HILL WALLACK LLP
ATTORNEYS AT LAW

Quarterly
NEWSLETTER

Volume 18, Number 2

IN THIS ISSUE

Message From the Managing Partner

Over the past year, Hill Wallack LLP has experienced continued growth as we joined forces with one of New Jersey's premiere regulatory law firms, Sandson & DeLucry LLC, based in Atlantic City. As part of that growth we formed a Gaming Law Practice Group to provide legal services to casinos and other gaming related businesses. Former Sandson & DeLucry attorneys Richard J. DeLucry and Timothy J. Lowry as well as former Atlantic City Deputy Solicitor Joseph R. Dougherty form the nucleus of the Hill Wallack LLP Atlantic City Office.

The expansion of Hill Wallack LLP's offices in Atlantic City has allowed our firm to place lawyers closer to the clients we serve. As we did in Doylestown and Langhorne, Pennsylvania, Hill Wallack is making a significant long term commitment to Atlantic City and to expand our South Jersey clientele. Although Hill Wallack LLP's regulatory practice has grown over recent years, the addition of the Gaming Law Practice Group presents significant opportunities for increased and expanded legal services to our already significant government procurement practice and industry-specific practice groups with a focus on the gaming, banking and insurance sectors.

Paul P. Josephson, Hill Wallack LLP's partner-in-charge of the Regulatory & Government Affairs Practice Group is now also the head of the Gaming Law Practice Group and Hill Wallack LLP's Atlantic City office. Mr. Josephson is former Chief Counsel to the Governor with over 15 years experience in casino, gaming and other regulatory law matters. He spearheaded casino regulatory streamlining legislation in 2002, and also served as Director of the Division of Law within the Attorney General's office.

We are bullish on Atlantic City and South Jersey. There is no doubt the casino industry is one of New Jersey's critical economic engines. We have watched this industry establish itself and mature into a steady contributor to the State's economy over the past two decades. The region's continued growth depends on sound regulatory and tax policy that encourages more private investment, while retaining the high standard for integrity that attracts capital and allows the industry to flourish. We intend to use our skills in brokering innovative regulatory solutions in Trenton to advocate for the casino industry and its leaders.

Our well-regarded Real Estate, Land Use, Community Association, and Trial and Litigation Practices based in Princeton will thrive from our presence in Atlantic City. Our local presence is real and substantial and will make our representation of South Jersey clients even more efficient and economical. Hill Wallack LLP looks forward to its expansion into this key market with great excitement and anticipation.

In our lead article *"Equities Dictate Against Strict Application of Merger Doctrine…"*, Liz Holdren discusses developments in the foreclosure process. *"Just Compensation—Non-Compensable Damages in Eminent Domain Proceedings"* written by Todd Greene concentrates on the power of the State to take private property under the Eminent Domain Act. Len Collett outlines lobbying law in his article *"What the Heck is a Government Affairs Agent?"* Ken Thayer addresses employer's protection against intoxicated employees in his article *"Workers' Compensation and the Intoxication Defense,"* while Eric Kelner gives insight into the Bankruptcy Code in his article *"What Qualifies As A Single Asset Real Estate Case?"*. Cherylee Judson brings us up-to-date on PIP Coverage in her article, *"Minivans and SUVs Used for Business Purposes Must Carry PIP Coverage"*. Finally, Irene Komandis examines gender identity in her article *"Legislature Amends New Jersey's Law Against Discrimination to Include A New Protected Characteristic"*.

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*. We hope that you will find this newsletter useful, and we would be pleased to have your comments or suggestions.

– Robert W. Bacso

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Equities Dictate Against Strict Application of Merger Doctrine Where It Would Serve to "Handcuff" Bank

by Elizabeth K. Holdren

In the recent New Jersey Bankruptcy Court case, *In re: Price,* the Honorable Michael B. Kaplan, United States Bankruptcy Judge found that equities dictated against a strict application of the merger doctrine. In Price, the bank, represented by Hill Wallack LLP, had obtained a foreclosure judgment and scheduled a sheriff's sale prior to the debtor filing a Chapter 13 Bankruptcy Petition. As a result of the bankruptcy filing, the bank's foreclosure action was automatically stayed. Over a period of approximately three (3) years during the course of the bankruptcy case, the bank made a total of eight (8) applications for relief from the automatic stay to allow it to return to the foreclosure action to proceed with its sheriff's sale, as a result of the debtors' repeated defaults. Each of the bank's applications was denied and the bank was assured that it would be paid in full upon the sale of the debtor's real estate. Eventually, the bankruptcy trustee obtained an order allowing him to sell the property, the property was sold, and the bank was paid in full. However, the trustee later filed an adversary complaint against the bank seeking the recovery of certain fees and costs included in the payoff figure, including attorney's fees and costs.

