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*The **Hill Wallack LLP Quarterly** provides information of general interest to our readers. It is not intended, and should not be used, as a substitute for consultation with legal counsel. If you have any questions regarding specific issues raised in this issue, you may contact the authors directly at (609) 924-0808 or by e-mail at info@hillwallack.com.*

Message From The Managing Partner

In this winter issue of our firm's *Quarterly*, we touch on several financial issues of interest in our troubled economy as well as highlight several timely legal issues that are arising.

We open this issue with Eric Kelner's clarification of the FDIC limits in this economic downturn in his article "*The FDIC The Security Blanket in the Unstable Economy*". Ginger Hardwick examines discrimination against the disabled in her article *"The Americans with Disabilities Act is Tougher Than Ever…"*, while Christina Saveriano discusses eco-construction in her article *"Going Green in the Garden State: Who Knows Where the Wind Blows"*.

Jeffrey DiAmico brings us up-to-date on the duties the community association has to their members in his article *"Pennsylvania Homeowners' Association Not Liable for Dog Attack of Neighbor"*, while Jennifer Reed alerts us to business relationships and insurable damages in *"Is There Insurance Coverage for a Claim for a Contractor's Faulty Workmanship?"* while Ryan Kennedy reviews domain name association with your business in his article *"MyCompetitorStoleMyName.com…"*.

Finally, Irene Komandis concentrates on the importance of monitoring your stock portfolio in her article, *"Think Your Stock Broker Has Acted Improperly?"*.

We are sure that you will enjoy both the substance and the variety of the articles in this issue. Again, please let us know the subjects you would like to see covered in the *Quarterly*. As always, we invite you to contact us with your comments, suggestions and questions.

-Robert W. Bacso

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The FDIC — The Security Blanket In The Unstable Economy

by Eric P. Kelner

The headlines in the nightly news highlight the instability in the global economy. Investment houses are filing for bankruptcy. The stock markets are taking precipitous drops. 401k plans are losing their value. The public is unsure in this unstable time as to the security of their money.

While the public may have once had confidence in being fiscally conservative by depositing their life savings into a savings account, checking account or certificate of deposit, this too is now uncertain. In the past year, fifteen banks have failed due to their inability to pay depositors and others. These banks have been closed by the Office of the Comptroller of the Currency, the Office of Thrift Supervision or state regulator. Once their local branch closes, customers begin to worry about the implications with respect to their funds. After detailing the bank's closure the news stories then indicate that the FDIC has been appointed as the receiver and the deposits at the failed bank are insured up to the FDIC insurance limits. This has caused bank customers to begin to query: What is the FDIC? How much are the limits? Do my deposits fall within the FDIC limits? And what if I have deposits at the bank above the FDIC limits?

What Is The FDIC?

The FDIC is the acronym for the Federal Deposit Insurance Corporation. It is an independent agency of the federal government, which was created in 1933 in response to the thousands of bank failures during the Great Depression. The FDIC receives no money from the federal government and is funded by premiums that banks pay for deposit insurance coverage and from earning on investments in U.S. Treasury securities. Additionally, the FDIC directly examines and supervises over 5,000 banks.

Once a bank fails the FDIC responds immediately. The FDIC has several options for the bank's failure including selling the deposits and loans of the failed bank to other banking institutions, liquidating the personal and real property of the failed institution and managing the receivership. All of these actions by the FDIC are to protect the insured and uninsured depositors.

The FDIC insures deposits in banks and thrift institutions up to the FDIC limit. Thus, if a bank fails, the bank customers are insured that their deposits will be honored up to the FDIC limit. Since its inception no depositor has lost a cent of insured funds as a result of a bank failure.

What Are The FDIC Limits?

On October 3, 2008, FDIC temporarily increased its limits from $100,000.00 to $250,000.00 per depositor at each FDIC-insured institution that the depositor maintains an account at through December 31, 2009. The FDIC insurance covers all deposit accounts at insured banks and savings associations, including, checking accounts, NOW accounts, savings accounts, money market accounts and certificates of deposit (CDs) up to the insurance limit. However, the FDIC does not insure stocks, bonds, mutual funds, life insurance policies or annuities purchased from the insured banks and savings associations, thus, these products may be uninsured if there is a bank failure.

Do My Deposits Fall Within The Limits?

While the FDIC only insures $250,000 per depositor this does not mean that a family can only maintain

accounts at one specific bank only up to $250,000 to guarantee that the money is insured by the FDIC.

While the FDIC limits are $250,000 per depositor, a family can have coverage for a larger amount if the family has accounts in different ownership categories.

The different ownership categories for the accounts that one may possess are single accounts, joint accounts, IRA accounts and revocable trust accounts. The FDIC coverage limits are as follows: $250,000 per owner for a single account; $250,000 per co-owner for a joint account (two or more people); $250,000 per owner for IRA accounts and $250,000 for the interests of each beneficiary for revocable trust accounts.

A single account is an account or a group of accounts owned by one person and titled in that person's name only. All of this person's accounts are added up and the total is insured up to $250,000. Thus, if Joe Smith has a Certificate of Deposit for $45,000 titled in his name only, a checking account in his name only in the amount of $55,000 and a savings account in the amount of $150,000 in his name only, his accounts would total $250,000 and he would be within the FDIC insurance limits. While the limit is $250,000 per depositor, Joe Smith could have additional deposits at the bank, which would also be insured if he possesses accounts with different ownership categories.

Joe Smith could also have a joint account with Molly Smith. The FDIC coverage limits for the joint accounts of Joe Smith and Molly Smith are $250,000 each or $500,000 in the aggregate. Joint accounts are deposit accounts owned by two or more people and titled jointly in the co-owner's names only with no beneficiaries. Each co-owner must also have a right of withdrawal on the same basis as the other co-owner. Thus, if Joe Smith and Molly Smith have a joint checking account in the

amount of $200,000, a jointly titled Certificate of Deposit in the amount of $200,000 and a jointly titled savings account in the amount of $100,000. Both Joe Smith and Molly Smith have a $250,000 ownership interest in the jointly titled accounts as both co-owners have an equal half share of the joint accounts and have joint accounts in the aggregate amount of $500,000. Accordingly, Joe Smith's and Molly Smith's joint accounts are within the FDIC insurance limits.

Not only does Joe Smith have single and joint accounts at the bank but Joe Smith also has an IRA retirement account at the bank. The FDIC coverage limits for retirement accounts are $250,000. These deposit accounts are owned by only one person and are titled in the name of that person's retirement plan. Only certain types of retirement plans are insured including: individual retirement accounts (IRA), Keogh plan accounts and Section 457 deferred compensation plan accounts. The aggregate of all of these retirement accounts are insured up to $250,000.

