seminar, *"Brownfield Redevelopment, Natural Resource Damages & Insurance Update 2005"* at the New Jersey Law Center. He discussed the current maze of statutory liability provisions, defenses and cleanup liability protections afforded to qualifying Brownfield purchasers and developers to encourage redevelopment of abandoned or underutilized sites burdened with contamination. As partner-in-charge of **Hill Wallack's Environmental Law Practice Group,** Mr. Lewis counsels and represents corporations, public entities and individuals on a wide range of environmental and land use matters, including local development applications; environmental permitting; regulatory compliance; and environmental litigation, including complex CERCLA (Superfund), RCRA and New Jersey Spill Act disputes. A frequent lecturer and writer on environmental, land use and insurance topics, he is a past Chair of the NJSBA's Insurance Law Section, a member of its Environmental Law and Dispute Resolution Sections, and a Master of the Justice Stewart G. Pollock Environmental American Inn of Court. Mr. Lewis is admitted to the Superior Court Roster of Court-Approved Mediators. Mr. Lewis received his undergraduate degree from Princeton University and his law degree from the University of Michigan Law School. He is admitted to practice in New Jersey, the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit.

Nielsen V. Lewis also was recently a featured speaker at the 2005 Environmental Law Forum in Avalon, NJ. Mr. Lewis participated in a mock ethics hearing demonstrating ethical dilemmas faced by environmental attorneys under New Jersey's Rules of Professional Responsibility. The three-day forum is sponsored annually by the NJSBA Environmental Law Section, the Environmental Law Committee of the New Jersey Corporate Counsel Association, and New Jersey ICLE. Mr. Lewis has over twenty years of experience in environmental, solid and hazardous waste, insurance and land use law and general civil litigation. Since entering into private practice, he has focused on counseling and representing corporations, municipalities and individuals in disputes and litigation concerning the environment, land use and related insurance. Before entering private practice, Mr. Lewis was a Law Clerk to the late Honorable Ward J. Herbert, Judge of the Superior Court, and a Deputy Attorney General of the State of New Jersey.

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

When You Are Responsible for the Acts of An Independent Contractor: What You Need To Know

by Christina L. Saveriano

"A homeowner may be vicariously liable for the negligent acts or omissions of an independent contractor…"

The Relationship Between a Homeowner and Independent Contractor

Frequently, it is necessary for a homeowner to employ an independent contractor to perform services in the home setting, such as home remodeling, construction, landscaping, tree removal, building a deck or installing a pool. As the employer of an independent contractor, you need to take precautions to avoid liability for the negligent acts of the independent contractor that you hire. Often, if a claim is commenced against an independent contractor for an act committed while the independent contractor was performing services for the homeowner, the plaintiff will also name the homeowner who employed the independent contractor as a defendant.

Generally, when a homeowner hires an independent contractor to perform a service, the homeowner is not responsible for the independent contractor's negligent acts. However, this rule is subject to exceptions which impose "vicarious" liability on the homeowner based upon the relationship with the contractor even though the homeowner did nothing wrong. If imposed, "vicarious" liability requires the homeowner to pay any damages assessed against the contractor that the contractor is unable to satisfy himself.

Exceptions To General Rule of Non Liability for Acts of an Independent Contractor

A homeowner may be vicariously liable for the negligent acts or omissions of an independent contractor if: (1) the homeowner retains control of the "method and means" of the work; (2) the homeowner negligently engaged an incompetent contractor; or (3) the work contracted for is "inherently dangerous." These are exceptions to the general rule of non-liability, although it is important to note that any one of them, if applicable, will expose the homeowner to possible liability for the negligence of the contractor who does not have sufficient assets to pay the plaintiff's claims.

Control Over the Methods and Means

In New Jersey, our courts examine the following four factors to determine whether the homeowner is controlling the methods or means of the work: (1) the degree of control exercised by the homeowner over the means of completing the work; (2) the source of the independent contractor's compensation; (3) the source of the independent contractor's equipment and resources; and (4) the homeowner's termination rights. For example, if you hire a contractor to paint your house and you specify that the painter

