HILL WALLACK LLP
ATTORNEYS AT LAW

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NEWSLETTER

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IN THIS ISSUE

Message From the Managing Partner

Over the past five years Hill Wallack LLP has experienced a level of growth which we believe is a result of our commitment to "personal" representation of our clientele and continuous reinvestment in our organization to provide expansive and quality legal services. Many of you have come to know us over the years as we joined forces with different practice groups led by practitioners who identify with our goals.

In January, Joanne Rathgeber & Associates joined our firm as Hill Wallack LLP opened an office in Doylestown, PA expanding the firm's presence with a location in Bucks County. Joanne Rathgeber is a partner in the firm and member of the Employment & Labor Law Practice Group. She will continue to practice employment law and will now be assisted by Hill Wallack LLP's field of attorneys, who have diverse experience and education in various areas of law. L. Stephen Pastor, a partner in the firm and a resident of Pennsylvania, will also work out of the Doylestown office. Mr. Pastor has been with the firm for over 20 years and provides legal services to developers, financial institutions and other entities involved with real estate development and finance. We also welcome Virginia L. Hardwick, who joined the firm as an associate in the Litigation Division and Employment & Labor Law Practice Group focusing on employment and commercial litigation.

We open this issue with Paul Josephson's and Christina Saveriano's clarification of the nature of the relationship between trade association members and the attorney that represents the trade association in their article *"Trade Association Members May Not Be a Client of the Trade Association's Attorney"*. Steve Hyland examines family business succession in *"Estate Planning for Family Business Owners"*, while Ken Thayer discusses medical treatment in a workers' compensation matter in his article *"Effectively Returning Injured Employees Back to the Work Force"*.

Megan Schwartz brings us up-to-date on New Jersey's Smoke-Free Air Act in her article *"New Jersey Goes Smoke Free…"*, while Lance Forbes alerts us to legislative efforts to contain high costs of automobile insurance in *"Is A 'Resident Relative' Under the Personal Injury Protection Statute As Restrictive as Being an 'Immediate Family Member' Under the New Jersey Tort Option?"* Finally, Jae Cho reviews property owner liability in his article *"Caution: Slippery When Wet"*, while Brian McIntyre outlines homeowner rights to humanely trap dogs or cats that invade their property in his article *"Property Rights and the New Jersey Society for the Prevention of Cruelty to Animals"*.

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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Trade Association Members May Not Be a Client of the Trade Association's Attorney

by Paul P. Josephson and Christina L. Saveriano

Recently, our appellate court decided in a published case of first impression that an attorney-client relationship does not exist between a trade association's attorney and a member of a trade association simply by virtue of the attorney's representation of the trade association. *J.G. Ries & Sons, Inc. v. Spectraserv, Inc.* This is the first time a New Jersey court reviewed whether a trade association member could disqualify the trade association's attorney from representing another client against the member in a subsequent matter. This decision clarifies for businesses and individual members of trade and like associations the nature of their relationship with an attorney that represents their association.

Facts of the J.G. Ries Case

J.G. Ries and Spectraserv are both industrial property owners in Kearny and both members of a trade association formed by local businesses in the Lincoln North area of Kearny to advance and promote the business interests of its members and the area. In June 2004, J.G. Ries filed suit against Spectraserv contending that its property was adversely affected by Spectraserv's business operations. J.G. Ries was represented in the suit by the law firm of the Lincoln North association. Subsequently, in December 2004 J.G. Reis's lawyers filed suit on behalf of the Lincoln North association challenging a Kearny zoning ordinance.

As a result of the law firm's representation of Lincoln North, Spectraserv moved to disqualify the trade association's attorney from representing J.G. Ries in the J.G. Ries-Spectraserv litigation, contending that the trade association's attorney also represented Spectraserv as a member of the Lincoln North association. The trial court agreed and disqualified the trade association's attorney from continuing to represent J.G. Ries against Spectraserv. J.G. Ries appealed. The appellate court reversed, holding that the attorney's representation of the trade association did not bar the attorney from representing one member against another in unrelated litigation.

No Conflict of Interest Here

The court declined to find mere membership in the association sufficient to create an attorney-client relationship, and thus a disqualifying conflict of interest. Under the Rules of Professional Conduct governing attorneys, an attorney cannot represent a client if the representation raises a "concurrent conflict of interest." A concurrent conflict of interest exists when, for example, the representation of one client is directly adverse to another client, or where there is a significant risk that the representation of one client will be limited by the attorney's responsibilities to another client.

Whether a trade association's lawyer will be disqualified from appearing in a matter adverse to one of the association's members depends on whether that member formed an attorney-client relationship with the trade association's attorney. An attorney-client relationship can be formed through an agreement between the attorney and client setting forth the representation, or through actions of the parties demonstrating an attorney-client relationship, such as the disclosure of confidential information.

In this case, the court held that Spectraserv's contacts with the trade association attorney were too attenuated to disqualify the trade association's attorney. While Spectraserv provided information used by the trade association attorney in support of the trade association's zoning challenge, Spectraserv never met with the trade association attorney and did not provide the information directly to the attorney. Rather, Spectraserv provided information to another member of Lincoln North, who in turn communicated with the trade association attorney. Second, the trade association attorney never represented that information received from association members would be treated as confidential, and Spectraserv never requested that the information it provided be held confidential. Third, much of the information that Spectraserv did provide was not only confidential, but information that was publicly available. Fourth, Spectraserv could not reasonably expect that the information it supplied to the trade association would not be disclosed, as disclosure was necessary to advance the purposes of the Lincoln North litigation.

The court also held that the two litigations were unrelated. That is, there was no "substantial relationship" between the litigations that would require disqualification if Spectraserv was found to be a client of the trade association's attorney. Accordingly, the court declined to disqualify the trade association attorney from representing a party adverse to an association member.