"…FDIC insurance covers all deposit accounts at insured banks and savings associations…"

The final type of account that Joe Smith may possess is a revocable trust account. With respect to revocable trust accounts each owner of the account is insured up to $250,000 for the interests of each beneficiary. A revocable trust account is a deposit account held as a payable on death account ("POD") or a living trust or family trust account. The FDIC limits with respect to these types of accounts are more complicated. Assume that Joe Smith has three POD accounts at the bank. The first POD account is in his name with deposits being payable to Molly Smith at his death. The second POD account is also in his name with deposits being payable to his mother Betty Smith at his death. The final POD account is also in his name with the deposits being payable to his children Billy and Johnny Smith at his death. The first POD account has a balance of $250,000. The second POD account also has a $250,000 balance. The final POD has a balance of $500,000. While the aggregate of these accounts is $1,000,000, the entirety of these

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The Americans With Disabilities Act Is Tougher Than Ever: What's An Employer To Do?

by Virginia L. Hardwick

Since 1992, the Americans with Disabilities Act (ADA) has prohibited discrimination against the disabled. The Americans with Disabilities Act Amendment Act (ADA-AA), which goes into effect in January 2009, represents the most significant change to employment law in years. The ADA-AA greatly expands the class of persons who may seek protection as "disabled" and therefore expands responsibilities - and potential liability - for employers.

Passage of the ADA-AA was a decisive victory for advocates of employees and the disabled. After a series of court decisions during the last 15 years had steadily narrowed the reach of the ADA, Congress stepped in with the ADA-AA and told the courts in no uncertain terms that the ADA is to be interpreted far more broadly.

Why Did Congress Take This Action?

The ADA protects disabled employees from discrimination if those employees are able to do their job "with a reasonable accommodation." Therefore, an employee with a disability so severe that he or she cannot perform the job is not protected. To be protected by the ADA, an employee must be disabled but not *too* disabled.

Over recent years a series of court cases narrowed the class of people who could be considered disabled. In other words, employees who were not sufficiently disabled were found by the courts not to qualify for the ADA's protection.

These interpretations of the ADA set up a paradox for employers, employees and courts. Advocates for the disabled and for employees complained that many employees fell through the cracks: if they were disabled enough to qualify for protection under the court decisions, they might be too disabled to show that they could still do the job.

What Does The ADA-AA Do?

The ADA-AA specifically overrules four Supreme Court decisions, which employers have used to argue for a narrow interpretation of the scope of the ADA.

Lower standard in the definition of disability: The Supreme Court in *Toyota Motor Mfg. v. Williams*, instructed lower courts to apply a "demanding standard" when determining which employees were disabled. Congress specifically rejected this narrow "demanding standard," effectively overruling the Supreme Court's interpretation of the ADA. The new ADA-AA states that there must be "a broad scope of protection" for employees, and specifically directs courts interpreting the ADA to protect plaintiffs "to the maximum extent permitted by the statute."

This language will be extremely helpful to employees who are bringing discrimination suits under the ADA. Cases which might have been thrown out on summary judgment under the standard required by the Supreme Court are now likely to proceed to a jury trial, and the instructions given to the jury about what conditions might be considered a disability will be much broader.

Mitigating Measures: The ADA-AA also specifically provides that a court may not consider mitigating measures in determining whether a person's condition is a "disability." This change overrules the Supreme Court's 1999 decision in *Sutton v. United Air Lines*, which had provided that a person was disabled only if he or she was impaired in a major life activity even after accounting for mitigating measures.

This change will provide ADA protection for a significant number of employees whose cases would have been dismissed under previous rulings.

> *"The Americans with Disabilities Act Amendment Act… represents the most significant change to employment law in years."*

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Going Green In The Garden State: Who Knows Where The Wind Blows

by: Christina L. Saveriano

> *"Many municipalities are now for the first time faced with the task of enacting ordinances on renewable energy."*

Going green is the future, but building windmills and solar installations is not so easy in New Jersey. Currently there is no statewide legislation regulating the construction of renewable energy stock. Instead, construction of windmills and solar systems is governed by local ordinances enacted by the State's 566 municipalities. Eco-construction that is encouraged in one municipality may be banned or severely limited in another. Individuals and builders who wish to undertake this construction must engage in a thorough review of local ordinances, land use laws and other state and local regulations before "going green."

Wind Power

Windmills producing wind-generated energy are certainly the future for "going green." However, windmills are a subject of debate, with objectors claiming that windmills are noisy and aesthetically unpleasing. With no State legislation relating to windmills, municipalities control the building and use of windmills. For example, in Long Beach Township, Ocean County, windmills are completely banned by local ordinance. On the other hand, Atlantic City in Atlantic County is leading the way in wind-generated energy with the creation of a wind farm consisting of five windmills that generate enough energy to power approximately 2,500 homes.

Many municipalities are now for the first time faced with the task of enacting ordinances on renewable energy. Those ordinances must take into account such issues as the size and safety of the windmill, as well as, issues relating to whether the proposed windmill will be constructed in a residential or nonresidential area. Concerns over the size and look of the windmill are more significant in residential areas than non-residential areas. As a result, installations in residential areas may be more restricted than installations in non-residential areas.

Building Renewable Energy Sources Under Local Ordinances

Because most local zoning ordinances do not provide specific provisions addressing renewable energy installations, anyone wishing to build a windmill or solar installation must apply to the local municipality for approval to do so on a case by case basis. Even the most devoted "green" advocate may be dissuaded from pursuing renewable energy because of the time and costs related to obtaining local approval. Unfortunately, these local hurdles may discourage green building practices.

As municipalities enact local ordinances addressing renewable energy the path to installation of renewable energy will become clearer but the lack of uniformity across the state remains a challenge for builders. Each municipality will need to face the issue of going green. Decisions at the local level will be naturally subject to local rather than statewide concerns. Thus, while one municipality may ban windmills entirely, the municipality next door may enact an ordinance favoring the use of wind energy. As a result, those looking to go green will be required to research local ordinances as well as land use laws relating to renewable energy.

