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 year, Hill Wallack LLP has experienced a surge of growth as we joined forces with different practice groups led by Pennsylvania practitioners who identify with our goals.

Joanne Rathgeber & Associates joined our firm in January when we opened an office in Doylestown, PA. Joanne is a partner in the firm and member of the Employment & Labor Law Practice Group. Supporting Joanne are Virginia L. Hardwick and Tiffinie C. Benfer, who joined the firm as associates in the Litigation Division and Employment & Labor Law Practice Group focusing on employment and commercial litigation. L. Stephen Pastor, a partner in the firm and a resident of Pennsylvania, is also working 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.

In July, Sullivan & Sullivan, one of Bucks County's noted firms serving business and commercial clients, joined our firm as Hill Wallack LLP opened an office in Langhorne, PA. Francis J. Sullivan continues his practice with us as partner-in-charge of the firm's Business & Commercial Law Practice Group. Rosemary A. Sullivan, a partner in the firm's Trusts & Estates Practice Group, will continue to work out of the Langhorne office concentrating her practice in the areas of estate administration, elder law, orphans court litigation and commercial litigation. We also welcomed Jeffrey G. DiAmico and Denise M. Bowman, who joined the firm as associates in the Business & Commercial Law Practice Group.

We open this issue with Frank Sullivan's analysis of the impact of business divorce in his article *"When Small Business Owners Divorce"*. Rosemary Sullivan examines the right of survivorship in *"Fore-Warned is Fore-Armed",* while Steve Pastor discusses New Jersey's Real Estate Sales Full Disclosure Act in his article *"Registration Required When Targeting New Jersey Residents for Sales of Out of State Homes."*

Joanne Rathgeber alerts us to employer liability in the workplace in her article *"Who's in Charge Here?...";* while Jeff DiAmico bring us up-to-date on consumer protection for telephone solicitation via facsimile in his article *"Fax Blasts – Don't Fax Me I'll Fax You!!!"* Virginia Hardwick discusses sexual discrimination in her article *"Protection Against Discrimination Because of Sexual Orientation: Pennsylvania's Scattered Approach"*, while Tiffinie Benfer explains claims of employer retaliation in her article *"Recent Court Decisions Expand Definition of Retaliation."*

As with every issue of the *Quarterly,* Hill Wallack LLP strives to address topics of interest to our readers and to provide informative articles on those subjects. We encourage you to contact the authors with any questions relating to the articles contained in this issue or with suggestions on future topics of interest.

– Robert W. Bacso

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To request information, please call the authors directly at (609) 924-0808 or send an e-mail message to info@hillwallack.com.

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When Small Business Owners Divorce

by Francis J. Sullivan

According to the U.S. Chamber of Commerce, small businesses (companies with less than 500 employees) represent 99.7% of all employer firms in the United States and employ one-half of all private workers. It is estimated that there are over 5.7 million employer firms operating in excess of 7.1 million business establishments in the United States in all industry categories. Small businesses account for over 50% of the private sector output and generate 60-80% of new jobs annually. The substantial majority of small businesses are legally formed as corporations. Moreover, as these statistics demonstrate, most small business corporations are entities which generally have less than 30 owners or shareholders and typically the owners are often family members or are close friends who have decided to become business partners. Often, the ownership of the small business and the personal life of the owners are inextricably entwined. Thus, the hallmark of most American small businesses is a strong interpersonal relationship, familial or otherwise, upon which the business is based. Therefore, there is no surprise that when the strong, interpersonal relationship shatters, the effect upon the business can likewise be catastrophic.

Causes of Business Divorce

The business divorce is often the culmination of internal business conflicts such as financial problems as well as financial successes, using the business to pay for personal expenses, personality conflicts, nepotism, marital problems, drugs and substance abuse problems, embezzlement of funds, arguments over control, sexual harassment lawsuits, managerial incompetence, wasted assets or just general disagreement on day to day business issues argued in an environment where all trust has been lost. When the survival of a small business is tied to the continuing vitality of intimate personal relationships, and the parties are unable to separate the business and personal aspects of their relationships, then, like the disintegration of a marriage, unless the parties have entered into a carefully drafted "pre-nuptial" agreement, the parties inevitably contact their lawyers and the business divorce war erupts and litigation commences.

Typically in a small business, there is a diversity or separation of labors between the owners. Often there is the inside person who handles the business operations while the outside, or sales function, is the responsibility of another owner. There are numerous variations on this theme, especially if there are different or distinct lines of business but the common thread is that one owner has decided that the other owner has to go. This decision is manifested generally in one of two ways. One shareholder engages in a course of action to "squeeze out" or "freeze out" the other or sets up a new business operation and diverts business opportunities and assets from the commonly owned business to the newly created business. Frequently, a difference in ownership percentage among owners dictates what scenario occurs. However even when the ownership is on a 50/50 basis, where there is a stronger, more powerful personality and "runs" the business (sound familiar), these scenarios remain the same. Other less frequent scenarios involve the majority owner deciding to sell his interest, which causes the minority owners to scramble to protect their investment. Usually, this scenario occurs when the majority owner is an investor or has now decided that it is time to cash out. Thus, absent a well drafted owner or shareholder agreement (covering buyout issues and valuations, employment issues, put-call rights, drag along or tag along provisions) made while the owners still liked each other and which contemplated and determined how shareholders will deal with each other in these situations, the seeds for the business divorce are sown.

Impact of Fiduciary Obligations

In most small businesses, an owner/shareholder often times is also a director or officer of the company. Directors and officers owe fiduciary obligations to the corporation and its shareholders. Moreover, even if a majority shareholder is not officially nominated as a director or officer, the fiduciary relationship still exists. Thus, one standing in a fiduciary relationship with another is subject to liability for harm resulting from a breach of duty imposed by that relationship. A fiduciary relationship exists between persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship.

In Pennsylvania, the fiduciary obligation carries with it both the duty of care and the duty of loyalty. An officer or director of the corporation must perform his duties as an officer in good faith, in the best interest of the corporation and with such care, skill and diligence, as a person of ordinary prudence would use under similar circumstances. Pennsylvania Law provides that a fiduciary cannot directly or indirectly make a profit at the expense of the corporation. Accordingly, diverting assets (including confidential or proprietary information) or business opportunities from the corporation to another entity which benefits the shareholder/director/officer is prohibited. Similarly, a “squeeze out” or “freeze out” of a shareholder is a breach of fiduciary duty.

It is obvious that when owners of a small business decide to divorce, the declarations of breach of fiduciary duty will sound loudly and often. Secrets shared and confidences given will become weapons wielded by the owners against each other, often spelled out in embarrassing, lurid detail in the lawsuits and counterclaims that inevitably follow after the decision to divorce is made. These allegations, all based on the principal of breach of fiduciary duty, may and most likely will encompass claims for (1) interference with contractual relationships; (2) misappropriation of trade secrets and confidential information; (3) unfair competition; (4) usurpation of corporate opportunities; and (5) conversion of corporate assets. Preemptive actions in the nature of injunctions are also often employed. In summary, a business divorce can quickly become hostile, deeply acrimonious and extraordinarily expensive especially when, in addition to the claims for damages, the shareholder, who is not in control of the business, seeks the further remedy of dissolution of the entity and/or the appointment of a custodian over the operations of the business.