Equitable Exception to Merger Doctrine

The trustee argued that under the case *In Re: A&P Diversified Technologies Realty, Inc.,* the note and mortgage merged into the foreclosure judgment, and therefore the bank was limited to the attorney's fees which were included in the foreclosure judgment. In the *A&P* case, the note and mortgage included a provision that the borrower was responsible to reimburse the bank for the attorney's fees and costs it incurred in collection of the debt and protecting its rights under the loan documents. The court determined that the bank did not maintain that benefit after it obtained a final judgment in foreclosure, and the judgment was satisfied through a sale in the foreclosure process. However, in that case, the mortgagee was granted relief from the automatic stay allowing it to proceed with its foreclosure action and obtain a judgment in that action

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"Just Compensation"—Non-Compensable Damages in Eminent Domain Proceedings

by Todd D. Greene

When the State exercises its power to take private property under the Eminent Domain Act, it must pay just compensation for the property taken. "Just compensation" is defined as the fair market value of the property as of the date of the taking, determined by what a willing buyer and willing seller would agree to, neither being under any compulsion to act. It is the value that would be assigned to the property by knowledgeable parties freely negotiating under normal market conditions based on all the surrounding circumstances at the time of taking. However, under the laws of the State of New Jersey, not all losses suffered by a condemnee are compensable. The following presents a general description of the damages our courts have held to be non-compensable under the laws of eminent domain.

Loss of Business Profits

Most jurisdictions including New Jersey, do not allow for recovery of loss of business profits or good will resulting from eminent domain proceedings. The rationale for denying recovery of business profits and good will is the profits of a business are too uncertain and depend on too many contingencies to be accepted as evidence of the usable value of the property upon which the business is situated. See *State by the Commr. Of Transp. v. Dickert.* Economic gains are realized from the skill of the workers and management and are independent of the real estate, which is the only asset the condemning authority is acquiring.

Loss of Access

Under the State Highway Management Act, each owner of real property is entitled to *reasonable access* to the general system of streets and highways in the State, but not to a particular means of access. The general rule is that the property owner is not entitled to access to his land at every point between it and the highway, but only to free and convenient access to his property and the improvements on it. Essentially, no compensable damages result from the government's change to a traffic pattern where the only harm that results is the inconvenience of having to navigate a more circuitous route. The reasoning behind this rule is that the change in the traffic pattern is borne by the general public and is not a private injury suffered by the individual property owner. *See State v. Charles Inv. Corp.*, (holding that property owner was not entitled to compensation for the economic harm suffered as a result of the decreased traffic flow directly in front of his station). Moreover, the change in the traffic pattern is not compensable because it is an exercise of the government's police power and not a "taking" pursuant to the Fifth Amendment.

Visibility

In *State v. Stulman,* the Appellate Division specifically considered a damages claim based on the loss of visibility. The court rejected the owner's argument that he was entitled to compensation for the loss of visibility of his property because the loss resulted, not from the partial taking in the case, but from the construction of a new highway on property belonging to others.

The right to compensation for loss of visibility is denied principally upon the theory that one has no control over his neighbor's property and therefore could not prevent his neighbor, under

"…under the laws of the State of New Jersey, not all losses suffered by a condemnee are compensable."

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What The Heck Is a Government Affairs Agent?

by Len F. Collett

The following article discusses the scope of the lobbying law and several exemptions from the lobbying law that may apply to a business' interaction with State officials. These rules define what is and what is not lobbying activity for purposes of lobbyist disclosures to State regulatory bodies.

"The independent, bipartisan Election Law Enforcement Commission (ELEC) is responsible for the regulation of lobbying activity."