The State Takes A Step Into Uniform Regulation

Although there is no State legislation regulating renewable energy, the New Jersey Legislature did step in and take action relating to solar energy. Last year the Legislature passed a law prohibiting homeowners associations from banning solar energy systems outright. Under that legislation, homeowners associations have the right to adopt regulations regarding where solar collectors may be placed on the roof however, the association is prohibited from banning the installation in its entirety. Such action promotes the use of renewable energy while leaving the specific installation

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Pennsylvania Homeowners' Association Not Liable For Dog Attack Of Neighbor

by Jeffrey G. DiAmico

A homeowners' association is not liable for an attack by a property owner's dog on another property owner when the association had no control over the dog, according to a recent decision by the Commonwealth Court of Pennsylvania. In *McMahon v. Pleasant Valley West Association*, the court held that the association had no duty to protect a member from another member's dogs because the association had no obligation to compel the dog owners to maintain, control and confine their dogs on their own property or to prevent the attack.

In *McMahon*, an association was sued by one of its members for injuries he suffered from his neighbors' dogs. The plaintiff had been standing in his own driveway, loading his car, when he was attacked and injured by two pit bull terriers owned by a neighboring couple. The dogs had been unleashed and ran directly from the couple's property onto the victim's property. This incident occurred several months after the injured owner's roommate had complained to the association's board of directors that the dogs' aggressive behavior was "terrorizing" the community.

Following that meeting, the association had sent the couple a written notice of the complaint and requested that they confine the dogs to their property and otherwise keep them on a leash as required by the association's rules and regulations.

As a result of the dog attack, the property owner sued both the association and the couple. In particular, he claimed that the association was negligent (1) by failing to establish and enforce rules and regulations requiring the couple to maintain, control and confine the dogs on their property and (2) by violating its duty to exercise reasonable care to prevent the harm despite its knowledge of the violent propensities of pit bulls.

Several states have recognized a community association's duty to exercise due care for its residents' safety in areas under its control. The trial court in *McMahon*, noted, "The association's liability extends to those parts of the premises over which it has retained the right of control and which are responsible for the injury … and its duty to safeguard these common areas extends not only to physical conditions on the land but also to dangerous activities on the land." A dangerous condition can include the presence of a vicious dog when the association has knowledge of the dog's dangerous propensities and a right or duty to control the dog. However, the trial court also stated that "[t]he Association did not own, control or manage the dogs, the property where they were kept, or the premises where the alleged attack occurred." The court ruled in favor of the association's motion to dismiss the lawsuit, concluding that because the victim did not prove that the association had the ultimate right to remove or confine the couple's dogs or take possession of their property, he had not proven that the association could be held legally responsible for his injuries.

Affirmative Duties Of Homeowners Associations

On appeal, the Commonwealth Court explained that, in general, the affirmative duties owed by a homeowners association to its members are summarized as follows:

(1) In addition to duties imposed by statute and the governing documents, the association has the following duties to the members of the common interest community:
  (a) to use ordinary care and prudence in managing the

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"Several states have recognized a community association's duty to exercise due care for its residents' safety in areas under its control."

Is There Insurance Coverage For A Claim For A Contractor's Faulty Workmanship?

by Jennifer L. Reed, Esq.

In New Jersey, litigation often ensues after a homeowner, developer or general contractor files a claim against a contractor or subcontractor ("contractor") alleging that the contractor negligently and/or defectively performed work pursuant to an agreement. Case law in New Jersey and various other jurisdictions makes clear that Commercial General Liability ("CGL") Policies issued to contractors whose work was allegedly deficient do not cover claims for faulty workmanship. This is so because many of the claims arising out of defective workmanship do not constitute "property damage" of an "occurrence," as those terms are defined in CGL Policies, and due to the applicability of certain standard express exclusions, often collectively referred to as the "Business Risk" Exclusions.

Claims Not Covered

As an initial note, CGL Policies typically do not provide coverage for an insured's "negligence." Thus, in the context of a claim for a contractor's faulty workmanship, the threshold question is whether the claims against the insured contractor constitute (1) "property damage" and (2) an "occurrence," as those terms are defined in the CGL Policy issued to the contractor. Claims must meet both definitions for coverage to be triggered.

In the construction context, the leading New Jersey case discussing damages under a CGL Policy is *Weedo v. Stone-E-Brick, Inc. ("Weedo")*, which was decided by our State Supreme Court in 1979. *Weedo* involved an allegation of faulty workmanship against a masonry contractor insured under a CGL Policy. More specifically, the contractor applied stucco to the exterior of the Weedos' home. After the job was completed, the stucco began to crack. The Weedos had to remove the stucco and replace it with "proper material." Thereafter, our State Supreme Court was called upon to determine the issue of whether the CGL Policy issued to the mason provided indemnity against damages in an action for breach of contract and faulty work on the project, where the cost of damages was limited to repairing the contractor's work.

In deciding this issue, our State Supreme Court first looked at the insured contractor's "business relationships with its customers," noting that warranties of merchantability and/or fitness are either express or implied in business contracts. The Court found that CGL Policies do not cover such claims, because the contractor has control over the quality of the goods and services that it provides. The Court justified this position by explaining that the "replacement or repair" of faulty goods and work is a business expense to be borne by the insured contractor in order to satisfy their customers. Thus, *Weedo* held that a contractor's defective workmanship is not a subject of insurance.

In addition to discussing business relationships and insurable damages, our State Supreme Court relied upon specific provisions of the CGL Policy, which exclude coverage for property damage to the named insured contractor's products or work. These provisions are commonly referred to as the "Business Risk" Exclusions. In short, *Weedo* makes clear that in the construction context, CGL Policies do not provide coverage where the alleged damages are merely the cost of repairing the insured's faulty work. For example, if a contractor was hired by a homeowner to install wood flooring, and the homeowner later brings a claim against the contractor based upon an allegation that the wood flooring warped and buckled, the claim will not be covered under the contractor's CGL Policy if the only actual damage was to the wood flooring itself. Stated differently, if the contractor can remove and replace the wood flooring without damaging any other portion of the homeowner's property, then the claim is not covered. If, however, ripping up and replacing the wood flooring would cause damage to another aspect of the homeowner's property which the contractor did not work on, *i.e.*, if wood trim that the contractor did not install would have to be ripped up and replaced in order to remove the wood flooring, then coverage under the CGL may be triggered. In other words, if the plaintiff is able to prove that he or she suffered consequential damages as a result of the insured contractor's defective work, then coverage under the CGL Policy will be triggered, and coverage will not be barred by any exclusion set forth therein.