“Thus, absent a well drafted owner or shareholder agreement … which contemplated and determined how shareholders will deal with each other in these situations, the seeds for the business divorce are sown.”

Majority vs Minority Owners

Typically, disputes between owners involve a fight between the “majority” versus the “minority” owner. This majority/minority dichotomy can be based upon a difference in the percentage ownerships but frequently occurs when one owner is no longer actively engaged in the business operations of the corporate entity, and the “majority” owner is in place operating the business. Many times, the out of office owner was also an employee, and his employment has been terminated by the majority or stronger owner. Under either circumstance, the ability of a minority owner to seek redress from the courts under Pennsylvania law is limited by the obligation to prove that the majority owner has been acting “illegally, oppressively or fraudulently” against the minority owner.

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Fore-Warned Is Fore-Armed

by Rosemary A. Sullivan

When Mom or Dad, as a widow or widower, reaches a point in life where a little help is needed from an adult child to pay bills and tend to financial matters, more often than not, the adult child goes to the parent's bank and places their name on the account with Mom or Dad in order to make it easier for the adult child to help the parent with their finances and pay bills. However, this simple act, done as a matter of convenience for both parties, can often lead to unexpected consequences for everyone involved.

"Under the Pennsylvania Inheritance and Estate Tax Act, entry into a joint lessee's safety deposit box is prohibited by any one other than the decedent's spouse unless certain specific procedures are followed after the death of one of the joint lessees."

Under the Pennsylvania Probate Code, a "joint account means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." Thus, placing Junior's name on Mom's account, to help Mom pay her bills, means Junior can make withdrawals from the account at will. If Junior is not one of the more upstanding members of the community, Junior's creditors could potentially go after the funds in Mom's account.

Beware of Legal Presumptions

Pennsylvania law sets forth a different set of presumptions as to ownership of funds in joint accounts during the parties' lifetime, as compared to when one of the parties on the joint account dies. During the lifetime of all parties on a joint account, the funds in a joint account belong to the parties in proportion to their individual net contribution to the sum on deposit, unless there is clear and convincing evidence of a different intent by the parties. So if the joint account with Junior consists of all of Mom's savings from her lifetime, but one of Junior's creditors sees Junior's name on the account, the creditor could still potentially go after the account, and Mom would have to prove that all the funds in the account originated from her.

On the flipside, Mom may have a will that says she wants all of her assets, including her personal property i.e. bank accounts, to be equally divided among all her children. But if one of the bank accounts is a joint account with one child's name on it, who is presumably helping Mom with her finances, there is a presumption under Pennsylvania law that at Mom's death the funds in that joint account would go to such child as the survivor on the account and not be divided with the remaining siblings despite what Mom's will says. Unless Junior's siblings can present clear and convincing evidence that Mom intended something different at the time she created the joint account, it is presumed that Mom intended to pass the contents of the joint account to Junior. (Perhaps, she always liked him best!)

Many parents continue to put one adult child's name on their bank accounts for convenience and even when advised of the statutory presumption, believe that such child would never keep his fellow siblings from sharing in the wealth. Unfortunately that is not always the case, and often when the other siblings discover the situation at the time Mom's estate is administered, the cost in both dollars and emotion must be considered if the issue is to be litigated. It should be noted that the banking institution is relieved of liability in paying the balance of the funds in the joint account to Junior when Junior makes a request for Mom's funds after her death. Nevertheless, rather than believe the dark side of human nature always prevails, some generous siblings would not even think of cutting out their brother and sister when confronted with a joint bank account containing thousands of dollars which could be exclusively theirs. One solution is to put the adult child on Mom's bank account as a power of attorney which would allow them to

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Registration Required When Targeting New Jersey Residents for Sales of Out of State Homes

by L. Stephen Pastor

Over the past several years the number of New Jersey residents leaving the State to live elsewhere has increased. Many factors have caused this migration, which has not gone unnoticed by the real estate development community. New Jersey builders are under increased pressure from the home-buying public to provide modern home designs and more and better amenities in order to maintain new home sales. But there is also increased competition from out of state builders—notably those in Pennsylvania—who specifically market new homes for sale to New Jersey residents.

Pennsylvania developers who have projects located along or near the border with New Jersey have long enjoyed a steady influx of buyers from New Jersey. In years past "word of mouth" marketing has brought a fair number of buyers into Pennsylvania. But when a Pennsylvania developer targets a New Jersey resident with marketing materials, regardless of whether it was done inadvertently, the developer is required to first obtain approval for all such marketing with the New Jersey Real Estate Commission (the "Commission"), as such targeted marketing requires compliance with New Jersey's Real Estate Sales Full Disclosure Act (the "Act").

New Jersey's Real Estate Sales Full Disclosure Act

The Act is designed to regulate the marketing and sales of certain properties and ownership interests in New Jersey. Included are condominiums, other planned communities, subdivided land sales, time shares and retirement communities ("regulated properties"). (Excluded are commercial projects, small subdivisions and listings of individual homes or properties). Most Pennsylvania developers are aware that compliance with the Act is required if they attempt to solicit buyers from New Jersey via direct marketing. However, many Pennsylvania developers are unaware that general advertising which is likely to be mailed to New Jersey residents can trigger the need for registration under the Act. Simply, any publication or mailing of any materials directed to New Jersey residents for the purpose of soliciting, inducing or causing the purchase of an interest in any regulated properties constitutes advertising in New Jersey. The Real Estate Commission routinely monitors many magazines, including the *New York Times Sunday Magazine*, for any advertising which may require registration with the Act. The Act also provides specific advertising standards which must be followed.

"The Act is designed to regulate the marketing and sales of certain properties and ownership interests in New Jersey."

Public Offering Statement Required

If registration is required, there is an application form which must be completed and filed with the Commission, which includes a proposed "Public Offering Statement". The application fee is $500 plus $35 for each regulated property being offered, with a maximum fee of $3,000. The Commission also charges travel costs to send a representative to the development to ensure that the advertised homes, amenities, etc. exist and are in the condition as advertised.

The Commission will review the application and the proposed Public Offering Statement. The Public Offering Statement contains specific required information, including estimated completion date(s) for improvement(s), fees, amenities to be provided, hazards, and proximity to municipal services, police, fire departments and schools. The Commission also requires proof that the developer can convey good title and complete the project as advertised.

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Who's In Charge Here? Multiple Employers, Multiple Employees, Multiple Problems

by Joanne Rathgeber

> *"Turning a blind eye to harassment based on race or sex is bad business…"*

Bullying, profanity, racial epithets. No one is told to stop. Are we at a Junior High School Playground?