Scope Of The Lobbying Law

New Jersey's lobbying act (the "Act") and regulations, govern the practice of lobbying in New Jersey. The independent, bipartisan Election Law Enforcement Commission (ELEC) is responsible for the regulation of lobbying activity. The law requires anyone who is "employed, retained or engages himself as a governmental affairs agent" to register with ELEC prior to any communication with, or the making of any expenditures providing a benefit to, a member of the Legislature, legislative staff, the Governor, the Governor's staff, or an officer or staff member of the Executive Branch. Such individuals and their employers and clients must also file quarterly activity reports, as well as annual financial disclosures by February 15, for the preceding calendar year.

Governmental Affairs Agents

The Act governs the designation and regulation of "governmental affairs agents" formerly known as "legislative agents" and commonly called "lobbyists." Note however that in New Jersey's regulatory scheme, "lobbyist" is itself a defined term that refers to the employer or client of a governmental affairs agent; thus a business may fall into the definition of a lobbyist and the individuals it employs or retains to influence legislation, regulation or government process might be governmental affairs agents under this statutory scheme. For purposes of this article, the term "lobbying" is used to denote the activities of a governmental affairs agent, (hereafter "agent" or "GAA"), while the term "lobbyist" will refer only to a client or employer of a GAA.

ELEC defines an agent or GAA as a person who is compensated directly or indirectly, or reimbursed more than $100 in any three-month period, to influence legislation, regulations, or governmental processes by communicating with (for more than 20 hours in a calendar year), or providing a benefit to a State official covered by the Act. Time expended by a GAA to prepare for such communications is included in determining whether the 20-hour threshold has been reached by any particular individual.

Activities Exempt from Lobbying Act

The regulations governing these obligations also lists certain activities that are not governed by the lobbying registration and reporting requirements. First are categorical exemptions for particular sorts of entities and organizations. The Act does not apply to:

- Government and its Agents: This includes the acts of the government of the United States

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Workers' Compensation and the Intoxication Defense

by Kenneth W. Thayer

The New Jersey Workers' Compensation Act states that an employer holds a defense to the payment of benefits if the cause of the employee's injury was due to the employee's intoxication. More specifically, the Act states that "compensation benefits are required in cases of personal injury or death, arising out of the course of employment … except when the injury or death is the intentionally self-inflicted, or when intoxication or the unlawful use of controlled dangerous substances … is the natural and proximate cause of the injury or death." New Jersey courts have interpreted the statute as requiring the intoxication to not only be the "natural and proximate cause" of the injury, but to be the "sole cause" of the accident in order for the employer to benefit from the defense.

Recent Case Law

The most recent case to examine this issue is the matter of *Tlumac v. High Bridge Stone*. In *Tlumac,* the employee was hired as a tractor trailer driver for the employer. The employee claimed that he fell asleep at the wheel of his truck, causing the truck he was driving to veer off the road and strike a utility pole. The police officer who investigated the accident claimed that he detected the smell of alcohol on the employee. The employee was questioned as to whether he had been drinking, but stated that he had been drinking the night before and rather that his falling asleep at the wheel was the cause of the accident. Emergency medical treatment was provided, where blood samples were drawn at the hospital. The employee suffered serious injuries and subsequently filed a workers' compensation claim.

A trial was held in which the employer presented evidence that the employee was intoxicated at the time of the accident and therefore was barred from pursuing and subsequently collecting compensation benefits. The employer presented medical evidence that, at the time of the accident, the employee's estimated blood alcohol level was between .10% and .12%, well above the legal limit. The employee testified that he had been drinking the night before, however, fell asleep at the wheel due to lack of sleep because of long work hours and added family obligations. On these facts, the trial judge concluded that the employee's intoxication was not the "sole cause" of the accident. The trial judge stated that the intoxication may have been one of many contributing factors leading to the cause of the accident, but was not the "sole cause" of the accident.

The matter came before the New Jersey Supreme Court, which agreed with the trial judge and affirmed the decision granting benefits to the employee. The Supreme Court held that "unless the employer shows by a preponderance of the evidence that the employee's work-related injuries were caused solely by intoxication, the employee is entitled to recover workers' compensation benefits." Contributory factors such as an employee's home life stresses, excessive work hours, and prior activities will be examined in determining whether the intoxication or the combination of the intoxication and other factors lead to the cause of the work place accident. The burden is upon the employer, not the employee, to show by way of greater evidence that the intoxication was the only cause of the accident.