> *"CGL Policies typically do not provide coverage for an insured's "negligence.""*

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SPOTLIGHT

APPOINTMENTS & RECOGNITION

Edward H. Herman, a partner with **Hill Wallack LLP** in the Princeton office has been appointed as Municipal Court Presiding Judge for Vicinage 8 Middlesex County. Mr. Herman is a member of the firm's **Litigation Division** and partner-in-charge of the **Workers' Compensation** and **Automotive Dealers Business & Liability Practice Groups**. 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. Mr. Herman has been practicing law for more than 30 years. He is a recognized authority throughout New Jersey on the law and the practice of workers' compensation matters and is certified by the Supreme Court as a workers' compensation attorney. He has presided as Municipal Court Judge in Spotswood since 1987 and also serves as Municipal Court Judge in the Boroughs of Plainsboro (2005), Cranbury (2005) and Highland Park (2001) and the Middlesex County Jail.

Kenneth E. Meiser, a partner with the firm in the Princeton office recently served as a panelist at the 2008 COAH Update sponsored by New Jersey Institute for Continuing Legal Education. Mr. Meiser gave a presentation on the Third Round Council on Affordable Housing Regulation. Known for his role in several precedent-setting legal decisions, Mr. Meiser is a partner in the **Land Use Division** which includes the firm's **Land Use Litigation, Land Use Applications** and **Environmental Law Practice Groups**. He has a practice concentration in the areas of land use applications and litigation. A graduate of Xavier University, Mr. Meiser earned his law degree *cum laude* from Harvard Law School. He has taught courses in land use regulation as an Adjunct Professor at Rutgers Law School. A frequent public speaker, Mr. Meiser has made presentations to the Institute for Continuing Legal Education, the National Business Institute and numerous other organizations in New Jersey. He serves on the New Jersey Builders Association's Legal Action Committee and is a member and former chair, of the Board of Directors of the Land Use Section of the New Jersey State Bar Association. He has also been named as a 2006, 2007 and 2008 New Jersey Super Lawyer by *Law & Politics* and the publishers of *New Jersey Monthly*.

Paul P. Josephson, partner-in-charge of the ***Regulatory & Government Affairs Practice Group*** in the Princeton office at Hill Wallack LLP was recently a featured panelist at the Lorman Education Services Seminar Conference *"Eminent Domain in New Jersey"* held in New Brunswick. Mr. Josephson gave his presentation on ethics, redevelopment and eminent domain matters. Mr. Josephson concentrates his practice in Redevelopment Law as well as Election Law and Campaign Finance Compliance and Government Ethics. Mr. Josephson previously served as Chief Counsel to the Governor, and as Assistant Attorney General and Director of the Division of Law within the New Jersey Office of the Attorney General. In the latter capacity, he managed a 550-attorney division responsible for all civil representation of the State of New Jersey including all state condemnations. Born and raised in Essex County, Mr. Josephson graduated from Montclair Kimberley Academy. He earned his undergraduate degree from the University of Michigan, and his J.D. with honors from the National Law Center at George Washington University.

Michael S. Karpoff, a partner of the firm in the Princeton office and member of the firm's **Community Association Practice Group**, was recently elected to a three-year term on the Board of Directors of the New Jersey Chapter of the Community Associations Institute (CAI). He is also a member of CAI's national *Amicus Curiae* Advisory Group. CAI is a national organization bringing together homeowners, developers and related professionals dedicated to providing a forum for the exchange of information and ideas regarding responsive and competent operation, management and leadership of condominiums, cooperatives, homeowner associations and other common interest ownership communities. Mr. Karpoff is certified by the Supreme Court of New Jersey as a civil trial attorney and is a member of Community Association Institute's College of Community Association Lawyers. He graduated from Rutgers College, holds a Master of Science degree in public relations from Boston University, and received his Juris Doctor degree from Rutgers Law School - Newark. He is admitted to practice law in New Jersey, New York and Pennsylvania as well as before the United States Supreme Court, the U.S. Court of Appeals for the Third Circuit, and the U.S. District Court for the District of New Jersey.

Anthony Muscente, Jr. a partner with **Hill Wallack LLP** in the Princeton office was recently a featured speaker at the ISLES

Microbusiness Training Program session entitled *"Build Your Own Business"*. His presentation focused upon the various options, legal requirements and other planning considerations which should be addressed when starting a business and in order to turn a business plan into a successful venture. Isles is a nationally recognized nonprofit community development and environmental organization founded in 1981 with the mission to foster more self-reliant families in healthy, sustainable communities. Mr. Muscente is a member of the **Real Estate, Business & Commercial, Estate Planning** and **Real Estate Tax Appeals Practice Groups** at **Hill Wallack LLP** and has a wide-range of experience in providing representation to clients in both the public and private sectors; such as governmental agencies, developers and other businesses as well as individuals. His practice includes residential, commercial and governmental real estate transactions with a background that includes developments and major redevelopment projects, acquisitions, financing, taxation, leasing, environmental law, construction law, public contracting, administrative law and governmental permitting and regulation. His experience also encompasses the organization and sale of business entities, estate planning and administration, real estate tax law and appeals, commercial landlord-tenancy matters, commercial collections, litigation and general legal representation. In addition, he practices in the area of alternate dispute resolution and provides services as a mediator of civil cases with a focus on collections, construction disputes and real estate related claims. He earned his law degree from Southwestern University School of Law in Los Angeles, California and his B.A. from Cornell University, College of Arts & Sciences in Ithaca, New York. He is admitted to practice in New Jersey and the District of Columbia.

Joanne Rathgeber, a partner of **Hill Wallack LLP** in the Yardley office where she is partner-in-charge of the firm's **Employment & Labor Law Practice Group** recently presented a Continuing Legal Education Seminar Program *"How To Recognize a Valid Employment Discrimination/Harassment Claim and What To Do About It"* for the Bucks County Bar Association. Ms. Rathgeber concentrates her practice in Employment Discrimination, Civil Rights & Constitutional Litigation, Personal Injury Litigation, Workers' Compensation and Legal Malpractice. Ms. Rathgeber has litigated cases for over twenty-five years with million dollar results in both workplace discrimination and personal injury. She has extensive experience in the areas of Employment and ERISA and has represented clients in all phases of employment related litigation, including claims of discrimination and harassment, wrongful discharge, whistleblower and others. A graduate of LaSalle College, *maxima cum laude* and Temple University School of Law, Ms. Rathgeber is admitted to practice in the Commonwealth of Pennsylvania, the U.S. District Court for the Eastern District of Pennsylvania, U.S. Court of Appeals and the Pennsylvania Supreme Court. Ms. Rathgeber is very active in the Bucks County Community. She has served as a course planner and presenter at numerous legal seminars sponsored by the Bucks County Bar Association and the People Law School.