What It Means

Simply being a member of a trade association does not create an attorney-client relationship between the member and an attorney that represents the trade association. Rather, there must be more—such as an exchange of confidential information disclosed with the intent that the information would be held confidential, or a specific agreement between the trade association member and the attorney where the attorney is acting as counsel to the individual member, as well as to the trade association. In addition, there must be a "substantial relationship" between the trade association attorney's work for the association and the matter in which the attorney is adverse to the association member.

Thus, members of a trade association should not consider themselves the client of the trade association's attorney where the attorney-client relationship has not been explicitly established. This may also mean that communications with the trade association attorney may not be privileged, and thus care should be taken when discussing sensitive business or legal matters with the trade association's attorney. Likewise, the trade association's attorney should take care when requesting confidential information from trade association members lest they inadvertently create an attorney-client relationship.

"Whether a trade association's lawyer will be disqualified from appearing in a matter adverse to one of the association's members depends on whether that member formed an attorney-client relationship with the trade association's attorney."

We at **Hill Wallack LLP** stand ready to assist trade associations and their members in evaluating and resolving potential conflict of interest issues.

Paul P. Josephson *is partner-in-charge of the firm's* ***Regulatory and Government Affairs Practice Group*** *and former member of the New Jersey Executive Commission on Ethical Standards. He has counseled public and private companies, and political candidates and committees, on legal compliance, government ethics and campaign finance issues for over fifteen years.*

Christina L. Saveriano *is an associate in the* ***Regulatory and Government Affairs*** *and* ***Complex Litigation Practice Groups.***

Estate Planning for Family Business Owners

by Stephen J. Hyland

When the owner of a family business first starts working on an estate plan with an attorney, the attorney usually asks, "Do you have a business succession plan?" For an estimated 70% of small businesses, the answer is "no." The failure to have a written plan for management and ownership succession is, according to the Small Business Administration, the primary reason that only 1 in 3 family-owned businesses manage to survive the transition from first to second generation ownership. The lack of a succession plan also complicates the estate planning for these owners, since the value of the business, the owner's future plans for the business, and the interest of actual and potential heirs in the business, must be determined prior to crafting the overall estate plan strategy.

Typically, the small business owner has devoted most of their time to developing the business, but little time planning for the day when they no longer will be there to run the business. Often, the owner labors under the assumption that one or more close family members—typically a son or daughter—will take over the business at some point in the owner's life. Unfortunately, little time is spent by the business owner to establish how—and when—the inevitable business transfer should take place. Like the old expression, "a failure to plan is a plan to fail," the failure to plan for succession in a family business is a plan for the business to fail.

Small and/or family business succession usually falls into one of three forms. First, there are those businesses in which several generations of family members are active participants and where other family members are expected to succeed to ownership and management when the current owners retire or die. Second, are those businesses where family members are only peripherally involved and where ownership, but not management, is expected to pass to other family members. Third are those businesses where the owner intends to sell the business to a third party at some point, usually when they decide to take retirement, and neither ownership nor management are expected to pass to the next generation. Each of these forms present specific estate planning challenges.

Often, a business owner envisions their business succession plan taking one of these forms, when in reality, another form may be more appropriate. For example, a business owner may expect a particular child or younger sibling to take over the management of the business when, in fact, the "anointed" successor lacks the aptitude for and/or the interest in doing so. Conversely, a family member may have an expectation that there is an appropriate successor when, actually, the current owner has an entirely different individual or succession model in mind. In another example, a business owner's plan may fail to recognize competition and even outright hostility between family members who are placed into positions of control. These mismatched or unrealistic expectations, regardless of their cause, can seriously impact the estate plan by causing the owner's intended succession plan to fail or to be challenged by unhappy family members.

The Consequences of Not Planning for Succession

When the owner of a family-owned business dies or becomes disabled without a succession plan, it almost invariably dooms the business to failure. Even if the business manages to survive the owner, the failure to plan for succession will have a negative impact on the overall estate plan, leading to significant disruption and hardship for the owner's heirs.

For most family business owners, the business is the single most important asset contained in their estate, and it is the one most likely to suffer significant loss in value immediately upon their death or disablement. This loss can be attributed to a variety of factors, such as the lack of knowledge about business operations, loss of confidence in the business' future by customers, suppliers, lenders, and employees, control struggles between family members and other potential successors, departure of key employees, and the absence of sufficient capital to continue business operations. Without an orderly succession plan, these

factors can lead to the layoff of loyal employees, the liquidation of the business assets at fire-sale prices, and an often substantial diminishment of the owner's testamentary wishes.

The business disruption that results from the lack of a succession plan usually leads to an immediate disruption in some or all of the family income. Additional financial demands upon the family, including unplanned-for expenses, funeral costs, and professional fees, combined with the ongoing financial costs associated with the business can quickly lead to a cash flow crisis that forces the owner's family to begin liquidating portions of the owner's estate. Since the succession crisis quickly reduces the value and liquidity of the business, the family will often have to sell other assets of the estate, such as a home or automobile, in order to meet these short-term needs.

The death of the owner will lead to a substantial estate tax burden on the already financially stressed heirs, as a result of some or all of the business being counted as part of the owner's taxable estate. Opportunities to shelter a substantial part of the owner's estate from these taxes by, for example, using gifting, trusts, or alternate ownership forms are irrevocably lost. The need for cash to pay the resulting estate taxes provides a further drain on the family's available resources.

Without a proper succession plan, control of the business may pass in unintended ways. For example, an unqualified or uninterested son or daughter could inherit the business in its entirety, or could end up in a position of significant control over other, more qualified persons. Control of the business may even pass outside the family, as a result of a sale of some or all of the equity in the business. The lack of a succession plan could also lead to family feuds that arise where two or more family members, with differing opinions about the business, are given equal control and management of the business.