Possible Eradication of the Defense

The *Tlumac* decision is cause for concern for all employers in the State of New Jersey. Under the rationale of this case, the intoxication defense seems to no longer exist in the State of New Jersey, since the standard set by the Supreme Court is such a lofty one that few, if any, fact patterns could adequately fit to establish a successful

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"…the intoxication defense seems to no longer exist in the State of New Jersey…"

What Qualifies As A Single Asset Real Estate Case?

by Eric P. Kelner, Esq.

"…expedited reorganization track requires that the debtor begin making interest payments to the secured lenders ninety (90) days after the entry for the order of stay relief or the debtor has filed a plan for reorganization that has a reasonable possibility of being confirmed."

In a recent decision in the *Kara Homes, Inc.* bankruptcy case, the New Jersey Bankruptcy Court was required to make a ruling as to whether the Debtors were "single asset real estate entities", subsequent to the filing of motions for summary judgment by the secured lenders and the debtors' cross-motion for summary judgment. This determination would effect whether the expedited stay relief provisions for single asset real estate entities would apply to the debtors, which require the debtors to begin making interest payments to the secured lenders ninety (90) days after the commencement of the bankruptcy case unless the debtor has filed a plan of reorganization that has a reasonable probability of being confirmed.

Background

In *Kara Homes, Inc.*, a real estate builder filed a voluntary petition under Chapter 11 of the bankruptcy code along with 32 Debtor Affiliates (the "Affiliates"). The Affiliates owned separate real estate development projects for the construction of single family homes and condominiums. Kara Homes, Inc. owns ninety percent of each of the Affiliates and the principal of the corporation owns the remaining ten percent interest. On each of the Affiliates' voluntary petition the Affiliates placed a check in a box identifying the case as a "single asset real estate case". Each Affiliate also listed itself as a single asset real estate entity in response to a question on each Statement of Financial Affairs, which required the debtor to identify which of the debtor entities, if any, are single asset real estate entities. Subsequently thereto, each of the Affiliates amended their Statement of Financial Affairs to reflect that they were not, in fact, single asset real estate entities. The Affiliates then filed against each of the secured construction lenders, an adversary complaint for declaratory judgment seeking a determination that the Affiliates are not single asset real estate entities. The secured construction lender then filed motions for summary judgment seeking a determination that Affiliates were single asset real estate entities and the Affiliates cross-moved for summary judgment with respect to the same issue.

What are Single Asset Real Estate Entities?

Prior to the Bankruptcy Reform Act of 1994, the Bankruptcy Code lacked any express provision for a single asset real estate case. Then once the 1994 Act was enacted, there was a specific provision for the treatment of single asset real estate by defining the term "single asset real estate" in the Bankruptcy Code and by placing single asset real estate cases on an expedited reorganization track. This expedited reorganization track requires that the debtor begin making interest payments to the secured lenders ninety (90) days after the entry for the order of stay relief or the debtor has filed a plan for reorganization that has a reasonable possibility of being confirmed. If the debtor in a single asset real estate case is unable to comply with either of these provisions then the secured lender is entitled to stay relief.

The definition of single asset real estate first included a limitation to debtors with secured debts of no greater than $4 million. The $4 million cap was removed as part of the 2005 Bankruptcy Code revisions. Thus, the Bankruptcy Code currently defines "single asset real estate" as:

> real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by

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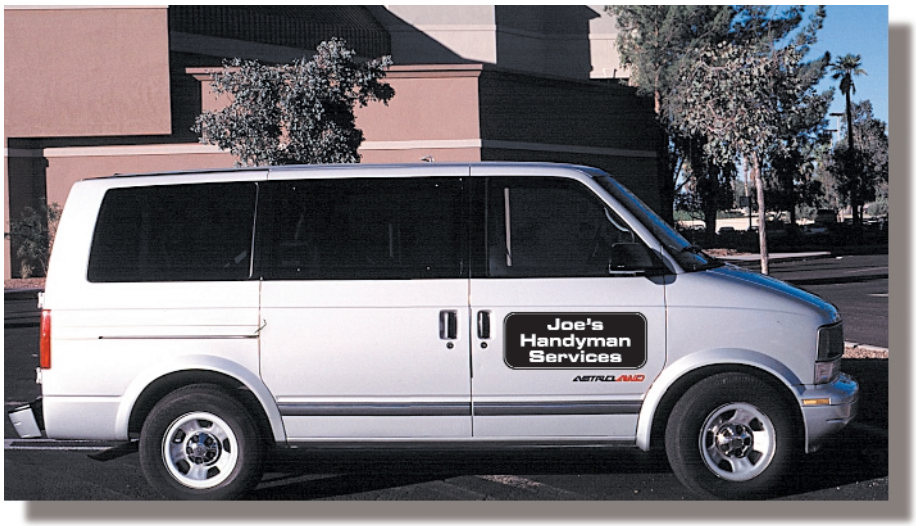
Minivans and SUVs Used for Business Purposes Must Carry PIP Coverage