Henry T. Chou, partner of the firm of **Hill Wallack LLP** in the Princeton office was recently appointed to the Board of Directors of the Land Use Section of the New Jersey State Bar Association. The land use section reviews developments in land use law, including local and state development land use approval and denial processes, and attempts to reduce or eliminate costs and delays associated with these processes. Mr. Chou is a partner of the **Land Use Division** which includes the firm's **Land Use Applications**, **Land Use Litigation** and **Environmental Applications Practice Groups**. He concentrates his practice in the land development application and permitting process and the litigation of land use matters. Mr. Chou has significant experience in Mt. Laurel affordable housing litigation and administrative matters before the New Jersey Council on Affordable Housing. In addition, he has represented developers, property owners and public entities in a wide variety of environmental, redevelopment and construction matters. Mr. Chou has handled numerous planning board and zoning board of adjustment applications, ranging from minor subdivisions to multifamily residential developments. He has litigated many cases challenging denials of land use applications, the validity of municipal ordinances, and appeals pertaining to complex land use issues. An honors graduate of the University of Georgia, Mr. Chou received his law degree from the Rutgers University School of Law. Following law school, he served a judicial clerkship with the Honorable Lawrence M. Lawson, Assignment Judge of Monmouth County. Mr. Chou is admitted to practice in New Jersey and Pennsylvania and the U.S. District Court of New Jersey.

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

MyCompetitorStoleMyName.com: A Roadmap For Taking Back Your Business' Identity On The Information Superhighway

by: Ryan P. Kennedy

What's in a name? For any business, identity is key. Indeed, a name that connects with customers and is recognized for its association with your entity may be your most important business asset. Your business' name brings in clients both by allowing existing contacts to locate you and by attracting new ones searching for your services and products. If your customers cannot find you, they simply cannot do business with you, and it goes without saying that if your customers find your competitors before they find you, those customers may quickly become former customers and lost business.

As commerce moves increasingly from brick and mortar to the Internet, that connection with customers also means a connection between your business' online identity and its real world presence. The association between Mike's Bike Shop on Main Street and mikesbikeshop.com on the internet is becoming just as important as the association between the physical store on Main Street and the sign out front. Buyers see the sign and make the connection to the physical presence. Online, customers see the name or the Internet search results and make the connection to the business.

That connection is all well and good when Mike's Bike Shop on Main Street and the Internet domain name refer to the same business - however that is not always the case. When the owner of the domain name and the owner of the business are one and the same, customers make the correct connection. As you would expect nike.com is owned by the famous shoe company, and leads customers to its internet storefront. However, since domain names can be registered with the click of a mouse and without any oversight, web addresses sometimes are registered to people completely unrelated to the business or worse, to competitors or "squatters" looking to profit off the domain name's association with your business. What do you do when mikesbikeshop.com connects not to your Main Street business, but to your biggest competitor?

As a business owner, there are several courses of action to take back your online identity when another party is using your company's name for their website address. Depending on the result you are looking for, be it money damages or simply turning over the keys to the domain name, actions in state and federal court are available as well as a special arbitration process. No matter which method is appropriate, it is of course important to take action before this important business asset is tarnished, diluted or pilfered by competitors.

Trademark Remedies

If the name of your business is a protected trademark, the first line of defense may be traditional actions in state or federal court to protect your mark. Just as a business may take action to defend itself from a competitor using its name or slogan on its products, action can be taken under the Federal Lanham Act or state statutes when a domain name similarly infringes on a valid trademark.

In such a proceeding, a court will look to various factors such as strength of the mark, the similarity of the domain name and the trademark (is "Mike's Bike Shop" the same as "Mike's Bikes"?), evidence of actual consumer confusion, type of goods or services (does the owner of the website sell bicycles and the owner of the Main Street store sell motorcycles?), the intent of the domain name registrant in selecting the mark (was the Internet name selected just to redirect a competitor's customers?) and even the likelihood of expansion of the product lines (will the motorcycle dealer start selling the human powered version anytime soon?). A successful trademark owner could receive money

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Think Your Stock Broker Has Acted Improperly? What Can You Do About It? Caution: It's Not As Simple As Filing A Suit

by: Irene N. Komandis

As any investor will tell you, it is imperative that you be conscientious and knowledgeable about the value and status of your stock portfolio. In today's volatile economy, it is more important than ever to be vigilant in the monitoring and assessment of your stock portfolio, not only to keep abreast of its value, but also to ensure that your stock broker is acting in your best interest and according to your directions.

While most investors will likely never encounter a problem with their broker's handling of their stocks, some unlucky few will. In those instances it is important to be knowledgeable about the remedies available to an investor. Unlike civil suits against other entities, disputes between a broker or brokerage firm and individual investors do not typically get resolved in a court room. As an investor, if you feel you have been harmed by the inappropriate actions of your broker or brokerage firm, your method of redress may not be as simple as filing a complaint in State Court. Accordingly, it is imperative to be cognizant of the proper avenue to resolve a dispute with your broker or brokerage firm.

Know The Nature Of The Account

The first step is to determine if an investor has indeed been harmed by his broker's actions. Be cognizant that, despite the complaints of an investor, simply losing money in one's stock portfolio is not proof of misconduct or mismanagement of one's account by the broker or firm. The way to determine if misconduct by a broker has occurred is to compare the broker's actions with his obligations given the type of account held by the investor. As simplistic as it sounds, the duties and obligations of a broker are inextricably derived from the nature of the investor's account, such that a violation will only arise if the broker has acted contrary to his obligations and duties given the account held by the investor. Two types of accounts exist with respect to the trading of stocks: discretionary and non-discretionary.

A discretionary account is an account wherein the investor has bestowed upon the broker the authority to buy and sell securities, either absolutely or subject to some restriction, without obtaining authorization from the investor. In a discretionary account, a broker is viewed as a fiduciary, such that the broker owes certain duties to the investor.

A non-discretionary account is an account wherein the broker can only act with knowledge and upon authorization of the investor. Contrary to a discretionary account, no fiduciary duty is owed to an investor for a non-discretionary account as the broker or firm cannot act without proper authorization of the investor. This does not mean that no duty is owed to an investor.

To determine if a violation has occurred, an attorney must examine the allegedly inappropriate conduct of the broker in comparison to the type of account held by the investor. If the conduct of the broker accords with the duties owed to the investor, no violation has occurred. If, however, the broker's conduct runs afoul of the obligation owed to an investor, a violation has occurred. In this instance, what recourse does a wronged investor have?