All of these consequences can be easily avoided by the business owner by simply taking the time to develop a written succession plan and then putting the plan in place with the help of an experienced estate planning team.

The Benefits of Proper Succession Planning

Avoiding these consequences should be sufficient incentive to make a business succession plan part of the business owner's estate planning process. Fortunately, it is not the only incentive—succession planning provides a number of benefits that make it an indispensable part of the business owner's estate plan.

Like a business plan, a succession plan is a valuable tool for obtaining business financing. Banks and other lending institutions may give the business owner more favorable rates and terms on loans, when they see that a closely held business has a plan for survival. Lenders are also less likely to call on lines of credit upon the owner's death or disability, since they are more confident about the business' long-term viability. Adequate funding for transitional expenses can be estimated and any loans necessary to carry out the transition can be put into place.

Furthermore, with a written plan in place, the owner can transition the transfer over a longer period of time, resulting in a smoother succession that will more likely ensure the business' long-term survival. During the transition process the successors can benefit from the experience and advice of the current owner, even as the owner winds down his or her participation. Planning and beginning the transition process sooner, rather than later, will increase the owner's options and reduce the taxes paid to the government.

Another significant advantage is that the owner can choose the successor(s) most likely to lead the business forward, and can choose alternative successors if their initial choice is unable to assume their duties or incapable of effectively running the business. If there are no capable family members who are interested in managing the business, the decision can be made as to whether the business should be sold, and whether some percentage of ownership should be retained by the family.

Finally, creating a written succession plan clarifies the owner's long-term goals for the business. The business can then be appropriately structured and an appropriate estate plan can be formulated that will minimize and perhaps eliminate the owner's potential estate tax liability. Alternatives to ownership can be established so that family members who are not included in the business do not feel "short-changed" by the transfer.

In short, business succession planning can be an enormous opportunity for the savvy family business owner to ensure that the years of hard work and sacrifice are not wasted.

The Succession Planning Process

Although the development of a succession plan is an evolutionary process, the planning process should proceed through four phases. First, the owner should develop a written statement identifying the goals and the timing of the transition process. Second, the owner should meet with a business valuation consultant to arrive at a preliminary valuation of the business. Third, the owner should meet with an estate planning team, composed of legal counsel, a financial planner, and a tax advisor to determine how best to fit the business succession plan into the larger estate

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"Without a proper succession plan, control of the business may pass in unintended ways."

Effectively Returning Injured Employees Back to the Work Force

by Kenneth W. Thayer

"The obligation of the employer to provide monetary temporary disability benefits ends regardless of whether the employee is returned to work at full, medium or light duty."

In all workers' compensation matters there comes a time when the medical treatment provided to the injured employee will cease and the employee will be expected to return to his/her position within the company. Up until this point, medical treatment has been under the control of the employer. New Jersey State Statute 34:15-15 states "the employer shall furnish to the injured worker such medical, surgical and other treatment, and hospital service as shall be necessary to cure and relieve the worker of the effects of the injury to restore the functions of the injured member or organ where such restoration is possible". In most workers' compensation cases, the end stage of treatment will result in a medical plateau where the injured worker has reached a state of maximum medical improvement (MMI). Most times the employee is not completely cured, but the condition has been treated to the point at which the functional loss of the injury has either stopped progressing or has in fact reversed, and the employee has made medical progress. "Functional loss" or "partial permanent disability" is defined as a restriction of the body or of its members or organs, which shown through objective medical evidence, produces a lessening to a material degree of the employee's working ability. (See, N.J.S.A. 34:15:36). At this point, the authorized treating medical providers may return the employee back to work. A question is then presented to the employer: will the employee be able to return to the same type of work he or she once performed prior to the work place injury?

The treating medical provider may release the employee back to work full duty or some form of modified duty. The medical provider may even release the employee back to work but continue medical care such as continued physical therapy or subsequent periodic office visits. The problem facing the employer is what to do with an employee, who may have been returned to work but have returned on modified duty or require additional time off to continue subsequent medical treatment as directed by the authorized medical provider.

The obligation of the employer to provide monetary temporary disability benefits ends regardless of whether the employee is returned to work at full, medium or light duty. The ability to terminate temporary disability benefits is not a product of statute but is found in New Jersey case law. A light duty return to work is termed as a "bridge or modified duty phase" in which the injured worker is eased back into the work force. Depending upon the level of labor intensity of the employee's position, the employer may decide to request that a functional capacity test be performed. A functional capacity test is a valuable tool to determine whether modified duty will be within the physical capacity of the employee. It is important to the employer to determine the extent of the returning employee's functional loss. This is important to ensure the employee is able to perform his duties, limit the exposure of possible re-injury and ensure the safety of co-employees. The results of the test are to be used as a guide as to whether the employee should be returned to work at this time or provided with additional rest and medical treatment.

Rushing an employee back to work might be beneficial to the employer in the short term, however, if a re-injury occurs, the money that has been expended on medical treatment and the rehabilitation gained will be for naught. The old saying of penny wise pound foolish comes into play. It is best to ensure the employee can safely perform the duties requested of his/her position before returning the employee to that position. It may be in the best interest of the employee to create a new position for the returning employee to facilitate their acclamation back to work. This new position would be a temporary position. The creation of the temporary position shows the employee that their services are appreciated and that the employer wishes them a speedy recovery. Once

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New Jersey Goes Smoke Free: The Smoke Free Air Act Enforcement Provisions

by Megan M. Schwartz

On April 15, 2006, indoor public places and workplaces across the State of New Jersey became smoke free. New Jersey's Smoke-Free Air Act (the "Act") applies just about everywhere, including, but not limited to: restaurants, bars, clubs, bowling alleys, offices, factories, commercial and governmental buildings, hotels, malls, stores, private clubs and public areas in private buildings. Compliance is the responsibility of the person having control of an indoor public place or place of employment under the Act. Enforcement of the Act also will be achieved by a complaint system. Employees and the public may report violations of the Act to their local health departments. Thus, regulated businesses and municipalities must be prepared to enforce the Act or risk fines for failing to comply.