Vile sexist and racist graffiti on the bathroom walls. No one cleans it up. Perhaps we are seeing the bathroom at a juvenile detention center?

A hangman's noose is left swinging for days to intimidate racial minorities who complain about mistreatment. No one takes it down. Those in charge look the other way or even make jokes about it. Is this the deep south in the 1920's?

Sadly, these scenarios are not isolated, and are not from a distant time and place. They have played out in the last several years here in Pennsylvania. This outrageous and illegal behavior has been tolerated, even dismissed with a shrug because it is so commonplace in construction sites. Most of us know that racial and gender discrimination in the workplace is illegal. Why then is harassment of racial minorities and women so pervasive at construction sites?

Many an upstanding and reputable contractor would not consciously allow racial discrimination, but still would not consider it "his business" to interfere with the behavior of another contractor's or subcontractor's employees on a worksite. Similarly, a landowner may observe objectionable behavior, but chose to ignore it, just hoping to get the job done. Turning a blind eye to harassment based on race or sex is bad business, because this behavior saps productivity and causes strife. And, ignoring harassment may subject all of these parties to liability for civil rights violations.

Construction sites often pose uniquely difficult issues of supervision because the lines of authority are not clearly drawn. Who is responsible for the racial harassment by employees of one of the many subcontractors on a site? The subcontractor? The contractor? The union? The landowner? Yes, yes, yes and yes.

Who Are My Employees and When Am I Responsible for Their Actions?

Liability for illegal behavior may be more far reaching than most contractors understand. Lurking in the law is the concept of "joint employer". If the job of a contractor requires subcontractors, or if workers are hired through a temporary agency, or even if you simply own the property where a job is being performed may create liability.

Under Title VII of the Civil Rights Act, the term "employer" has been construed liberally and does not require a direct employer/employee relationship. Under the concept of "joint employers", the Courts assume in the first instance that the companies are what they appear to be – independent legal entities that are working together. The most important issue in determining whether two separate employers are in fact joint employers is the aspect of control. It is a matter of determining which of two, or whether both, control the labor relations of a given group of workers. Has one employer, in fact, retained sufficient control of the terms and conditions of employment of the employees who are employed by the other employer?

The Courts will apply the law to the facts. What are the facts? Some of the important ones are:

- Who controls and supervises the manner in which the labor is performed?
- Who assigns the work?
- Who owns the tools and equipment needed to perform the work?
- Who owns the premise at which the work is performed?
- Who has the right to hire and fire?
- Who writes the paycheck?

These are some of the questions that the Courts will ask. While Title VII contemplates some employment relationship, this relationship need not link together the plaintiff and the defendant. The Court have construed the term employer in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspect of an employees compensation or terms, conditions or privileges of employment.

Any company working in conjunction with another, who exercise some control over their employees better be aware of what constitutes liability under the discrimination laws.

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Fax Blasts—Don't Fax Me I'll Fax You!!!

by Jeffrey G. DiAmico

Effective as of August 1, 2006, the Telephone Consumer Protection Act of 1991, ("TCPA") was amended to update the compliance rules with regard to sending out unsolicited advertisements ("junk faxes"). The TCPA was enacted and amended in order to restrict telephone solicitation to a telephone facsimile machine, amongst other things. Pursuant to the TCPA, telephone solicitation through facsimile is permitted only under the following excepted out circumstances:

1. To any person with that person's prior express invitation or permission, in writing or otherwise; or
2. To any person with whom the sender has an established business relationship (defined below).

An "Established Business Relationship" ("EBR") means a prior or existing relationship formed by a voluntary two-way communication between the sender and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by the sender, which relationship has not been previously terminated by either party.

Essentially, an EBR requires the individual or business to first contact the sender regarding products or services offered by the sender. The TCPA does not permit the sender to first contact the individual or business. Consequently, the TCPA provides that it is unlawful to send unsolicited advertisements to any fax machine without the recipient's prior express invitation or permission, in writing or otherwise. Additionally, a fax advertisement may only be sent to an EBR customer if the sender:

1. Obtained the fax number directly from the recipient, with in the context of such EBR;
2. Obtained the fax number from the recipient's own directory, advertisement or site on the Internet to which the recipient voluntarily agreed to make available its fax number; unless the recipient explicitly noted on such materials that unsolicited advertisements are not accepted at the specified fax number; or
3. Obtained the fax number from other sources other than the recipient, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

Additionally, the TCPA requires advertisements from senders to contain a notice that informs the recipient how to "opt-out" of future junk faxes. The notice must meet the following requirements:

1. Be clear and conspicuous and on the first page of the advertisement;
2. State that the recipient may make a request to the sender not to send any future faxes and that failure to comply, within thirty (30) days, is unlawful;
3. Set forth the below requirements for an "opt-out" request by the recipient; and
4. Include a domestic telephone number, fax number, and cost free mechanism (including a toll free telephone number, local number for local recipients, a toll free fax number, website address, or email address) to opt-out of faxes. The telephone and fax numbers and cost free mechanisms must permit a recipient to make an opt-out request 24 hours a day, 7 days a week.

"…the TCPA provides that it is unlawful to send unsolicited advertisements to any fax machine without the recipient's prior express invitation or permission, in writing or otherwise."

To stop unwanted fax advertisements, recipients "opt-out" requests must comply with the following requirements:

1. The request must identify the fax number(s) to which the request relates;
2. The request must be made to the telephone number, fax number, website address or email address identified in the sender's fax advertisement; and
3. The recipient making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to the recipient at such fax machine.

It is important to note that any sender on whose behalf a fax is sent or whose goods or services are advertised is liable for a violation of the TCPA rules, even if they did not physically send the fax themselves, and a fax broadcaster (the person or entity transmitting messages to a fax machine on another person's behalf) may also be liable for violations of the TCPA, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such faxes.

The TCPA gives recipients of a junk fax a right to sue the sender to: (1) enjoin such violations to stop future

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SPOTLIGHT

NEW OFFICE

Hill Wallack LLP and Sullivan & Sullivan are proud to announce that the two firms have merged forces to become one, thus offering their clients expanded legal service. Hill Wallack LLP, located in Princeton, NJ and Doylestown, PA, is a full-service firm with more than 20 practice groups serving clients throughout New Jersey and Pennsylvania. It joined forces with Sullivan & Sullivan, located in Langhorne, Pennsylvania, which was noted as one of the most reputable firms serving business and commercial clients. "It's a perfect fit for both of us," said Robert W. Bacso, managing partner of Hill Wallack LLP, "Sullivan & Sullivan concentrates in an area of law that we are interested in providing to our clients, and we have other areas of practice that provide terrific support for business and commercial work." "Our name may change, but our determination to provide quality service will not," assured Francis J. Sullivan, managing partner of Sullivan & Sullivan. "In fact, the merger will provide us with the resources to set new, higher standards for our client representation. We're also excited to be able to provide them with a menu of concentrations they can utilize for any of their legal needs." Hill Wallack LLP brings its strong dedication to community, to the Bucks County area and will draw from its wide range of legal resources to offer perspective and advice on the full spectrum of client needs. It is our pleasure to serve the lay and legal community as well as the charitable organizations of Bucks County.