The Courthouse Doors May Be Closed To You

Upon establishing that a broker or brokerage firm has acted improperly and that you have sustained damage as a result of this conduct, an investor's first inclination may be to file suit in Superior Court for any damages sustained by the investor. However,

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The FDIC — The Security Blanket... *(continued from page 3)*

accounts are within the FDIC insurance limits as the limits are $250,000 for each beneficiary; and the accounts have four different beneficiaries. All of the accounts of Joe Smith fall within the FDIC limits, however, there is always the possibility that a bank customer's accounts exceed the FDIC limits.

What If My Accounts Do Not Fall Within The FDIC Limits?

It is possible that an individual exceeds the FDIC insurance limits in any of the different ownership categories. For example, Joe Smith could have in the aggregate of all of his single accounts $375,000. Then $125,000 of Joe Smith's deposits would not be insured. Thus, if Joe Smith's bank failed, $125,000 of his deposits would not be insured and honored by the FDIC. While the FDIC attempts to recover even the uninsured amounts by selling the assets of the failed bank and through the receivership of the failed bank, there are no assurances that the customer will ever recover this money. Thus, in order to avoid this potential economic loss, individuals should be familiar with the FDIC insurance limits outlined in this article and should redistribute their monies into different ownership categories to be within the FDIC insurance limits. The law firm of **Hill Wallack LLP** has extensive knowledge of the FDIC regulations and the FDIC insurance limits and can assist you in ensuring that your valuable deposits are protected.

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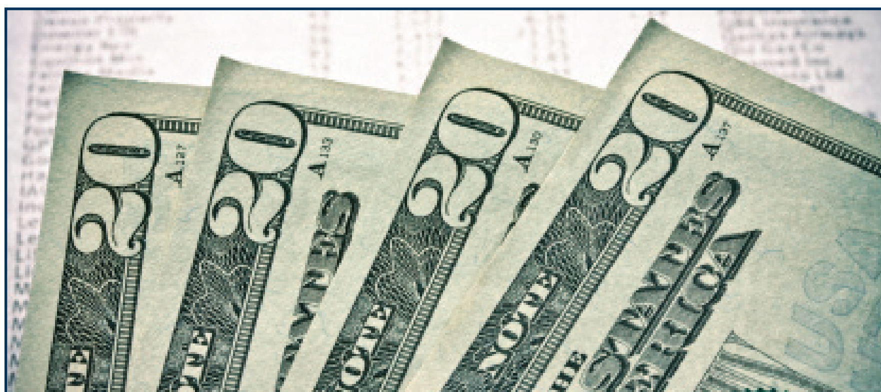

PA Homeowners' Assoc. Not Liable For Dog Attack... *(continued from page 6)*

property and financial affairs of the community that are subject to its control;

(b) to treat members fairly;

(c) to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design control powers; and

(d) to provide members reasonable access to information about the association, the common property, and the financial affairs of the association.

The court went on to state that in this case, the association's purported liability was premised upon the violation of its alleged duty to control the couple's actions with respect to their dogs and to protect the property owner from the harm flowing from those actions. However, a prior judicial ruling had held that there is no duty to control the acts of a third party unless a defendant stands in a "special relationship" with either the third party whose conduct needs to be controlled or the intended victim of such conduct.

Association Not Liable

In this case, though, there was no allegation by the property owner that the association retained the right to control the lot on which the couple's dogs were kept, that the association had any authority to compel the removal of the dogs from the lot, that there was a "special relationship" between the association and the couple or the property owner, that the association undertook to provide any additional protections against an attack by the couple's dogs, or that the association undertook to enforce the Commonwealth's Dog Law. The *McMahon* court therefore found that the property owner had failed to demonstrate that the association should be held liable for his injuries. Accordingly, the Commonwealth Court affirmed the dismissal of the lawsuit against the association.

Limited Authority Of Associations

This decision clearly was a favorable one for associations and their potential liability. However, the case also demonstrates the limited authority that associations have in controlling their members' actions on their own property despite the sometimes apparent necessity to do so. Associations may want to consider the extent to which they should assume additional duties to protect members from other members, balancing the pros and cons. If the decision is to expand the association's responsibilities, consultation with legal counsel is advised to consider the ability to do so and how best to achieve the association's objectives.

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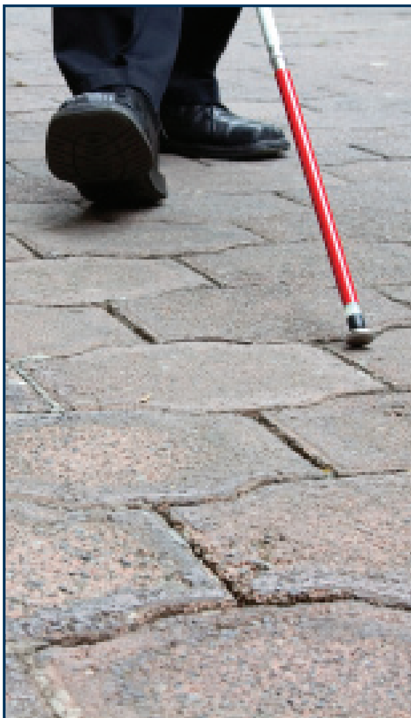
Disabilities Act Is Tougher Than Ever...

(continued from page 4)

For example, in the past, an employee whose epilepsy is controlled by medication might have been considered not disabled. Now, the ADA instructs the court to consider whether the condition without the benefit of medication would be a disability. In the past, an employee with a prosthetic or a hearing aid might also be considered not disabled if those devices allowed the employee to engage in all major life activities. Now, a court must consider the plaintiff's condition without those adaptive devices.

Moreover, this change eliminates a common employer defense, making it impossible for employers to argue that there is some mitigating measure that the employee could have used so as not to be "disabled." In a nod to common sense, eyeglasses and contact lenses are exempted from the direction not to consider mitigating measures; those of us who cannot see the alarm clock without our glasses will not qualify as "blind" under the ADA.

Major Life Activity: The ADA-AA expands the sweep of the ADA by its definition of "major life activity." Under the ADA, a disability is defined as a condition which affects a major life activity, but the original statute did not define major life activity. The Supreme Court in *Toyota Motors* had narrowly interpreted the phrase, frustrating the EEOC and advocates for the disabled. The ADA-AA provides a broad definition, rejecting the narrower interpretation. Now, a wide range of activities are specifically defined as major life activities, including caring for oneself, eating, sleeping, reading, concentrating, thinking, communicating and working.