by Cherylee O. Judson



A common misconception is that a motor vehicle that is owned and registered to a business is not required to carry personal injury protection (PIP) coverage. However, who owns the motor vehicle or how it is registered is not necessarily determinative of whether the vehicle is required to maintain PIP benefits under New Jersey's no-fault statute. Registration is a concept relating exclusively to the privilege to use an automobile on a public road; it is not a concept affecting the nature of the vehicle itself.

A fundamental principle of the no-fault statute is that it is only applicable to accidents involving "automobiles," which generally refers to private passenger vehicles or station wagon type vehicles. Accordingly, it is the nature of the vehicle which determines whether PIP coverage is required. This issue often arises when an injury is sustained by a person occupying a motor vehicle (usually a minivan or an SUV), which is owned by a business and used for commercial purposes. In these situations, our courts have repeatedly held that a minivan and an SUV are designed to be private passenger automobiles and are required to carry PIP coverage, regardless of how the vehicle is classified for registration and insurance purposes (i.e. whether it is insured under a commercial versus a personal policy of insurance).

What is PIP?

Under the New Jersey PIP statute, every standard automobile liability insurance policy currently in effect must have personal injury protection benefits. These benefits are effective regardless of fault and apply when a person sustains an injury as a result of an accident involving an "automobile." PIP benefits are available for injuries sustained in accidents where the injured party is: 1) occupying an automobile, 2) entering or exiting an automobile, or 3) "using" an automobile. PIP also applies to a pedestrian injured by an automobile or by an object propelled by or from an automobile. Generally, PIP benefits cover treatment that is medically necessary for injuries sustained as a result if the accident involving an "automobile."

What is an "Automobile" for PIP Purposes?

Pursuant to New Jersey law, there are two main categories of "automobiles" for purposes of PIP. First, an "automobile" is a "private passenger" or "station wagon type" vehicle, although certain types of even these vehicles are excluded based upon their particular use – such as those used as a "public livery or conveyance for passengers" or "rented to others with a driver." Second, an "automobile" refers to the broader category of "motor vehicles" (including those with a pickup body, a delivery sedan, a van, a panel truck or a camper) provided they are not used for business purposes. A vehicle's registration classification does not determine whether a vehicle is required to have PIP benefits; rather, the rule is to look first at the type of vehicle and then exempt some vehicles based upon their use. Importantly, commercial use is not the determinative factor.

Is a Minivan and/or SUV "Automobiles" Required to Maintain PIP Coverage?

Some may argue that a minivan or an SUV fall within the second category of "automobiles" and should be classified as a "van." If the minivan and SUV were considered a "van" and customarily used for business purposes, there would be no requirement for PIP coverage. This rationale, however, is misplaced because a "minivan" and an SUV do not have the same

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"…every standard automobile liability insurance policy currently in effect must have personal injury protection benefits."

SPOTLIGHT

NEW OFFICE

Hill Wallack LLP announced its merger with the law practice of Sandson & DeLucry LLC, one of Atlantic City's leading law firms. Hill Wallack LLP also announced the formation of a **Gaming Law Practice Group** to advise casinos, other gaming-related companies and those that do business with them.

Sandson & DeLucry attorneys ***Richard F. DeLucry*** and ***Timothy J. Lowry*** remain with the firm at the same location. Rounding out the Atlantic City office, former Atlantic City Deputy Solicitor ***Joseph R. Dougherty*** joined Hill Wallack LLP.

Paul P. Josephson, Hill Wallack LLP's partner-in-charge of the **Regulatory & Government Affairs Practice Group** will head the **Gaming Law Practice Group** and the Atlantic City office. Mr. Josephson is a former Chief Counsel to the Governor with over 15 years experience in casino, gaming and other regulatory law matters. He spearheaded casino regulatory streamlining legislation in 2002, and also served as Director of the Division of Law within the Attorney General's office.