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APPOINTMENTS & RECOGNITION

Edward H. Herman, a partner in the Princeton office, has been appointed by Chief Justice Deborah T. Poritz to serve as Municipal Court Judge to conduct first appearance hearings and arraignments and to accept pleas for pending municipal court cases subject to detainers and for indictable offenses occurring in Middlesex County. Mr. Herman is a member of the firm's **Litigation Division** and is partner-in-charge of the **Workers' Compensation Practice Group.** He is certified by the NJ Supreme Court as a workers' compensation expert. 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, environmental litigation and automobile dealer litigation. He is also partner-in-charge of the firm's **Automotive Dealers & Business Liability Practice Group,** representing many of the state's largest automobile dealers. Mr. Herman has been practicing law for over 35 years and presides as Municipal Court Judge in Spotswood, Plainsboro, Cranbury and the Borough of Highland Park in Middlesex County.

Suzanne M. Marasco, a partner in the Princeton office, where she is a member of the firm's **Litigation Division, Trial & Insurance Defense** and **Employment & Labor Law Practice Groups,** was recently appointed as Secretary/Treasurer of 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.

Rosemary A. Sullivan, a partner in the Langhorne office, where she is a member of the firm's **Trusts & Estates Practice Group,** was recently appointed to the Advisory Board of St. Mary's Medical Center. The Advisory Board is made up of a select group of professionals from the fields of law, financial planning, banking, insurance, and real estate who have demonstrated a supportive commitment to St. Mary's Medical Center and have significant experience and interest in charitable tax law and/or planned giving. Ms. Sullivan concentrates her practice in the areas of estate administration, elder law, orphans court litigation and commercial litigation, all of which are areas of the law which require significant abilities to understand the needs of the client and, more importantly, the ability to concentrate on the often difficult problems facing families. Ms. Sullivan is admitted to practice in the Commonwealth of Pennsylvania and the United States District Court for the Eastern District of Pennsylvania.

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SEMINARS

Ronald L. Perl, a partner in the Princeton Office, where he is partner-in-charge of the **Community Association Law Practice Group,** recently presented a keynote speech to the Seattle chapter of the Community Association's Institute. The speech was entitled *"Bringing Community to Community Associations"*. Mr. Perl discussed the challenges facing common interest communities throughout the country, emphasizing the critical role that property managers and volunteer leaders play in creating a sense of community. Mr. Perl is nationally recognized for his work in the field of community association law. He is a member of the National College of Community Association Lawyers and an Adjunct Professor of Law at Seton Hall Law School in Newark, NJ. He is president of the National Community Associations Institute.

Paul P. Josephson, partner in the Princeton office where he is partner-in-charge of the firm's **Regulatory & Government Affairs** and **Gaming Law Practice Groups** was recently a featured panelist at the New Jersey Institute for Continuing Legal Education Seminar *"Lobbying for*

Lawyers: Update 2006." Mr. Josephson gave his presentation on the new rules concerning lobbyists and government affairs agents and how lawyers can more effectively provide lobbying services. Mr. Josephson concentrates his practice in Administrative Law and Litigation, including Election and Campaign Finance Compliance and Government Ethics. He earned his law degree with honors from the National Law Center at George Washington University.

Paul P. Josephson, also was recently a featured panelist at the New Jersey Institute for Continuing Legal Education Seminar *"Pay to Play: The New Rules of the Game."* The following day, he chaired the New Jersey Association of Counties 56th Annual Conference Seminar *"Pay to Play Update and Other Best Practices for Public Entities."* Mr. Josephson gave presentations at both seminars on the pay to play rules with practical guidance on how they affect government. He discussed legal compliance and best practices overview for public entities in the areas of pay to play, corporate governance, government contracts, procurement, labor and ethics.

Nielsen V. Lewis, a partner in the Princeton office, was a featured panelist at the recent New Jersey Institute of Continuing Legal Education Seminar, *"Environmental Risks and Business Solutions."* He gave a presentation on the acquisition of properties with pre-existing contamination and the availability of cleanup liability defenses and shelters for qualified land owners, purchasers and developers under New Jersey's Spill Act and Industrial Site Recovery Act. Partner-in-charge of **Hill Wallack LLP's Environmental Law Practice Group,** Mr. Lewis counsels and represents corporations, public entities and individuals on a wide range of environmental and land use matters, including local development applications; environmental permitting; regulatory compliance; and environmental litigation. Mr. Lewis received his law degree from the University of Michigan Law School. He is admitted to practice in New Jersey, the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit.

Partners of **Hill Wallack LLP's Community Association Law Practice Group** were recently panelists at the Lorman Education Services Seminar *"Legal Aspects of Condominium Development and Homeowners' Associations in New Jersey".* Partner-in-charge, ***Ronald L. Perl*** and partner ***Michael S. Karpoff*** provided valuable instruction regarding recent developments in community association law, recurring issues regarding state and federal laws governing associations and proposals for major statutory changes pending in the legislature. 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 National College of Community Association Lawyers. He received his Juris Doctor degree from Rutgers Law School – Newark and 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.

Anne L. H. Studholme, a partner in the Princeton office was recently a featured speaker at the Metropolitan Real Estate and Investors Association General Meeting. She gave a presentation on the topic *"It's My Property! Why Can't I Do What I Want With It?"* discussing zoning, eminent domain and easements. Ms. Studholme is a partner of the **Land Use Division** which includes the firm's **Land Use Applications, Land Use Litigation** and **Environmental Applications Practice Groups.** She concentrates her practice in development applications and litigation, as well as federal civil litigation, complex litigation and legal malpractice. A graduate of Princeton University, she earned her law degree from University of North Carolina, Chapel Hill, and is admitted to practice in New Jersey and North Carolina.

Members of **Hill Wallack LLP's Land Use Division, Regulatory & Government Affairs** and **Real Estate Practice Groups** were recently featured panelists at the Continuing Legal Education International Seminar *"Eminent Domain, Condemnation, Valuation and Relocation".* ***Stephen M. Eisdorfer*** and ***Anne L. H. Studholme,*** partners of the firm's **Land Use Division;** ***Paul P. Josephson,*** partner of the firm's **Regulatory & Government Affairs Practice Group,** together with ***Todd D. Greene,*** associate of the **Real Estate Practice Group** provided up to the minute guidance on pending matters in the area of eminent domain. **Hill Wallack LLP** represents governmental entities in the acquisition of all types of commercial, industrial and residential properties for public projects. The group has extensive experience in handling condemnation matters for public entities as well as for individuals and entities whose property is being acquired for public projects.