Major life activities are specifically defined to include a range of bodily functions which may not be apparent to an employer, and which many courts have held did not fall within the definition of major life activities. This includes functions of the immune system, cell growth, digestive functions, reproductive functions and neurological functions. This definition will make it much easier for an employee with a disease such as diabetes, epilepsy, lupus or HIV-AIDS to show that his or her condition is a protected disability.

Episodic Impairments: The new ADA-AA also provides protection for impairments that are "episodic or in remission" if those impairments substantially affect a major life activity when they are active.

No Reverse Discrimination: The ADA-AA specifically provides that a non-disabled person cannot sue complaining that the employer has given preferential treatment to those with disabilities.

Protection against "Regarded As" Discrimination: The ADA has always protected employees from discrimination if their employer "regarded" them as disabled - whether or not they actually had a disability. In this arena also, the ADA-AA has expanded employee protection. Under the Supreme Court decision in *School Board of Nassau County v. Arline*, the Supreme Court held that an employee would have to make a specific showing that the employer regarded the employee as being substantially limited in a major life activity in order to show that the employer regarded the employee as disabled. Many "regarded as" cases were tossed from court because the employee could not meet this difficult burden. Under the ADA-AA, the employee must simply show that the employer regarded him or her as having a mental or physical impairment, a standard which is likely to be easier for a jury to understand and easier for an employee to prove.

What's An Employer To Do?

Under the sweeping changes of the ADA-AA, employers are more likely to find themselves subjected to suit and employees are more likely to prevail at trial.

Probably the primary lesson of the ADA-AA for employers is "don't assume." Don't assume an employee does not have a disability just because you can't see it. Don't assume that you can apply workplace rules across the board without making accommodations for those who may have a disability. If an employer is aware that an employee has a disease or impairment, make sure that there is a very good reason before telling the employees that the rules cannot bend for him or her. For example, an employer who has a "no eating at the desk" rule should be prepared to make an exception for a diabetic. An employer may be legally required to be flexible with shift assignments to accommodate an employee's need for medical treatment.

Under the ADA-AA the list of conditions which might be considered disabilities is endless, as is the list of accommodations which an employer might be required to provide. Although an employee's request for an accommodation may seem an inconvenience, that inconvenience is minor in comparison to the risk that the employee will bring a successful discrimination suit under the ADA.

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Is There Insurance Coverage For Faulty Workmanship... *(continued from page 7)*

When Defective Construction Claims Trigger Coverage

In 2006, the Appellate Division analyzed the question of whether claims for a contractor's defective workmanship fell within the coverage afforded by under a CGL Policy in the matter of *Firemen's Ins. Co. of Newark v. National Union Fire Ins. Co*. In *Firemen's*, the underlying case involved a condominium association's claim against its developer, general contractor and subcontractor, for, among other things, negligent design and construction. The Appellate Division analyzed the CGL Policy at issue, which provided coverage for "property damage" caused by an "occurrence." CGL Policies generally define "property damage" as:

a. Physical injury to tangible property, including all resulting loss of use of that property… or

b. Loss of use of tangible property that is not physically insured…

"Occurrence" is normally defined as an accident.

In *Firemen's*, the Appellate Division held that if a claim does not constitute both "property damage" and an "occurrence" under the terms of the policy, the CGL Policy will not afford coverage for the claim. In that instance, a court did not reach the issue of whether or not the Business Risk Exclusions in the CGL Policy apply to bar coverage. *Firemen's* also upheld the majority rule that faulty workmanship does not constitute "property damage" or an "occurrence" under a CGL Policy, so that coverage for a claim for defective workmanship by a contractor is not often triggered.

The "Business Risk" Exclusions

Even if the facts supporting a claim demonstrate that it constitutes "property damage" caused by an "occurrence," coverage will nevertheless often be excluded by way of the Business Risk Exclusions of the CGL Policy. As indicated above, in the seminal case of *Weedo*, the Court relied upon the "Business Risk" Exclusions contained in the CGL Policy which was issued to the mason being sued. In most CGL Policies, the two main Business Risk Exclusions address the "insured's products" (Exclusion (n)) and "work performed" (Exclusion (l)).

After analyzing these Exclusions, the *Weedo* Court held that CGL Policies do not, and were not intended to, cover damages caused by an insured's defective work or damages to the insured's own work. In short, in the context of construction defect cases, CGL Policies do not provide coverage where the damages are limited to the cost of repairing and replacing the insured's faulty workmanship. Again, if a plaintiff is able to prove damages to items other than the insured contractor's work, there will be coverage for the claim.

Conclusion

In general, claims for the faulty workmanship of a contractor do not trigger coverage under a CGL Policy because they do not meet the policy definitions of "property damage" caused by an occurrence. Even in instances where such a claim does constitute "property damage" and an "occurrence" under the CGL Policy in issue, the Business Risk Exclusions will typically bar coverage for the claims. Thus, when a claim concerning defective workmanship alleges damages limited to the cost to repair and replace the defective work, the claim will not be covered. However, if the alleged defective work damages another portion of property which the insured contractor did not work on, then the Business Risk Exclusions will not apply, and there will likely be coverage for such claims under a CGL Policy.

The attorneys at **Hill Wallack LLP** are experienced in litigating coverage actions relating to construction defect claims and stand ready to assist anyone requiring representation in such an action.

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Going Green In The Garden State... *(continued from page 5)*

issues to those most impacted by the solar energy.

There is proposed State legislation that would promote renewable energy by making windmills and solar installations "inherently beneficial" so that the burden required to get a variance from a local board for installation would be reduced under the law. Importantly, such a law would effectively prohibit a municipality from banning renewable energy. Such proposed legislation is the beginning of limited uniformity throughout the State and promotes clear energy and energy conservation in New Jersey. Going green in New Jersey may be difficult at present but it certainly is worthwhile. Green entrepreneurship is the future but land use law has not yet caught up to this reality. In the meantime, individuals, businesses and builders wishing to undertake this construction must research what the local municipality requires before installing renewable energy sources. The attorneys at **Hill Wallack LLP** stand ready to assist with all your land use needs including applications for installation of renewable energy.

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MyCompetitiorStoleMyName.com... *(continued from page 10)*

damages as well as injunctive relief against the domain name registrant.

Unfortunately, as with any trademark action, litigation can be expensive and the burden to prove infringement can be high. Actual consumer confusion can be difficult and costly to prove. While many domain name disputes have been resolved under traditional trademark law, with the boom of the Internet and the rush to register Internet domain names for speculation, Congress saw that the problem needed a more direct answer.