Hill Wallack LLP's **Gaming Law Practice Group** consists of a team of attorneys with a history of successfully representing major casinos and companies involved in the lottery, horse racing, Indian gaming, and Internet wagering sectors, as well as their executives, investors, institutional financial sources, banks and vendors.

"The highly regulated and multi-jurisdictional nature of the gaming industry requires counsel well-versed in the operation of gaming venues as well as direct experience in New Jersey's regulatory environment. Likewise, companies that do business with casinos and others in the gaming industry require special counsel who understand the unique regulatory and business environment surrounding their business partners. Our team has that experience" Josephson said.

Hill Wallack LLP attorneys have handled the gamut of matters that confront gaming interests including licensing and enforcement issues, internal and special investigations, real estate development, land use and environmental projects, corporate financing, litigation and tax matters, as well as commercial, employment, collections and personal injury and workers' compensation litigation.

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NEW ATTORNEYS

Ryan P. Kennedy has joined the firm in its **Commercial Real Estate Practice Group** in the Princeton Office. He concentrates his practice in all aspects of commercial real estate acquisition and development, with particular emphasis on complex negotiations, urban development and transit oriented development. Mr. Kennedy earned his law degree from Seton Hall Law School. He previously served as Judicial Law Clerk to The Honorable Joseph L. Yannotti, New Jersey Superior Court, Appellate Division. A resident of Lawrenceville, he is admitted to practice in New Jersey.

Irene J. Komandis has joined Hill Wallack LLP's Princeton office as an associate in the firm's **Trial & Insurance Defense Practice Group.** Ms. Komandis concentrates her practice in the areas of trial & insurance defense and general litigation. She earned her law degree from Seton Hall University School of Law and is admitted to practice in New Jersey. She served as Judicial Law Clerk to the Honorable Joseph P. Quinn, J.S.C., New Jersey Superior Court, Law Division. Ms. Komandis is a resident of Kendall Park, NJ.

Tiffanie C. Benfer has joined the firm in the Doylestown, PA office in the **Employment & Labor Law Practice Group** concentrating her practice in employment discrimination and civil rights & constitutional litigation. Ms. Benfer is a graduate of the University of Baltimore School of Law and is admitted to practice in Pennsylvania and Maryland. She previously served as a Judicial Law Clerk to the Honorable Timothy E. Meredith and is a resident of Newtown Square, PA.

Denise M. Bowman has joined the firm in its **Business & Commercial Law Practice Group** in Hill Wallack LLP's Langhorne Office. She concentrates her practice in the representation of corporate entities and partnerships, buying and selling businesses and real estate, tax and regulatory issues, commercial litigation and the representation of clients in general

business matters. Ms. Bowman earned her law degree from Temple University, James E. Beasley School of Law. A resident of Langhorne, PA, she is admitted to practice in Pennsylvania and New Jersey.

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APPOINTMENTS & RECOGNITION

Edward H. Herman, a partner with Hill Wallack LLP in the Princeton Office, has been re-appointed Municipal Court Judge in the Borough of Spotswood in Middlesex County. Mr. Herman is a member of the firm's **Litigation Division** and partner-in-charge of the **Workers' Compensation** and **Automotive Dealers Business & Liability Practice Groups.** His principal area of practice is in the representation of major self-insured corporations, insurance companies and clients of third-party administrators in the defense of workers' compensation claims, as well as defense of tort liability and environmental litigation. Mr. Herman has been practicing law for more than 30 years. He is a recognized authority throughout New Jersey on the law and the practice of workers' compensation matters. He has presided as Municipal Court Judge in Spotswood since 1987 and also serves as Municipal Court Judge in the Boroughs of Plainsboro, Cranbury and Highland Park and the Middlesex County Jail.