Members of **Hill Wallack LLP's Workers' Compensation Practice Group** were recently panelists at the Council on Education in Management Seminar *"New Jersey Workers' Comp Update 2006".* Partners of the firm's **Workers' Compensation Practice Group, *Craig W. Summers*** and ***Marc Harlan Herman*** together with associates ***Kenneth W. Thayer*** discussed solution-oriented workers' compensation updates. They presented claims management best practices for handling preexisting injuries and repeat claimant and proactive strategies for reducing out of control workers' comp costs.

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Protection Against Discrimination Because of Sexual Orientation: Pennsylvania's Scattered Approach

by Virginia L. Hardwick

If you are like the majority of Americans, you believe that discrimination on the basis of sexual orientation is wrong, and you believe that it is illegal. You might be surprised to know that about half of all Americans live in jurisdictions that provide no protection against discrimination because of sexual preference. Many of those unprotected workers are in Pennsylvania. (New Jersey's Law Against Discrimination, on the other hand, does provide protection against discrimination on the basis of sexual orientation.)

Federal civil rights and anti-discrimination laws do not extend their protections to gay workers or to gays who seek housing. In other words, federal law offers no recourse to an employee whose employer fires him only because the employee is homosexual. The Pennsylvania Human Relations Act ("PHRA") protects Pennsylvanians from discrimination in employment, housing and public accommodations on the basis of race, color, national origin, religion, age and disability. However, the PHRA provides absolutely no protection if the discrimination is because of sexual orientation.

Although there is no state-wide system in place, some Pennsylvania residents are protected by legislation enacted by municipalities and one county. Erie County has adopted legislation that protects against discrimination based on sexual orientation, as have Allentown, Easton, Harrisburg, Lancaster, Lansdowne, New Hope, Philadelphia, Pittsburgh, Scranton, Swarthmore, West Chester and York. In addition, State College has an ordinance that protects only against discrimination in housing. There is a great deal of variation and uncertainty about the recourse that an individual claiming discrimination has under this patchwork of local ordinances.

Protection by Courts

Even in Pennsylvania, it is possible to find some protections for those discriminated against because of sexual orientation or gender identity under existing laws.

Although Title VII, the federal anti-discrimination statute, does not expressly protect against such discrimination based on sexual orientation, the U.S. Supreme Court has held that an employer who discriminates because an employee does not fit "gender stereotypes" has engaged in illegal discrimination on the basis of gender. For example, an employer's comments that a female employee should dress more femininely or wear makeup may be used as evidence of sex discrimination if that employee is fired or is not promoted.

In addition, an employee who is subjected to sexual harassment will have a cause of action for gender discrimination if that sexual harassment was motivated by co-workers' belief that the employee was insufficiently "masculine" or "feminine." So, for example, a worker who is sexually harassed by co-workers because he was of slight build and wore an earring might show that he suffered discrimination "because of sex." Whether the plaintiff in that situation was actually gay would be of no relevance; likewise, it would be irrelevant whether the defendants were motivated by anti-gay animus.

However, the lack of any statutory protection for discrimination on the basis of sexual orientation leaves a gaping hole. A gay or lesbian employee who is sexually harassed because of sexual orientation may have a cause of action. But, if that gay or lesbian employee is just fired because of sexual orientation, there is no recourse under federal or Pennsylvania law.

Legislative Proposals

Numerous proposals that would extend protection against discrimination to gays have died on the vine. The Employment Nondiscrimination Act, proposed federal legislation that would have protected gays from discrimination in employment failed to pass the U.S. Senate by a vote of 50-49, in 1996, and never passed the House. The Republican majority has blocked any movement on the issue in recent years, and it remains to be seen whether this is an issue that the newly elected Democratic majority will address.

In Pennsylvania, the legislature has sent mixed signals on expanding rights for gays. In 2002, the Ethnic Intimidation Act, a statute addressing hate crimes, was amended to include protection against crimes committed to victimize a person because he or she is homosexual or transgender. In July 2006, the legislature rejected the Marriage Protection Act, which would have permanently barred same sex marriage or civil unions. (This rejection was not a strong statement of support for gay rights; the legislation passed the Senate, and the House adopted a bill that would bar same sex marriage, but allow civil unions.)

Proposed legislation introduced in 2006 would have expanded the PHRA to include protection against discrimination on the basis of sexual orientation and gender identity. That bill, which had 57 sponsors in the House and 19 in the Senate, died in committee before the session ended. Strong support in the legislature indicates that the bill will be re-introduced in 2007, and that it may enjoy wide popular support. A June 2003 poll of Pennsylvania voters by a Republican polling organization found that 68% of Pennsylvanians support legislation that would ban discrimination based on sexual orientation, gender identity or expression. Equal rights in workplace are supported by 84%, in public accommodation by 81%, and in housing by 77%. Interestingly, the majority of Pennsylvania voters incorrectly believe that these rights are already secured by federal law and 38% thought they were protected by state law.

More Protection in New Jersey

New Jersey is far ahead of Pennsylvania when it comes to protecting against discrimination on the basis of sexual orientation. Discrimination against gays in employment, housing and public accommodations has been

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Recent Court Decisions Expand Definition of Retaliation

by Tiffanie C. Benfer

Recent decisions by the U.S. Supreme Court and the United States Court of Appeals for the Third Circuit have made it easier for employees to bring a retaliation claim against an employer in Pennsylvania and New Jersey. In fact, an employer that does not properly handle a claim of discrimination or sexual harassment may find itself liable for retaliation even if the underlying claim is without merit.

Retaliation Can Create a Claim Despite a Meritless Discrimination Claim

Title VII of the 1964 Civil Rights Act makes it unlawful for an employer to retaliate against an employee who has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. Some acts plainly constitute retaliation, including, hiring, firing, failing to promote, reassignment with significantly different responsibilities, or making a significant change in the employee's benefits. However, the Circuit Courts of Appeals have issued conflicting interpretations of what other actions by an employer constitute retaliation under Title VII.

The federal courts, for example, are split on whether an employee can bring a retaliation claim based upon a hostile work environment. In *Jensen v. Potter,* an opinion authored by Justice (then Judge) Alito just prior to his appointment to the Supreme Court, the Third Circuit concluded that an employee can establish a retaliation claim based upon a hostile work environment. In doing so, the Third Circuit joined the majority holding that the Civil Rights Act prohibits severe or pervasive retaliatory harassment by the employer.

The Supreme Court recently expanded the scope of acts which will be considered retaliation in *Burlington Northern & Santa Fe v. White*. The Court concluded that the anti-retaliation provision forbids not only retaliatory actions that have an effect on the terms and conditions of the employment relationship, but may include retaliatory actions taken by an employer that cause an employee harm outside the workplace. The Supreme Court declared that all such actions are forbidden in order to achieve the objective of the anti-retaliation provision: to prevent harm to an individual who seeks a workplace in which he or she is not discriminated against because of his or her race, ethnicity, religion or gender.