The Act itself does contain enforcement provisions as set forth in *N.J.S.A. 26:3D-62. Subsection (a)* provides that the person having control of an indoor public place or workplace shall order any person smoking in violation of this Act to comply with the provisions of this Act. Further, a person, after being ordered to comply, who smokes in violation of this Act is subject to a fine of not less than $250 for the first offense, $500 for the second offense and $1,000 for each subsequent offense. Thus, as set forth above, those persons having control of an indoor public place or workplace (e.g. bar owners, managers, workplace supervisors) will be responsible for ordering violators to stop smoking. If a person does not stop smoking after an order, the bar owner, manager, workplace supervisor, etc. may contact the local police to write a ticket/summons for the violation.

Likewise, under subsection (b) of the Act, the Department of Health and Senior Services ("DHSS") or the local board of health, upon written complaint or having reason to suspect violations, shall have the power to: (1) advise, in writing, the person having control of a public place or workplace, that violations are or may be occurring and (2) order appropriate action be taken. Any person receiving such notice that fails or refuses to comply will be subject to a fine.

Penalties collected for violations of the Act will either be remitted to the State or the municipality depending on who is the plaintiff. If the plaintiff is DHSS, the penalty recovered shall be paid into the State treasury. If the plaintiff is the local board of health, the penalty shall be paid into the municipality's treasury wherein the violation occurred. Moreover, such penalties shall be the only civil remedy for violations of the Act. No private right of action is available against a party for failure to comply with the Act.

DHSS Draft Rules and Regulations

In May of 2006, DHSS filed draft regulations with the Office of Administrative Law regarding the Act. In addition, DHSS has published a sample sign to be hung in all affected places. The signs may be downloaded from DHSS' website. Specifically, the Act requires that a "No Smoking" sign be prominently posted at every public entrance and properly maintained where smoking is prohibited. These signs must state that violators may be fined.

Most significantly, the draft regulations did not include a proposal that would have extended New Jersey's ban on indoor smoking to prohibit people from smoking within 25 feet of restaurants, taverns and other businesses. The so-called "25-foot rule" would have all but extinguished plans by restaurants and taverns to create outdoor patios or decks where customers could smoke. In fact, DHSS reassessed the draft guideline establishing a minimum setback of 25

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"…those persons having control of an indoor public place or workplace…will be responsible for ordering violators to stop smoking."

SPOTLIGHT

NEW PARTNERS

Todd J. Leon has become a partner in **Hill Wallack LLP's Litigation Division** where he is a member of the **Trial & Insurance Practice Group.** He concentrates his practice in the representation of insurance companies in complex insurance coverage and defense litigation. He received his law degree from Rutgers University School of Law at Camden. Mr. Leon is admitted to practice in New Jersey and the Commonwealth of Pennsylvania and is a resident of Newtown, PA.

Anne L. H. Studholme has become a partner of the firm's **Land Use Division** and its **Land Use Applications Practice Group.** In addition to applications, litigation, and appeals in all aspects of zoning and land use, she handles complex civil litigation in state and federal courts. A graduate of Princeton University, Ms. Studholme earned her law degree from the University of North Carolina, Chapel Hill. She is admitted to practice in New Jersey and North Carolina and resides in Princeton, NJ.

Shilpa M. Upadhye has joined **Hill Wallack LLP** as partner in its **Real Estate Division** including the **Banking & Secured Transactions** and **Commercial Real Estate Practice Groups.** Ms. Upadhye concentrates her practice in all aspects of commercial real estate acquisition and development, with particular emphasis on complex negotiations, banking and secured transactions, including: acquisition finance, construction financing and refinancing, loan modification, restructuring and documentation preparation. She earned her law degree from St. Mary's University School of Law in San Antonio, TX and her undergraduate degree from the University of Michigan.

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NEW ASSOCIATE

Anthony R. Christiano has joined the firm in its **Land Use Division** which includes the firm's **Land Use Applications, Land Use Litigation** and **Environmental Applications Practice Groups.** Mr. Christiano is a graduate of The George Washington University School of Law and is admitted to practice in New Jersey, New York and Maryland. A resident of Trenton, NJ, he is a member of the United States District Court for the District of New Jersey.

Virginia L. Hardwick has joined the firm in the Doylestown office as an associate in its **Litigation Division** and **Employment & Labor Law Practice Group** focusing on employment discrimination and commercial litigation. Ms. Hardwick received her Juris Doctor from N.Y.U. School of Law, where she was an editor of the N.Y.U. Law Review, and received her undergraduate degree from Cornell University. After law school, she clerked for the Honorable John J. Gibbons on the Court of Appeals for the Third Circuit. A resident of Doylestown, PA, she is admitted to practice in Pennsylvania, New Jersey and New York.

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APPOINTMENTS & RECOGNITION

Rocky L. Peterson, a partner of the firm, where he is a member of the firm's **Litigation Division, Municipal** and **School Law Practice Groups** was recently selected by the Garden State Bar Association and the Commission of Professionalism in the Law as a recipient of a Professional Lawyer of the Year Award. The awards are given annually to lawyers who, by virtue of their conduct, competence and demeanor, set a positive example for others in the profession. A graduate of Cornell University, Mr. Peterson received a degree in law from Cornell University School of Law.