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Possession Is Nine Tenths of the Law, Except for Motor Vehicle Replevins

by Eric P. Kelner

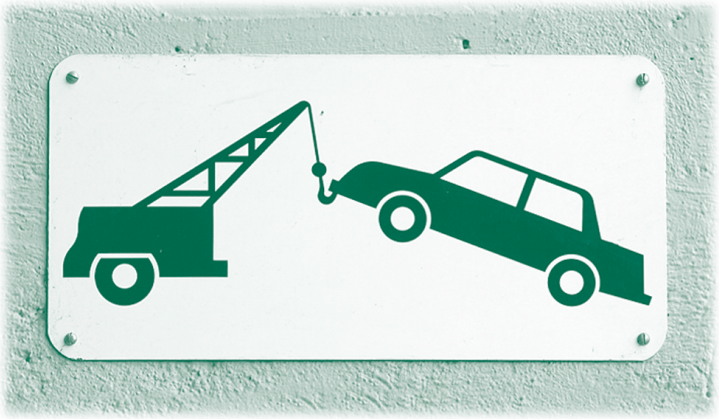
The rights and remedies of a secured creditor under a duly executed Retail Installment Sales Contract/Security Agreement ("RISC") for a motor vehicle upon breach of the terms thereof are easily understandable. The secured creditor has a security interest in the motor vehicle, which is perfected upon the filing of the title with the Department of Motor Vehicles. Once the titled owner of the motor vehicle breaches the terms of the executed RISC, the secured creditor is entitled to immediate possession of the motor vehicle and any deficiency balance under the RISC once the motor vehicle is sold in a commercially reasonable manner and all credits from the sale are applied.

However, the rights and remedies of the secured Creditor are not as clear when the motor vehicle is no longer in possession of the owner, but rather with a towing facility, repair facility or municipality. These entities will attempt to assert their statutory and common-law rights to their fees and costs expended with respect to the motor vehicle and most likely will not release the motor vehicle without a Court order. This article briefly outlines the Secured Creditor's rights and remedies with respect to the aforementioned entities in possession of the secured vehicle.

Towing Facility

If a motor vehicle owner is unable to continue to make payments once his/her vehicle is towed or is unable to pay for towing and storage of their vehicle, it is common that the owner leaves the secured vehicle at the towing facility. The owner, by failing to make payment pursuant to the RISC and allowing the vehicle to come into the possession of the towing facility, breaches the terms of the RISC. Thus, the secured creditor is entitled to possession of the secured vehicle.

The problem arises, whereby, the secured creditor can no longer simply utilize its recovery agents to secure the vehicle, as the towing facility will undoubtedly assert its entitlement to the entirety of its towing fees and storage pursuant to a New Jersey statute known as *The Garage Keeper's Lien Act.* This Act provides garage keepers with a statutory means for securing payment of debt for services performed with respect to a vehicle including storage, towing and repair work.



The seminal case of *Associates Commercial Corp. v. Wallia* sets forth the rights of the secured creditor when the secured vehicle is being held by a third party for services provided. In *Associates,* the Court held that while a facility that shall store, maintain, keep or repair a motor vehicle at the request or consent of the owner or his representative has a lien upon the motor vehicle for the sum for such services provided, the lien shall not be superior to, nor affect the lien of a secured creditor. Thus, the secured creditor has priority with respect to the secured vehicle.

Accordingly, the secured creditor has priority with respect to the vehicle and will be entitled to possession thereof without having to compensate the towing facility for any services provided.

Repair Facility

It is also common for motor vehicle owners to bring his/her motor vehicle to a repair facility to have repairs performed, determine that they are unable to pay for the services or can no longer make payments pursuant to the RISC and simply leave the vehicle at the facility. Based upon the owner's failure to pay and relinquishing possession of the vehicle to a third-party, the owner is now in default of the RISC. Thus, the secured creditor is entitled to possession of the vehicle.

This scenario will also result in a problem as the repair facility will assert its entitlement to storage fees and its repair fees, which could be significant pursuant to *The Garage Keeper's Lien Act* and *Artisan's Lien Law.* An artisan's lien, which is a common-law lien, is acquired when an artisan, by his labor and skill, contributes to the improvement, betterment or repair of personal property. Additionally, the holder .of an artisan's lien takes priority over the holder of a perfected security interest.

The case of *Ferrante Equipment Co. v. Foley Machinery Co.* addresses the rights of the secured creditor when a third party which has performed services on the secured motor vehicle asserts an artisan's lien. In *Ferrante,* the Court held while the holder of an artisan's lien has priority over a secured creditor, if the repair facility performed services on a "motor vehicle," it can only assert a garage keeper's lien regardless of whether an "artisan" improved the value of the motor vehicle. Thus, since the repair facility can only assert a garage keeper's lien, the secured creditor has priority with respect to the secured vehicle.