In order to successfully bring a retaliation claim against an employer, an employee must establish that the employer's actions would deter a reasonable employee from making or supporting a claim of discrimination or sexual harassment. The trier of fact shall consider the particular circumstance in each case and determine whether such actions by the employer would deter a reasonable employee, similarly situated, from making or supporting a claim of discrimination or sexual harassment. Consequently, an employer's actions could constitute retaliation in one case and not in another. For example, if an employee complains of sexual harassment and then the employer informs the employee that she must begin her work day one hour earlier, it may, depending upon other factors, be deemed an act of retaliation. A change in schedule could have a significant effect on an employee with small children and might be considered an act of retaliation to that employee. In contrast, a change in schedule may not necessarily be considered an act of retaliation for another employee. A jury will need to consider whether the specific facts show that the employer's actions were retaliatory.

Even prior to these decisions, it was often easier for an employee to successfully bring a retaliation claim against an employer rather than a claim strictly based on discrimination. With this expanded reach of the law, employees will have an even easier time sustaining a claim of retaliation. The Washington Post recently reported that the Equal Employment Opportunity Commission has experienced a surge in the number of retaliation cases after the Supreme Court's decision in *Burlington Northern & Santa Fe v. White*.

Take Every Claim of Harassment Seriously

Whether you are an employer or an employee, these decisions concern you. To minimize the risk of a retaliation claim, an employer in Pennsylvania or New Jersey must be more vigilant of its own, and its managers', actions after an employee makes or supports a claim of discrimination or sexual harassment. It is important that an employer is cognizant of the fact that even if it is found not to have discriminated against the employee, the employer can still be found responsible for retaliation.

As for an employee, if you have made or supported a claim of discrimination or sexual harassment and are subsequently subjected to any adverse consequences, whether at your place of employment or elsewhere, you may have a retaliation claim if such actions would deter a reasonable employee from making or supporting a claim of discrimination or sexual harassment. Actions that now may constitute retaliation include: an unfounded report to the local authorities about the employee made by the employer, routinely blocking an employee's parking spot and defacing or destroying an employee's personal property.

Despite the added challenges created by these recent decisions, one must keep in mind that the goal is to create a workplace free of unlawful discrimination, and one in which employees feel free to "secure or advance" their right not to be discriminated against.

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Fore-Warned Is Fore-Armed cont. *(continued from page 4)*

sign checks and pay bills for their parent but not have the funds pass to them upon the parent's death.

What's In The Box

Another area of unexpected consequences arises in the disposition of bank safety deposit boxes at the death of an owner/lessee, whether individually or jointly held. It has become a common practice of many banks to entice customers to open a new account by throwing in the lease of a safety deposit box for the first year without having a fee charged to the customer. As a result, when the estate of a decedent is administered and the assets reviewed, a check of bank records where the decedent had his or her accounts can often reveal a safety deposit box in the decedent's name that no one knew about. In that safety deposit box, there could be jewelry, securities, bonds, the decedent's Will, cemetery deed, insurance policies, titles to vehicles, deeds to properties and any number of additional items. Moreover, the Pennsylvania Department of Revenue will want to know the contents of that box so that they can get their fair share of inheritance taxes paid on the value of the contents.

Under the Pennsylvania Inheritance and Estate Tax Act, entry into a joint lessee's safety deposit box is prohibited by anyone other than the decedent's spouse unless certain specific procedures are followed after the death of one of the joint lessees. Over the years, the Pennsylvania Department of Revenue has implemented a number of procedures to facilitate the inventory of safety deposit boxes and eventually implemented a more user friendly program. Now, after written application to the District Revenue Office, a lawyer can be authorized as the appointee of the Department to inventory the box with the Personal Representative and complete the required forms. Prior to opening the box, a Certificate of Authority to inventory the box is sent to the lawyer by the Department of Revenue with a copy to the bank, and only that lawyer appointee may complete the inventory and accompanying documents which are forwarded to the Department.

If the safety deposit box is rented by the decedent and a surviving spouse, the spouse may enter the box after the decedent's death to retrieve the Will and cemetery deed, but a similar complete list of the inventory of the box should be made and list the parties present as well as the date the inventory was made.

Simple Will Search

If the safety deposit box was rented by the decedent with another person other than a spouse, or by the decedent alone, the box may be opened in the presence of a bank employee, only for the purpose of removing the Will and cemetery deed. The bank employee must make or cause to be made a record of the documents removed from the box during the entry. In addition, where the estate heirs do not believe there are any valuable assets in the box, the bank can be authorized to do a Will search just to see if there is anything in the box or if it is indeed empty, rather than going to the expense of hiring an attorney to inventory the box. However, not all banks are willing to do this.

Enter At Your Own Risk

A significant problem arises when the decedent rented the box with a son or daughter or any other person other than a spouse. Under the Inheritance and Estate Tax Act, the procedures to enter and inventory the box as outlined above must be followed, that is, the personal representative of the estate should have an attorney appointed by the Pennsylvania Department of Revenue, who then has the authority to enter the box and complete the inventory and forms required and forward them to the Department of Revenue. However, often after the death of a parent, a joint lessee of the box with the decedent, more often than not, an adult child unaware of the Tax Act's requirements and procedures, goes to the bank, enters the box, and removes the contents of the box. The bank employees, being unaware of the death of the co-lessee because the adult child never informs the bank employee, allows the entry because the adult child or other joint lessee is a co-lessee of the safety deposit box and entitled to entry. The co-lessee then removes the contents of the box and may even terminate the lease on the box. Now the bad news. Where a co-lessee enters a safety deposit box after the death of decedent co-lessee, without following the Tax Act's procedures as outlined above, the entering party, whether an adult child or whoever the co-lessee may be (other than a spouse of decedent), will be guilty of a misdemeanor of the third degree.

The penalty for such a misdemeanor is a term of imprisonment of not more than one year. If the bank employee, who permitted entry by a co-lessee, had knowledge of the other co-lessee decedent's death and permitted entry by the joint lessee in violation of the provisions of the Act, they too are also subject to the penalty.

Needless to say, the penalty for entering a safety deposit box of a deceased parent with whom an adult child was a joint lessee on the box without following the Inheritance and Estate Tax Act procedures, gives rise to truly unexpected consequences—like jail! The only defense is lack of actual knowledge of the death of the joint co-lessee (this may be hard for an adult child to argue). In addition, the Department of Revenue does not have to prove that tax evasion was the motive for unauthorized entry. Just the improper entry in and of itself is the offense and subject to the penalty.

Having experienced a client who never advised the writer of the existence of the safety deposit box even when asked and who only discovered after the fact that the client entered the box in violation of the Act's procedures, I offer this as a cautionary tale. The Department of Revenue, like any taxing authority, does not look kindly upon blatant though innocent violations of their procedures. And as always, ignorance is no defense.

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When Small Business Owners Divorce cont. *(continued from page 3)*

Generally, Pennsylvania Courts will impose upon the majority owner to act with the utmost good faith and loyalty in transacting corporate affairs. The courts look at actions taken by the majority as they affect the minority owner to make sure that they are "intrinsically fair" to the minority's interest in the business. A minority owner is acutely vulnerable in the small business setting principally because of two factors. First, there is no market liquidity for his minority interest. Secondly, because the majority owner has controlling interest, he is able to dictate to the minority owner the manner in which the corporation will be operated. As a consequence, the challenge by a minority owner to the conduct of a majority owner places the minority owner on the horns of a dilemma. He cannot profitably leave nor safely stay because, in reality, the only buyer of his minority interest in the business will be the majority owner.