Ronald L. Perl, partner-in-charge of **Hill Wallack LLP's Community Association Law Practice Group**, has been elected by the Community Associations Institute (CAI) Board of Trustees to serve as the 2006 president-elect of the 25,000-plus member national organization. Perl has served as president of the Foundation for Community Association Research and has chaired both the Business Partners Council and the Government and Public Affairs Committee. He has also been a member of the Board of Governors of the College of Community Association Lawyers and served on CAI's education faculty. He is slated to serve as CAI president beginning January 1, 2007. Mr. Perl is nationally recognized for his work in the field of community association law and is a member of the National College of Community Association Lawyers, has authored numerous publica-

tions and lectured frequently on issues related to community association law. He also teaches a course in Community Association Law at Seton Hall Law School in Newark.

Paul P. Josephson, a partner in the firm recently received the New Jersey State Bar Association's Distinguished Legislative Achievement Award. Mr. Josephson was recognized for his work on behalf of the State Bar Association to assure that attorneys are not considered lobbyists under expansive new lobbying laws passed in 2004. Mr. Josephson testified before the Election Law Enforcement Commission concerning its rules and implementing those laws. This was an important achievement preserving attorney-client confidences and recognizing the Supreme Court's ultimate authority to regulate attorneys. Mr. Josephson has lectured extensively on the new lobbying laws, including a panel on Lobbying for Lawyers sponsored by the Institute of Continuing Legal Education. Mr. Josephson will continue to work with affected corporations, citizen groups, trade associations, lobbyists and attorneys in 2006 as the Election Law Enforcement Commission entertains advisory opinion requests on these rules that will shape New Jersey lobbying law for years to come.

Suzanne M. Marasco, a partner of **Hill Wallack LLP** where she is a member of the firm's **Litigation Division, Trial & Insurance** and **Employment & Labor Law Practice Groups** was recently appointed as a Trustee by the Trial Attorneys of New Jersey (TANJ). TANJ is an organization of approximately 800 members consisting of both plaintiff & defense attorneys from the civil and criminal bar associations and is dedicated to promoting the interests of the public at large, the interest of the litigants involved in civil and criminal cases, and the interests of the bench and bar. A graduate of Rutgers College, Ms. Marasco earned her law degree from Rutgers School of Law-Camden. She is a member of the New Jersey Defense Association, the Defense Research Institute, the Mercer County Bar Association and New Jersey State Bar Associations.

Hill Wallack LLP recently unveiled www.ftmonmouthblog.com, a new weblog dedicated to providing the most up-to-date news and information related to the redevelopment of Fort Monmouth. The 89-year old military post, consisting of approximately 1,126 acres across the towns of Oceanport, Eatontown and Tinton Falls, in Monmouth County, New Jersey is scheduled to close in less than five years. Since the recent base closure decision, local, county and state officials have been focusing their efforts on the redevelopment of the site. **Hill Wallack LLP** has created a comprehensive blog with links to the laws, new articles, reports, and public hearings concerning all aspects of the redevelopment process. The blog will provide frequent updates on the latest news and developments related to Fort Monmouth. As one of Central Jersey's largest law firms, we are committed to Monmouth County and feel an obligation to use our knowledge and experience to help drive a responsible, proactive solution. We hope to create an electronic town meeting where citizens can obtain accurate information, debate the issues and priorities, and develop a consensus that results in a positive outcome with widespread community support. Submissions for inclusion on ftmonmouthblog.com can be directed to John Tatulli at jrt@hillwallack.com. Questions regarding specific legal issues and counseling on the redevelopment of Fort Monmouth should be directed to Paul P. Josephson at (609) 734-6319 or ppj@hillwallack.com.

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SEMINARS

Rocky L. Peterson, a partner of the firm where he is a member of the firm's **Litigation Division, Municipal** and **School Law Practice Groups** was recently a featured speaker at the Lorman Education Services Seminar *"Bullying and Social Aggression in New Jersey"*.

Kenneth E. Meiser, a partner of **Hill Wallack LLP** recently served as a panelist at the 2nd Annual Conference on Land Use Law sponsored by CLE International. Mr. Meiser gave a presentation on Third Round COAH Regulations which

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Is a "Resident Relative" Under the Personal Injury Protection Statute as Restrictive as Being an "Immediate Family Member" Under the New Jersey Tort Option?

by Lance S. Forbes

"In keeping with the intended broad scope of the PIP statute, the courts have typically extended the definition of what constitutes 'family' beyond those who stand in a legal or blood relationship to the named insured."

Over the last thirty years, New Jersey's no-fault insurance system has been marked by continual legislative efforts to reduce the escalating costs of automobile insurance by restricting an accident victim's ability to sue for non-economic or "pain and suffering" damages.

In 1972, the legislature enacted the "New Jersey Automobile Reparation Reform Act," commonly referred to as the "No-Fault Act," with the intention of containing the high costs of automobile insurance. Unfortunately, the No-Fault Act did not achieve its goal. As a result, in 1984 the legislature passed the New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act, which introduced two "tort options" that made available to an insured a $200 threshold or a new $1,500 monetary threshold (initially fixed at $1,500 and tied for later years to rise with the consumer price index). Under the new statute, an insured could choose between the two thresholds and receive a corresponding reduction in their premium rate; however, the insured was restricted from suing for pain and suffering unless his/her medical expenses exceeded either the $200 or $1,500 "threshold" as appropriate.

To further deal with rising insurance costs, eliminate insurance fraud, and ensure a fair rate of return for insurers while striking a balance between insurer's rights and those of automobile victims, in 1998 the legislature again enacted a new group of statutes by passing the Automobile Insurance Cost Reduction Act (AICRA). Under the new multi-pronged approach of AICRA, an insured could select to be subject to a new "verbal threshold" and benefit from a lower premium. The "verbal threshold" limits an accident victim to suing for pain and suffering only if his/her injury falls into one of six statutorily-defined categories.

The History of the PIP Statute

PIP benefits are required by statute to be provided in every insurance policy issued to cover a vehicle registered in New Jersey. The legislation, originally enacted in 1972, had the goal of providing a prompt source of recovery for losses sustained by automobile accident victims. Prior to the enactment of the PIP legislation in 1972, a tort victim had to wait many years for his/her claims to be litigated in the court system while he/she continued to accrue potentially enormous medical bills and lost wages that could only be recovered as an element of damages in the eventual court action.