It is necessary in this scenario for the secured creditor in order to retrieve its motor vehicle, to bring an emergent application for replevin as the repair facility will not likely release the vehicle

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When You Are Responsible... cont. *(continued from page 8)*

must only use specific tools or means of access to the property—such as a ladder, instead of a scaffold or other means of access to upper floors, paint brushes but neither rollers nor sprayers, and street parking as opposed to the drive way—a court or jury may find that you have sufficiently controlled the methods and means of the painter's work to be held vicariously liable for any damage caused by the contractor's negligence. The control test may be satisfied whenever the homeowner retains the right to control the details of the work even if he does not actually exercise that control. It is also important to note that the homeowner may be held vicariously liable for injury or damage even if the contractor's negligence is not directly related to the specific method or means over which the homeowner had control. Thus, a homeowner may be held vicariously liable if a neighbor trips over paint cans that the contractor negligently left on the sidewalk even though the homeowner exercised no control over that aspect of the work.

However, simple supervisory control by the homeowner will generally not support vicarious liability. Returning to our example on the other hand, the homeowner may specify the use of a particular type and color of paint, and that work should not begin before 9:00 a.m. without risking possible financial responsibility if the contractor left those paint cans on the sidewalk.

Negligent Hiring of an Incompetent Independent Contractor

Under the second exception, to find a homeowner liable for hiring an incompetent contractor, a plaintiff must show that (1) the contractor was incompetent or unskilled to perform the job for which he was hired **and** (2) the homeowner knew or should have known of the independent contractor's incompetence. For example, if the painter that was referred to you as a safe and careful contractor by someone you know and trust, then you should not be vicariously responsible if the contractor's negligence results in injury or damage to property. However, if the referral praised the painter's skill in painting but included a warning that the painter habitually left paint cans where people could trip over them, vicarious liability may be found if the neighbor trips over negligently placed paint cans.

Depending upon the complexity of the work or the circumstances under which the contractor is identified, the homeowner may have an obligation to conduct an independent inquiry as to the competence of the contractor before hiring out the work. The homeowner may consider asking the contractor for a list of referrals and an opportunity to view other jobs he has performed. The homeowner may also call the Better Business Bureau or other consumer protection group to determine if any complaints have been filed against the contractor. If the contractor is reluctant to disclose such information, a homeowner should be wary of engaging that contractor to perform any services.

Hiring an Independent Contractor to Perform an Inherently Dangerous Activity

Under the third exception, vicarious liability may be imposed on a homeowner if the activity contracted for constitutes a nuisance per se or is inherently dangerous. An inherently dangerous activity has been described by our courts as one in which there is significant risk of injury or property damage even if the work is carefully performed. With such activities, the danger is clearly obvious and a homeowner cannot escape liability by hiring someone else to perform those tasks. For example, hiring a contractor to remove a large tree stump from your property using dynamite would probably be considered inherently dangerous. If the explosion caused damage to your neighbor's home, and the contractor had insufficient assets to pay for the damage, your neighbor would properly look to you under the theory of vicarious liability.

Considerations Prior to Hiring an Independent Contractor

A homeowner may avoid being financially responsible for the negligence of independent contractors by leaving the details of the work to the contractor and conducting reasonable investigation of the contractor's ability and reputation. The homeowner should also obtain a written agreement from the contractor that leaves the decisions of how to do the work to the contractor.

A homeowner should also limit exposure to vicarious liability by ensuring that the hired contractor has sufficient assets with which to respond to the types or severity of injury or damage reasonably likely to occur. Prior to employing an independent contractor, a homeowner should ask about the contractor's liability insurance and, at a minimum, request that the contractor provide a Certificate of Insurance that lists both the contractor's insurance and the address where the work is to be performed. The Certificate of Insurance should also reflect that the homeowner is a Certificate Holder. In some instances, it may be appropriate for the homeowner to require the contractor to secure additional insured coverage in favor of the homeowner on the contractor's liability insurance policy.

By following the guidelines described above, you should be able to avoid vicarious liability for the negligence of independent contractors you hire for traditional, simple tasks. However, if you are contemplating retaining a contractor for substantial or potentially dangerous work, it is strongly recommended that you retain counsel to assist you in drafting an appropriate agreement and reviewing the competence and financial strength of the contractors you are considering for the job. As always, we at **Hill Wallack** stand ready to assist you with the legal issues you face in this increasingly complex world.

Christina L. Saveriano *is an associate in the* ***Regulatory and Government Affairs Practice Group*** *of* ***Hill Wallack.***

...Debtors Beware cont. *(continued from page 4)*

a creditor can obtain an injunction against further disposition by the debtor or transferee, or both, of the asset transferred or of other property. A receiver may also be appointed to take charge of the asset transferred or of other property of the transferee. It is well settled that a creditor need not have reduced a claim to judgment before commencing an action to set aside a fraudulent conveyance under the Act, but a conveyance cannot be set aside until a claim has been reduced to judgment or other lien.