Stephen M. Eisdorfer, partner of the firm in the Princeton office, where he is partner of the firm's **Land Use Division,** was recently appointed by the President of the New Jersey State Bar Association to the Bar Association's Special Committee on Appellate Practice. The Special Committee on Appellate Practice is the Bar Association's liaison with the Supreme Court and Appellate Division of Superior Court. They address all issues which affect practices and procedures in the Appellate Division and Supreme Court of New Jersey, including, but not limited to, commenting on proposed amendments to the Court Rules; promoting an open and ongoing exchange of views with appellate judges and court administrators and sponsoring cooperative efforts between the bench and the Association in order to enhance the quality, effectiveness and efficiency of justice at the appropriate level. Mr. Eisdorfer has a practice concentration on litigation in the state and federal courts and applications and proceedings before public agencies involving land use—including residential, commercial, industrial, and health care related projects, civil rights and consumer fraud. He is admitted to practice before the state and federal courts of New Jersey. A distinguished scholar, Mr. Eisdorfer has argued significant cases concerning anti-exclusionary zoning litigation, municipal zoning which discriminates against housing for the non-traditional households, and racial discrimination in selection of occupants for low-income housing.

Francis J. Sullivan, a partner of Hill Wallack LLP in the Langhorne Office, where he is partner-in-charge of the firm's **Business & Commercial Practice Group** was recently appointed as Vice President of the Charitable Foundation of the Bucks County Bar Association. The Charitable Foundation of the Bucks County Bar Association promotes and supports programs, organizations, and individuals throughout Bucks County who are engaged in activities designed to foster respect for the rule of law, the advancement of rights, liberties and protections under the law as well as activities which have as a principal purpose the advancement of social justice for the individuals, families and communities of Bucks County. Mr. Sullivan received a B.A. from La Salle College in 1969 and received his Law Degree from Villanova University School of Law in 1972. In 1987, he received a Master of Laws in Taxation from Villanova University School of Law and in 2004 received a Certificate in Estate Planning from the Graduate Tax Division of Temple University School of Law after completing a two year night program at Temple Law School. A resident of Yardley, PA, he is a member of the American Bar Association, the Pennsylvania Bar Association and the Bucks County Bar Association.

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A Recent Change to the Prevailing Wage Act Worth Noting: Update for Clients Working With the Public Sector

by Ryan P. Kennedy

> *"Failure to comply with the Act and pay the prevailing wage can lead to the public body terminating the right of the contractor to continue working on the project and impose administrative and even criminal penalties."*

New Jersey has a long-standing policy of protecting the compensation of workers and trades people who perform construction and other "public work" on behalf of the State. Under the Prevailing Wage Act, contractors are required to pay the "prevailing wage" for public work contracts. The amount of the prevailing wage for each craft or trade is established by the Commissioner of Labor and Workforce Development based on the wage paid to a majority of workers under collective bargaining agreements in the locality where the work is to be done. According to the public policy statement codified in the Act, the Legislature intended "to safeguard [worker's] efficiency and general well being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to efficiency and well-being."

Certainly, contractors who perform public construction work on behalf of the State, and its subdivisions and authorities should be quite familiar with the Act's requirements. For a contractor or employer performing "public work" those requirements include ascertaining the wage rate from the Commissioner for each trade or craft employed, filing written certifications to the public body detailing the wages paid and owing, and paying no less than the established prevailing wage. Contractors must post the prevailing wage rates at the work site, and are subject to audit and inspection by the Commissioner. Failure to comply with the Act and pay the prevailing wage can lead to the public body terminating the right of the contractor to continue working on the project and impose administrative and even criminal penalties. Additionally, the contractor and its sureties are liable to the public body for any excess costs related to the failure to comply with the Act, and contractors who fail to pay the prevailing wage for public work are subject to being placed on the debarment list for three years.

Historically, "public work" only included construction and certain other work done under contract with a public body and paid for out of the funds of a public body, or in certain limited circumstances where a public body was leasing or would be leasing property. However, a recent amendment to the Act expands its applicability to a whole new set of "work" not previously considered "public" and requires a fresh look by everyone working with the public sector to evaluate their compliance.

Recent Change in Law

On April 26, 2007, Acting Governor Richard Codey signed Assembly Bill 3890 into law, significantly amending and expanding the Prevailing Wage Act. The newly adopted amendment requires the payment of prevailing wages for most construction or repair work to be conducted on land **owned by a public body,** without regard to whether public funds are expended or a public body plans on leasing or utilizing the property. Put another way, even if the State is not paying for the construction work, the Prevailing Wage Act will now apply if the State or one of its subdivisions merely owns the premises where construction work occurs. Based on the new language expanding the definition of "public work" lessees and other entities conducting construction work on public property will now have to comply with prevailing wage requirements or potentially face the penalties provided both in the Act itself and under the criminal false claims statute. As Acting Governor Codey stated in the press release accompanying the revision:

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Legislature Amends New Jersey's Law Against Discrimination to Include A New Protected Characteristic

by Irene N. Komandis

Recently, Governor Jon S. Corzine signed into law an amendment to the New Jersey's Law Against Discrimination (LAD), to include "gender identity or expression" as a protected characteristic, offering recourse to persons subjected to employment discrimination based on their "gender identity or expression." The Act defines "gender identity or expression" as "having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth."