In response to this situation, the legislature passed the PIP statute with four goals in mind: (1) the prompt and efficient provision of benefits for all accident injury victims; (2) the reduction or stabilization of the prices charged for automobile insurance; (3) the ready availability of insurance

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Caution: Slippery When Wet

by Jae H. Cho

Visualize the following scenario: a wet floor in a building, wherein a person is walking, oblivious to the wet floor. She slips and falls, suffering injuries requiring medical attention. Is the property owner legally obliged to pay for her injuries? If your answer is "yes," you view the scenario through the eyes of a customer. If your answer is "no," your view is more like that of a property owner. However, if your answer is "it depends," you are evaluating the scenario with the eyes of a lawyer. Whether the property owner is legally obligated to pay for the injuries depends on whether the owner knew about the wet floor, and more importantly, it depends on why the injured person was on the premises.

Duty of Property Owners

In New Jersey, a property owner has a duty to exercise reasonable care to guard against any dangerous condition of which the owner knows, or should have discovered. Thus, when a floor is wet and the owner knows about it but does nothing, the owner becomes liable to a person who is injured by a slip and fall as a result of the wet floor. Conversely, if the owner did not know or should not have known about the condition, the owner is not liable.

The situation, however, becomes problematic when the injured person is not a customer of the property owner, but rather, an independent contractor of the owner, such as a janitor or security guard. Many property owners find value in outsourcing certain maintenance or incidental work to independent contractors. Who is legally responsible for a janitor's injuries after he slips and falls while walking to a closet to put away supplies? Similarly, who would be responsible for a security guard's injuries resulting from a slip and fall while he was attending to his rounds? The answer to these questions depends on the extent of their duties.

Duty to Independent Contractors

Recently in *McEwan v. U.S.*, the Federal District Court of New Jersey analyzed and clarified New Jersey law in regards to the imposition of liability on property owner for injuries sustained by an independent contractor.

"…a property owner has a duty to exercise reasonable care to guard against any dangerous condition…"

The *McEwan* plaintiff brought an action against the property owner for injuries sustained as a result of a slip and fall. The plaintiff worked for a company that contracted with the property owner to undertake maintenance duties including mopping up floors whenever they became wet. The property owner knew that the floor frequently became wet or damp during the summer months and required repeated mopping. In one of those summer months, the plaintiff was walking towards a closet to put away supplies when she slipped, fell, and suffered injuries. The court analyzed New Jersey landowner cases and determined that negligence is determined by the degree to which the landowner participated in, actively interfered with, or exercised control over the manner or method of the work being performed at the time of the injury. The court articulated New Jersey law: the landowner is generally not responsible for injuries sustained by an independent contractor's

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Property Rights and the New Jersey Society for the Prevention of Cruelty to Animals

by Brian J. McIntyre

"…you have the right to humanely trap dogs or cats that invade your property…"

Individuals often think that they have a right to protect their home, property and family. For the most part that assumption is correct. If an unwelcome and unwanted stranger enters your property and threatens your family, you may react with force. The same is true for animals. However, two proposed bills supported by New Jersey Society for the Prevention of Cruelty to Animals are pending before the New Jersey Legislature which would limit your rights to protect yourself. If the New Jersey Society for the Prevention of Cruelty to Animals is successful in having the proposed legislation passed, you will not be able to protect your property and family from unwanted dogs or cats.

Currently, you have the right to humanely trap dogs or cats that invade your property. You may enter into an agreement with an independent contractor, such a pest control company, to help in the removal process. Ordinarily this would include placing baited traps on ones property and then delivering the captured animal to a local animal shelter.

However, a bill to restrict who may capture cats and dogs was recently introduced into the legislature. Senate bill number 365 and Assembly bill number 2615, which are sponsored by Assemblyman Michael J. Panter, Assemblyman Reed Gusciora, Senator Ellen Karcher, and Senator Shirley Turner will prevent individuals from trapping dogs or cats. The two bills are identical and would make it illegal to intentionally take "a domestic dog or cat by means of a trap." The bills specifically exempt animal control officers, representatives of the New Jersey Society for the Prevention of Cruelty to Animals, and volunteers of the Trap-Neuter-Return program. A fine of one-thousand dollars shall be imposed per violation of the proposed bill.

An initial review of the bills may leave you with the impression that they are reasonable and not an attack upon your rights to control and protect your property. However, the bills do not provide the full picture surrounding the trapping of dogs and cats. For instance, the New Jersey Society for the Prevention of Cruelty to Animals advocates the use of a Trap-Neuter-Return program. The argument being that, if you neuter the dogs or cats, over time the population will dwindle. This of course does nothing to resolve the potential health and physical danger that the animals pose. This is especially true in light of the potential for cats to carry the Avian/Bird Flu and dogs to attack humans. Moreover, animal control officers are not always willing to come out and trap large populations of feral animals, which are domesticated animals that have returned to an untamed state. These entities are also limited by the amount of shelter space they may have at their disposal.

The New Jersey Society for the Prevention of Cruelty to Animals may also have an ulterior motive for supporting this legislation. When a feral cat or dog is captured and delivered to a shelter, it will be kept alive for no less than seven days. Ordinarily, feral animals are not adopted and are eventually euthanized under state guidelines. Currently, the New Jersey Society for the Prevention of Cruelty to Animals does not possess means to prevent the capture and delivery of animals to these shelters. With passage of this legislation it will be easier for the Society to force the implementation of Trap-Neuter-Return programs. If this is the case, the legislation can be viewed as an attempt to force individuals to implement these programs without ever having a public debate on the issue.