Under Pennsylvania law, a dissatisfied minority owner has a heavy burden enlisting the Courts to craft a remedy which would secure the value of his minority ownership interest. Unless the minority owner can prove that he has essentially been the victim of a "squeeze out" or "freeze out", with a showing that the majority has acted "illegally, oppressively or fraudulently", the minority owner may find himself on the outside without any remedy to either recover the value of his ownership interest or regain the ability to participate in the operation of the business.

Litigation Remedies

In litigation between warring owners, the lawsuit will contain the causes of action cited above and most likely will also contain provisions seeking the appointment of a custodian over the business or will seek the court to liquidate the business entity by the appointment of a receiver to wind down and dissolve the entity. Pennsylvania law would authorize the court to appoint a custodian over the business when there is a deadlock on the Board of Directors, the shareholders are unable to elect directors or those in the control of the corporation have acted "illegally, oppressively or fraudulently" toward one or more holders or owners of 5% or more of stock in the business. Dissolution of the entity may also be a remedy brought by the majority. However, dissolution is rarely imposed by the Courts in Pennsylvania even where there has been "illegal, oppressive or fraudulent" conduct against the minority because Section 1981 also requires that the dissolution of the corporation "be beneficial to the interests of the shareholders that the corporation be wound up and dissolved".

The reasons why most Pennsylvania Courts are loath to order a dissolution of a corporation are both numerous and valid, not the least of which is the loss of jobs and economic benefits to the employees as well as to third parties who deal with the corporation. Moreover, in almost all litigation between shareholders, the ultimate issue, whether statutorily provided or as a result of the Court's exercise of its equitable powers, will be the buyout of one shareholder by the other. Although Pennsylvania law does not provide for a buyout of a minority shareholder's interest, as does the business corporation law of other jurisdictions, Pennsylvania Courts have been leaning towards a judicially crafted remedy in the form of a forced buyout of the minority shareholder's interest in the small business.

Avoiding Litigation

Ultimately, the ability to resolve the business divorce, like a marital divorce, is in the hands of the divorcing parties. Different mechanisms can be utilized to resolve the conflict, either before or after litigation commences. A well drafted Shareholders Agreement (there is a theme here) can outline how the conflict will be resolved but absent an agreement, experienced counsel for both sides know that non-judicial resolutions are favorable over a Court mandated resolution. Mechanisms such as face to face negotiations or mediation through an independent, experienced third party can resolve expensive litigation. Sometimes, dividing the business by product line or geographic area can work.

Finally, if no solution appears satisfactory, the parties can agree to sell the business—assuming the sales price can be agreed upon—or absent a willingness to sell, the parties can agree for one to buy out the other. The buy out by one of the other can also cause the fight to continue interminably. Thus, a frequently used mechanism to avoid the continuation of the fight over the valuation is to employ a "Russian Roulette" theory of setting the price. The "Russian Roulette" theory simply provides that the party offering to sell will state the price at which he wishes to sell while the other third party has the option to be either a buyer or seller at that stated price. Reality, fairness and balance can be the result of this approach provided that the use of the "Russian Roulette" mechanism is not hamstrung by numerous and unreasonable conditions.

In conclusion, a business divorce, like a marital divorce, is an emotional rollercoaster for all involved. When the decision to divorce is made, unless there is an effective, well drafted Shareholders Agreement, the process of resolving all the owners' interest in the business will be an experience that prudent, small business owners will never, ever wish to repeat.

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Fax Blasts—Don't Fax Me I'll Fax You!!! cont. *(continued from page 7)*

transmissions; (2) recover the greater of the actual monetary loss from such a violation, or $500 for each junk fax; or (3) both an injunction and monetary damages. Additionally, if a Court finds that the sender willfully or knowingly violated the TCPA, or the regulations prescribed under the TCPA, the Court may, in its discretion, increase the amount of the award to an amount equal to not more than three times the amount of monetary damages.

The TCPA's requirements create an extremely high hurdle for any sender to overcome unless they already have an EBR. Each recipient needs to be examined on a case by case basis in order to determine if a sender can in fact send a fax to them based on their own particular facts. Consequently, fax blasts to many recipients at the same time which advertise the products and/or services of the sender may very well result in a violation of the TCPA.

Pennsylvania Law

In addition to the TCPA, numerous states have enacted their own laws regarding unsolicited faxes. In Pennsylvania, pursuant to the Unsolicited Telecommunication Advertisement Act, (the "PA Act"), there is no direct prohibition of sending unsolicited fax messages from a fax machine located in the Commonwealth unless:

1. The sender includes false or misleading information in the return address portion of the facsimile such that the recipient would be unable to send a reply message to the original sender;
2. Contains false or misleading information in the subject line; or
3. Fails to operate a valid sender-operated toll-free telephone number that the recipient of the unsolicited fax may call to notify the sender not to transmit further unsolicited documents.

Pursuant to the PA Act, any violation of the PA Act constitutes a violation of the Unfair Trade Practices and Consumer Protection Law and therefore, such violation can carry with it the imposition of reasonable attorneys' fees in addition to any other damages that may be claimed. The Pennsylvania Attorney General's Office will investigate any complaints received concerning violations of the PA Act, and if the Attorney General finds a violation, they may bring an action to impose a civil penalty and seek injunctive relief. The Attorney General will give 10% of any civil penalty, not to exceed $100, collected to the person filing the complaint leading to the civil penalty. Additionally, for willful violations of the PA Act, the court may increase the amount of an award to an amount not exceeding $1,500.

New Jersey Law

In contrast to the PA Act, the New Jersey State Legislature has basically adopted the same Statute as the federal TCPA, with the caveat that non-profit organizations, including but not limited to, professional trade associations, and their members, are exempt under certain circumstances from the NJ Act. The NJ Act is limited to senders located within the State of New Jersey sending faxes to recipients located within New Jersey.

Comparing the NJ Act to the TCPA, the NJ Act permits non-profit organizations, including but not limited to, professional trade associations, to send unsolicited advertisements to the fax machine of any person, other than a new or existing member, provided that the advertisement is intended to give the person notice of an event that is in furtherance of the organization's purpose, and further provided that such unsolicited advertisement shall provide clear and conspicuous notice on the first page of the unsolicited advertisement as follows:

1. Disclosure to the recipient that the recipient may request the sender not to send any future unsolicited advertisements to the recipient's fax machine;
2. The domestic address and fax number of the sender for the recipient to transfer such a request to the sender; and
3. The requirement that any request by the recipient to the sender to not receive faxes must be sent in writing to the sender's domestic address or sent by return fax to the sender's fax number in order to be effective.