> *"Congress enacted the Anticybersquatting Consumer Protection Act (ACPA) in 1999 to provide additional remedies for owners of protected marks from competitors or domain "squatters" who act in bad faith to profit from the mark."*

Anticybersquatting Consumer Protection Act

In response, Congress enacted the Anticybersquatting Consumer Protection Act (ACPA) in 1999 to provide additional remedies for owners of protected marks from competitors or domain "squatters" who act in bad faith to profit from the mark. The Act permits an action in Federal Court if a person of business can prove that a domain name is distinctive or famous, that the domain's owner acted in bad faith to profit from the name and that the domain name is identical or confusingly similar to the trademark. An important addition to the Act provides for "in rem" jurisdiction, giving the court jurisdiction over the domain name itself, if the trademark owner cannot bring the domain name owner into court. With many domains being registered to persons in foreign countries or who do not provide adequate contact information, this is an important tool in taking control of a business' identity.

For domains registered before the ACPA was enacted, the Act provides for a cancellation and return of the domain to its rightful owner as a remedy. For domains registered after 1999, the Act provides for the transfer of the domain and money damages.

Uniform Domain-Name Dispute-Resolution Policy (UDRP)

The Internet Corporation for Assigned Names and Numbers (ICANN), the group that ultimately controls the assignment of domain names and internet protocol addresses, has imposed an arbitration-style proceeding that can be a lower cost, and sometimes faster alternative to legal action. While you may not have read the fine print, when registering a domain name you are actually agreeing to subject yourself to ICANN's Uniform Domain-Name Dispute Resolution Policy, or UDRP. The UDRP can be a quick alternative if all one is seeking is the transfer of the domain name, however money damages are not available.

The factors that go into a successful UDRP arbitration include whether the domain name is identical or confusingly similar to a the business owner's name or trademark; whether the domain name registrant has any rights or legitimate interests in the domain name; and whether the registrant registered the domain name and is using it in "bad faith." Bad faith can include registering names only to sell them back to the trade-mark owner for profit, registering the name just to keep a competitor from using their own name, registering just to disrupt another business or using the domain name to try to attract users to the site through confusion (often called "initial interest confusion").

Protect Your Rights

Several options exist for business owners in the situation of having their business's identity taken online by a competitor. Whether through traditional trademark remedies, the Federal Anti-cybersquatting Act or ICANN's name dispute resolution arbitration, business owners should act quickly to protect their name recognition online, as an infringing domain name may be harming your business more than you may think.

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Think Your Stock Broker Has Acted Improperly?... *(continued from page 11)*

depending on the contract with the broker or firm, this recourse may be precluded.

An investor's civil remedies regarding disputes with the broker are established in the Customer Agreement executed by the investor when the investment account was first opened. Accordingly, an investor seeking to act against a broker or firm must first examine the Customer Agreement. Typically Customer Agreements will contain an "arbitration clause." These clauses, greatly favored under the law, preclude an aggrieved party from seeking relief in the State Court. Instead these provisions, which are contractually binding, require that resolution of any dispute between a customer and the broker be resolved at binding arbitration.

As such, before engaging in any action against a broker or firm, be sure to review with your attorney the Customer Agreement to ensure the planned action is permitted under the terms of the Customer Agreement. Note that, if the method of resolution calls for binding arbitration, you should make sure that your attorney fully explains this process so that you can fully appreciate and understand the nature of the proceeding.

Recovery May Be Limited

Beyond directing the forum in which a dispute must be resolved,

Customer Agreements can also contain stipulations as to the law that is applicable with respect to the instant dispute.

For example; assume an investor resides in New Jersey and is in a dispute with his broker over an unauthorized trade. The Customer Agreement directs the matter must be resolved in arbitration, but also directs that the law of the State of Massachusetts is controlling in the matter. Here, despite the fact that the investor resides in New Jersey, Massachusetts law will control the dispute. This choice of law can be very significant in resolving a dispute, as this law can limit the investor's recovery. In the prior example, Massachusetts's law directs that no punitive damages are afforded in any civil dispute unless expressly authorized by statute.

As such, unless a Massachusetts's statue exists that provides punitive damages in a securities case, the investor cannot seek this relief. Accordingly, the investor's potential recovery is limited only to the damages sustained by the broker's misconduct. Before engaging in arbitration, an attorney must be knowledgeable of the law controlling the dispute in order to properly advise a client as to the recovery available to them and to properly plead and prove the claims against the broker.

The Moral of the Story

In summary, certain threshold steps must be undertaken by an attorney prior to engaging in an action against a broker or brokerage firm. First, the conduct of the broker must in fact be a violation of the broker's obligations and duties to the investor, as established by the nature of the investor's account. Second, the Customer Agreement of the investor must be scrutinized to determine the appropriate mechanism for resolving the dispute between the broker and the investor. Third, regardless of where the investor resides or where the arbitration will take place, the law controlling the dispute must be determined so as to ascertain the remedies available to an aggrieved investor.

Following the above steps, prior to engaging in any action against a broker or firm, will provide both the investor and the attorney with an accurate understanding of the nature of the case and the process for resolving same, and will also help streamline the dispute resolution process.

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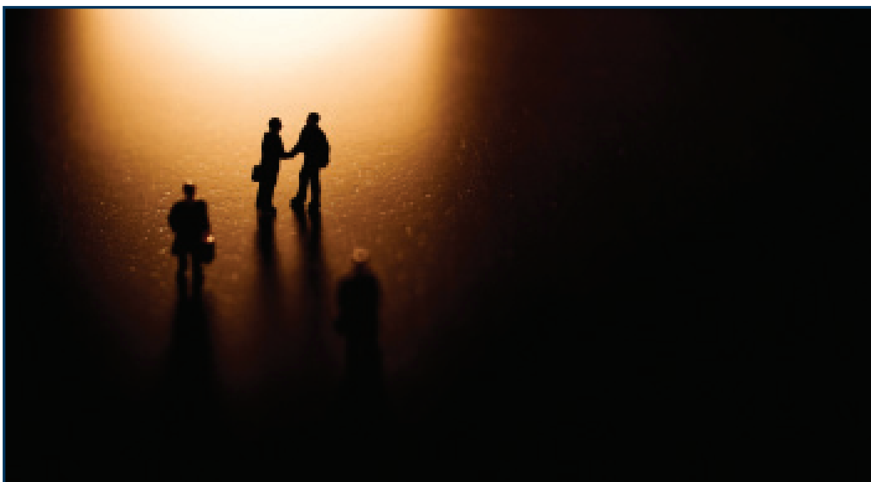

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