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...Injured Employees... cont. *(continued from page 6)*

again this may provide less productivity in the short run however is an effective way to retain valuable employees.

The employer may also make reasonable accommodations for the returning employee, such as desk/work station adjustments, a convenient parking spot or adjustment of start and end work times. Such accommodations help ensure that the employee is able to return without incident. It is important to minimize any potential exposure to a re-injury. An employee who returns to a work situation in which his employer acknowledges the limitations the employee is faced with will have an easier time recovering sufficiently to perform his normal duties.

An employer must always retain control of medical treatment. There are times when a returning employee is assigned to modified duty, however no additional medical treatment is warranted. Some employees may disagree and seek treatment on their own. Unauthorized medical bills will be generated, and the employee will seek reimbursement from their employer. In such a situation, it is important that the authorized medical providers are clear in their release report that no additional medical treatment would be beneficial to improve the functional loss suffered by the employee. It is the employer's obligation to closely monitor the medical treatment to establish any defenses to subsequent medical care which may be needed in the near future. The authorized doctors must address issues pertaining to future medical treatment. If the medical providers do not believe any additional treatment is required, their release report must state so and make a distinction between curative and palliative treatment. This will be required if the employee attempts to obtain unauthorized treatment and seek reimbursement at a later date by way of a motion before the Workers' Compensation Court.

It is therefore important for the employer to address these issues when faced with a returning injured employee. It is true most employment is in fact "at will" and an employer may terminate any injured employee who cannot fulfill the position for which they were hired due to their limitations, if said limitation causes risk of injury to the employee or co-employees. However, if the employee is a valued employee it is always in the best interest of the employer to ensure the employee has every opportunity to rehabilitate in order to return to their position within the company.

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New Jersey Tort Option?... cont.

(continued from page 10)

coverage necessary to the provision of accident benefits; and (4) the streamlining of the judicial procedures involved in third-party claims.

The Definition of "Immediate Family Member" Under The Tort Option

Under the Tort Option statute, the option selected applies to "the named insured and any immediate family member residing in the named insured's household." An "immediate family member" is defined as "the spouse of the named insured and any child of the named insured or spouse residing in the named insured's household, who is not a named insured under another automobile insurance policy." This is obviously a rather limited, circumscribed group of individuals entitled to insurance coverage.

The PIP statute states that benefits shall be made payable "to the named insured and members of his family residing in his household who sustain bodily injury as a result of an accident." Unfortunately, the statute does not define what constitutes "members of" the named insured's family.

Our courts have defined the term "family," when used in the context of providing for essential services under the PIP statute, to include the injured insured's spouse, children, and parents regardless of whether they resided with the insured or elsewhere. Moreover, the courts have determined that this category also includes members of the family residing in the household, including brothers, sisters, cousins, grandparents, and grandchildren. This expansive approach characterizes the definition of "family member" or "resident relative" under the PIP statute.

In fact, in keeping with the intended broad scope of the PIP statute, the courts have typically extended the definition of what constitutes "family" beyond those who stand in a legal or blood relationship to the named insured. Indeed, courts have found foster children eligible for PIP benefits on the basis that "the definition of family is not confined to those who stand in a legal or blood relationship;" therefore, the term includes "those who live within the domestic circle of, and are economically dependent on, the named insured."

Based upon the histories of both legislative schemes and case law, it appears that New Jersey courts are willing to extend the definition of family member for the purposes of PIP benefits beyond the traditional legal and blood relationships that are included within the confines of the term "immediate family member" under the New Jersey Tort Option.

Hill Wallack LLP's Trial & Insurance Practice Group stands ready and willing to assist any clients facing legal issues dealing with PIP/No-Fault insurance matters, or the New Jersey Tort Option, in an efficient and professional manner.

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Estate Planning... cont. *(continued from page 5)*

planning framework. Finally, the appropriate legal structures and financial arrangements should be implemented in order to carry out the plan.

The first step—preparing a written goal statement—requires the business owner to spend some time writing down their personal goals for the business and for their future participation in it. Once these goals are in writing, the owner needs to discuss them with family members, as well as with those key employees who are critical to the success of or are affected by the plan. Following this, the owner should evaluate possible successors and, if there are none, identify alternative succession methods, such as a sale of the company. Lastly, the owner needs to establish the timeline over which the transition should take place, specifically identifying target dates such as when majority control passes and when the owner intends to withdraw from the business.

This first step is the most difficult to complete because it depends almost entirely on the owner's commitment to embarking on the succession process and to finding the time, in an already busy schedule, to listen and to reflect on what the owner wants for their business, their family, and the remainder of their life. Once the owner has completed this step, however, the remaining steps fall readily into place.

Creating and nurturing a family business is like raising a child. And, like a loving parent who spends years preparing their child for the day when the parents are no longer there, so too, the successful family business owner must prepare his or her business for that same event. As difficult as it is to let go, planning for that transition is the only way to ensure that the owner leaves a lasting legacy to his or her family, employees and community.

At **Hill Wallack LLP**, we can help you through the process of developing a plan that suits your needs as well as put together a team of professionals who can help you put your succession plan into place.

...Cruelty to Animals cont.

(continued from page 12)

There are two primary ways to resolve the deficiencies with the bills. First and foremost, you may advocate that the bills should not be passed to become law. Secondly, and perhaps the more reasonable way to resolve the matter, would be to include a provision that if the exempt entities refuse to trap and remove the cats or dogs in a timely fashion, then the property owner may himself or through an independent contractor, trap and remove the feral dog or cat and transport it to the local animal shelter. This would ensure that the animal is removed in a timely fashion to guarantee that any potential health or physical dangers they pose are eliminated.

Accordingly, should the two bills be passed in their present form, as advocated by the New Jersey Society for the Prevention of Cruelty to Animals, a property owner's ability to protect his home, property and family may be greatly reduced. However, a simple revision of the bills would ensure that, should the proper exempt entities refuse or be unable to trap and remove the animals, the property owner would be able to take action to defend his property and ensure that the potential health and physical dangers are eliminated.