Non-profit organizations, including but not limited to professional and trade associations, and their members, are exempt from the NJ Act, and may send unsolicited advertisements to their new and existing members in furtherance of the organization's purpose, if the organization provides to each of its prospective new members, at the time of membership application or to each of its existing members at the time of membership renewal, clear and conspicuous notice of:

1. The member's right to request the organization, or other members of the same organization, whatever the case may be, not to send any future unsolicited advertisements to the member's fax machine;
2. The organization's domestic address and fax number to which its members may transmit such a request to the organization; and
3. The requirement that any such request to the organization shall be sent in written form to the organization's domestic address or sent by return fax transmission to the organization's fax number in order to be effective.

In accordance with the NJ Act, any person aggrieved by a violation may bring an action in the Superior Court in the county where the fax was either sent or received, or in which the plaintiff resides, for damages or to enjoin further violations. A violation of the NJ Act can result in a judgment for the actual monetary loss sustained from such violation, or $500 for each violation, whichever amount is greater, together with the imposition of reasonable attorneys' fees and costs. Additionally, if the plaintiff establishes that the sender was notified by return fax or another writing to cease and desist sending junk faxes, the court shall enter a judgment, for actual damages or $1,000 for each violation, whichever amount is greater, together with the imposition of reasonable attorneys' fees and costs of suit, not to exceed $1,000.

Conclusion

In examining the Federal, Pennsylvania and New Jersey state laws regarding solicitation via facsimile it is apparent that each recipient needs to be examined on a case by case factual basis. Furthermore, it is imperative to determine what state the fax is originating from and what State the fax is being sent to in order to determine the applicable regulation that may apply.

If you are sending faxes as part of your marketing efforts or if you are receiving unwanted faxes please contact our office to further discuss your obligations on a more detailed basis and/or any rights that you may have against senders' fax blasts pursuant to applicable laws.

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Who's In Charge Here?... cont. *(continued from page 6)*

You Can be Liable if you Did Not Know What was Happening on the Work Site, but you "Should Have" Known

There are two types of liability, when a supervisor with immediate or successively higher authority over the employee creates a hostile environment and takes tangible employment action, or when it is a coworker who is the perpetrator.

If the supervisor was the harasser, the employer has no defense if the employee suffered an adverse job action. This employment action could include the loss of the job, or something as simple as a change in shift or denial of overtime. So that even if the employer argues that it exercised reasonable care to prevent and correct the harassing behavior or that the employee failed to take advantage of preventive or corrective opportunities provided by the employer, liability still attaches.

If the harasser was a coworker, the employer is liable if an employer knew or should have known of the harassment and failed to take proper action. That proper action consists of a thorough investigation and remedial action which is sufficient to prevent further harassment in the future.

What Constitutes Harassment or a Hostile Work Environment?

Liability exists when:

1. The employee suffered intentional discrimination because of race or gender;
2. The harassment was severe or pervasive;
3. The discrimination detrimentally affected the employee;
4. The discrimination would adversely affect a reasonable person of the same race or gender in that position.

What Constitutes Severe or Pervasive?

In order to be actionable under Title VII, a sexually or racially objectionable environment must be both objectively and subjectively offensive. It must be something that would be objectionable to any reasonable person, and it must be objectionable to the victim. The Courts will determine whether the environment is sufficiently hostile or abusive by looking at the frequency and severity of the conduct and whether it was physically threatening or humiliating. The conduct must also unreasonably interfere with an employee's work performance.

What if the Company has a Written Anti-Discrimination Policy?

The Supreme Court has held that an employer is vicariously liable for the acts of a managerial employee and open to punitive damages if the employer failed to show a good-faith effort to comply with Title VII. To meet the good-faith compliance standard, the employer must at least adopt anti-discrimination policies and make a good faith effort to educate its employees about these policies and the statutory prohibition. The employer must demonstrate both that they maintain a strong policy against harassment and that they adequately trained its employees to comply with the policy.

How Does an Employer Stay Out of Trouble?

Adopt a written policy. Train their employees on that policy. Implement the policy. Keep their eyes and ears open. When there is a complaint, investigate it thoroughly. Punish the wrongdoer sufficiently to prevent others from harassing. Provide sensitivity training after an incident of harassment occurs.

Stay alert in any working arrangement. You may be the employer, even if you do not think so.

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Protection Against Discrimination

(continued from page 10)

banned by the Law Against Discrimination since 1992; amendments enacted on December 19, 2006 and effective in June 2007 will extend this protection to "gender identity and expression," which includes those who are transgender. On October 25, 2006, the New Jersey Supreme Court, in *Lewis v. Harris,* held that the state legislature must take action to either amend the state marriage statutes to include same-sex marriage or must create a parallel structure that will make the rights and benefits of civil marriage available to same-sex couples. In compliance with the Court's Order, the New Jersey Legislature has now made New Jersey the third state in the U.S. to recognize civil unions for same sex couples. The *Lewis v. Harris* decision and the legislation which followed will likely impact the obligations of employers in New Jersey to provide medical benefits to same-sex partners to the same extent that those benefits are provided to spouses, and to allow family leave to care for a same sex partner under New Jersey's Family Leave Act.

With its stable of experienced attorneys in various areas of employment law, **Hill Wallack LLP** stands ready to aid both employees and employers in dealing with a panoply of issues that may arise, including the design and creation of internal policies and procedures to address workplace discrimination problems or litigation.

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Registration Required... cont. *(continued from page 5)*

The proposed agreement of sale must contain a clause which grants the buyer the unconditional right to cancel the agreement within seven days after receiving a fully executed contract, with or without cause. The agreement of sale must also provide that all deposits are to be placed in escrow with a third party until closing, unless the deposits are bonded to the satisfaction of the Commission.

The developer is required to designate a New Jersey licensed real estate broker as its Broker of Record. The developer may also designate Supplemental Brokers to assist with the sales of regulated properties to New Jersey residents. Each Broker is required to certify to the Commission that he/she is familiar with the registration and has physically inspected the property, is familiar with the Act, and is not aware of any facts or other information which leads them to believe that the information in the registration does not provide a full and fair disclosure of the regulated properties.

The developer must supply the Commission with adequate proof that it has the financial capability to complete all the improvements associated with the regulated properties. This is typically accomplished by the posting of bonds or letters of credit. If the municipality where the regulated properties are located already required the posting of a bond or other financial security for completion of the project the Commission will likely accept such proof as satisfaction of this requirement.

Commission Review

The time period from the date of submission of a complete application to the Commission to the date of receipt of an Order of Registration is approximately 2-3 months. Upon receipt of the Order of Registration the targeted marketing to New Jersey residents may legally commence. Thereafter, for so long as materials are sent to New Jersey residents, an annual report is required to be filed with the Commission.

Pennsylvania developers should consider the benefits of marketing to New Jersey residents as a means to increase sales. Hill Wallack LLP has registered several out of state projects with the Commission, and can assist Pennsylvania developers with this process.

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