Certain Defenses Available

There are certain defenses afforded by the Act as more fully set forth in Section 25:2-30. A transfer is not voidable when actual intent to hinder, delay or defraud is proven against a person who took the transfer in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee. A transfer is also not voidable under subsection (b) of Section 25:2-25 if the transfer results from either (i) termination of a lease upon default by a debtor when the termination is pursuant to the lease and applicable law; or (ii) enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. A good faith transferee is entitled, only to the extent of the value given the debtor for the transferring or obligation, (i) to a lien on or a right to retain any interest in the asset transferred; or (ii) enforcement of any obligation incurred; or (iii) to a reduction in the amount of the liability on the judgment.

A fraudulent conveyance occurs when a debtor internationally removes some asset beyond the reach of a creditor which would have been available to them as a matter of law but for the conveyance. The Uniform Fraudulent Transfer Act was enacted to protect creditors from such deliberate acts by debtors. Once it is proven that a transfer was in fact fraudulent, the Act provides for remedies creditors are entitled to, including the ability to set aside the transfer. The Act should discourage debtors from transferring their assets for the purpose of removing such property from the reach of creditors.

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Employer/Employee Relationship... cont. *(continued from page 5)*

"seasonal amusement occupation," yet another layer of exemptions excludes certain types of businesses from this way around the State's overtime requirements. For instance, a "seasonal amusement occupation" does not include retail eating or drinking concession businesses; it does not include camps, beach and swimming facilities, movie theatres, theatrical productions, athletic events, professional entertainment, pool and billiard parlors, circuses and outdoor shows, sport activities or centers, country club athletic facilities, bowling alleys, race tracks and other similar facilities or enterprises.

Conclusion

At first blush, the rules governing employers and employees appear simple—employees serve "at the will" of the employer, and in exchange, are vested with certain minimum rights such as overtime pay and the payment of a minimum wage. Unfortunately, the "seasonal employee" exemption (with its own built in exception) to New Jersey's wage and hours laws is but one example to the labyrinth of laws and regulations which govern the employer employee relationship. To mention but a few, New Jersey employers should also be familiar with regulations governing workers compensation insurance, child labor, rules governing specific industries, organized labor, rules governing keeping employment records, and, well, and the list goes on and on.

Hill Wallack offers its clients a full array of attorneys experienced in employment law. Whether you are a business seeking to implement work-place policies and wish to be advised regarding what is and is not permissible in New Jersey, or whether you find yourself in litigation and need competent representation, **Hill Wallack** is ready to partner with you to meet your goals.

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Possession... cont. *(continued from page 9)*

because costly repairs have been performed without compensation. Additionally, it is imperative that the secured creditor request temporary restraints preventing the repair facility from harming or damaging the vehicle. The repair facility may have spent a significant amount of labor and materials repairing or improving the vehicle in which case it will potentially attempt to remove the materials it utilized in its services—hence, the need for temporary restraints. The applicable case sets forth priority in favor of the secured creditor, and accordingly, the secured creditor will be entitled to possession of its vehicle and will not be required to compensate the repair facility for the services provided.

Municipality

A more complex priority issue arises when a motor vehicle owner has his/her vehicle towed by the municipality due to traffic violations, abandonment or part of an investigation. The motor vehicle owner, by allowing the vehicle to be in the possession of a municipality, has breached the RISC, thus entitling the secured creditor to possession of the vehicle.

Unlike a towing facility or repair facility, a municipality is entitled to compensation for part of the services it provided. New Jersey Statute provides for the payment in the maximum amount of $400 for the storage of a municipality-authorized tow. The storage fees cannot exceed $3.00 per day for the first thirty days of storage per vehicle and $2.00 per day for the 31st day of storage and any day thereafter.

While the municipality may be entitled to compensation for nominal storage charges, the secured creditor is still entitled to possession of the motor vehicle upon payment of this nominal amount. It is highly probable that the authorized facility or municipality will seek greater compensation from the secured creditor than the limited amounts provided by statute. Thus, the secured creditor must bring an emergent application for replevin to retrieve its vehicle.

Conclusion

The Secured Creditor's rights are clearly established pursuant to the applicable statutes and case law with respect to its vehicle upon the motor vehicle owner's default under the RISC. However, a recalcitrant third-party that comes into possession of the vehicle is unlikely to release it to the secured creditor without being compensated accordingly. Thus, a replevin action is a vital and necessary tool to allow a secured creditor to enforce its right and retrieve its vehicle. The law firm of **Hill Wallack** has extensive experience in motor vehicle replevin actions and can perform these services for your benefit.

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