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...Smoke Free cont.

(continued from page 7)

feet from openings to an indoor public place or workplace. The revised notice of proposal would instead require owners and operators to establish site-specific conditions for smoking in exterior areas of their establishments appropriate to their particular circumstances and environments to ensure that smoke does not enter nonsmoking areas of such establishments

Local municipal and county governments would retain authority pursuant to *N.J.S.A. 26:3D-63* to articulate conditions for smoking in exterior areas, such as minimum distance setbacks or "buffer zones," provided those conditions establish restrictions on or prohibitions against smoking equivalent to, or greater than, those provided under the Act and the proposed new rules.

Conclusion

Affected businesses and municipalities armed with the above knowledge can ensure they are proactively enforcing New Jersey's Smoke Free Air Act. **Hill Wallack LLP's Administrative Law/Government Procurement** and **Municipal Law Practice Groups** are experienced and knowledgeable in representing businesses and municipalities concerning administrative compliance issues.

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Caution: Slippery When Wet cont. *(continued from page 11)*

employees in course of his assigned duties because an independent contractor is hired to carry on activity which by its very nature involves a peculiar or high risk of harm to the contractor's employees.

Accordingly, after finding that the landowner did not participate in, actively interfere with or exercise control over the manner or method of plaintiff's work, the duty to maintain the floor free from hazards rested with the plaintiff and, regardless of the source of water, the landowner could not be liable. It is interesting to note that despite the property owner's knowledge of frequent wet floors, such knowledge did not constitute constructive notice.

Janitors as Independent Contractors

A recent New Jersey state court appellate decision expressed a similar sentiment to the *McEwan* case. There, an employee of a hospital slipped and fell in the lobby during the winter months. The property owner conceded that the lobby floors frequently became wet from the snow and ice brought in by patients and visitors. The employee brought an action against the cleaning company, an independent contractor of the property owner, for negligence in maintaining the floors. The Appellate Division found that in order to impose liability on the cleaning company, the company needed actual or constructive notice of the wet floors, regardless of the source of water. Again, it is interesting to note that despite the cleaning company's knowledge of frequent wet floors, such knowledge did not constitute constructive notice.

Security Guards As Independent Contractors

Many property owners and businesses engage the services of security guards through the hiring of independent contractors. In many cases, the duties of a security guard are contractual. Although New Jersey's two published cases finding property owners liable to security guards who slipped and fell in the course of their duties, the distinguishing fact in those cases is that the property owners had actual notice of a dangerous condition and failed to remedy it in a timely manner. But what about a case where the property owner did not have notice of a dangerous condition and the security guard slipped and fell? The *McEwan* case provides a strong sense that property owners will not be liable to an injured security guard who slipped and fell in the course of her duties because such injuries are likely to result from the very hazards she was hired to guard against.

Basically, the duties of a security guard are to report any potential problems or hazards and to prevent theft, vandalism or trespassing. The security guard is the first line of defense for property owners in detecting potential hazards. Hence, the security guard's duties include maintaining a watchful eye for wet floors and spills.

Liability to Independent Contractors

Of course, the property owner should bear in mind that she cannot participate in, actively interfere with, or exercise control over the manner or method of the work being performed by the independent contractor at the time of the injury. For example, the lending of equipment, such as a ladder, to an independent contractor may subject the property owner to liability if the injury is somehow related to that equipment. Property owners' employees sent to assist the independent contractor may subject the property owner to liability. And in the context of exercising control, the property owner cannot instruct the independent contractor how to do her job.

Conclusion

Although a property owner may not be able to avoid a lawsuit from being filed against her for slip and fall injuries, the property owner can increase her protection by entering into a well-articulated contract with the independent contractor that includes a strong indemnification clause and mandatory insurance coverage. The selection of a competent independent contractor is also crucial. As the nuances of premise liability are easily stumbled over and the legal verbiage of contracts can be slippery, **Hill Wallack LLP's** experience can effectively assist property owners from falling into the depths of premise liability.

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Spotlight cont. *(continued from page 9)*

focused on growth share and its implication.

Julie Colin, a partner at the firm and member of the **Litigation Division** and **Employment Law Practice Group,** was recently a panelist at the 2nd Annual New Jersey Division of Civil Rights Seminar—A Legal Primer on the NJ Family Leave Act, the federal Family Medical Leave Act and Reasonable Accommodations under state and federal laws. The NJ Division on Civil Rights offers the legal primer in collaboration with the U.S. Department of Labor and the U.S. Equal Opportunity Commission.

Michael S. Karpoff recently spoke on the topic *"Dangerous Residents and Other Security Issues: Protecting Members While Preserving Rights,"* at the 27th Annual Community Association Law Seminar in Las Vegas, sponsored by the Community Associations Institute (CAI). The Law Seminar was attended by over 400 lawyers, community association managers and others from throughout the country. It explored trends and practices in the law of homeowner associations, condominiums, and residential cooperatives. Twenty-three educational programs were provided.

Stephen J. Hyland, a partner of **Hill Wallack LLP,** where he is partner-in-charge of the firm's **Trusts & Estates Practice Group** was recently a panelist at the New Jersey State Bar Association Seminar Panel *"Let's Write A Will"*. Mr. Hyland gave a presentation on the Domestic Partnership Act and estate planning issues contrasting New Jersey GLBT rights with other states. Mr. Hyland concentrates his practice on estate planning and administration, elder law and domestic partnership law. Besides authoring the new book, *"New Jersey Domestic Partners: A Legal Guide,"* Mr. Hyland has published numerous articles on estate planning and domestic partnership law, privacy law, computer law and internet law, and is a frequent speaker on legal issues.

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