The Act codifies an Appellate Court decision in which *Enriquez*, the Plaintiff, claimed discrimination based on a sex change. In *Enriquez v. West Jersey Health System*, the Plaintiff, a physician and male-to-female transsexual, alleged discrimination when her employer failed to renew her employment contract, allegedly due to the physical changes Plaintiff was undergoing.

The Appellate Division, in interpreting the scope of LAD, held that "[i]t is incomprehensible to us that our Legislature would ban discrimination against heterosexual men and women; against homosexual men and women; against bisexual men and women…but would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder." In so finding, the Court held that sex discrimination under the LAD includes gender discrimination thereby affording Plaintiff protection under LAD for stereotyping or in any way discriminating against a man or woman who has opted to transform into the opposite sex.

The present amendment to LAD not only codifies the Appellate Division's holding prohibiting discrimination to employees based on gender identity, but formally makes "gender identity and expression" a protected class under New Jersey law. This means that a person who has transformed through surgical or other means into the opposite gender, or who is in the process of such transformation, is a protected class under our constitution.

Who is Protected Under this Amendment?

Prior to this amendment, LAD already afforded protection from discrimination to employees because of "race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, disability or nationality." With the inclusion of "gender identity or expression" into the Act, the express intent of the legislature is to afford protection to persons, refers to individuals who hold "transgender status."

Broadly speaking, transgender individuals are those persons whose gender expression and/or gender identity does not accord with the traditional expectations associated with the physical sex of the person. Transgender is an umbrella term which includes, amongst others, transsexuals, transvestites and cross-dressers.

Transgender persons display their transgender status through their physical appearance. For example, a transgender individual may wear clothing that appears contrary to attire typically worn by that individual's assigned sex. Further, an individual may adopt mannerisms and habits not typically associated with their assigned sex, and may also persistently refer to themselves with names and pronouns inconsistent with their biological gender.

"…employers are prohibited from allowing an individual's 'gender identity or expression' from influencing all employment decisions.."

continued on page 14

Equities Dictate Against Strict Application of Merger Doctrine… cont.

(continued from page 2)

including all allowed attorneys fees and costs.

In contrast, in the *Price* case, the bank repeatedly applied to the court for relief from the automatic stay to proceed with the foreclosure action. Each of the bank's applications was opposed by the debtors and/or the trustee and was denied by the court. Thus, the bank in the Price case was unable to return to the foreclosure action and obtain the entry of an order for additional fees and costs in that action. The Court found it to be "patently inequitable that a lender should be limited to the rights under a foreclosure judgment, yet be thwarted in its efforts to include all outlays in the judgment itself." The trustee was "able to stave off [the bank's] efforts to complete the foreclosure until he had secured a sale of the real estate." Then the trustee sought to deny the bank the recovery of certain amounts including its attorney's fees and costs. The court found the unfairness to be obvious and an equitable remedy to be warranted. Further, it found that a strict application of the "merger doctrine" as enunciated in the A&P case would serve to "handcuff and punish" the bank and similarly situated lenders whose "lone crime" was to obtain a foreclosure judgment prior to the mortgagor's bankruptcy filing. Thus, the Court determined that it would review the bank's attorneys fees and costs and determine itself whether they were reasonable.

Exception Based Upon Loan Document Terms

It should be noted that the Third Circuit previously found, in a case applying Pennsylvania law, that there was an exception to the merger doctrine where the mortgage clearly evidences an intent to preserve the effectiveness of the provision allowing attorney's fees and costs even after the entry of the foreclosure judgment. While the Court in *A&P* found that this same exception would apply under New Jersey law, it did not find that the language in the loan documents clearly evidenced any such intent.

Bank's Tools to Recover the Highest Amount Possible

In light of these recent decisions, it is clear that the ability of mortgagees to recover their attorney's fees and costs and perhaps taxes and other out-of-pocket expenses, may depend upon the language contained in their loan documents, and upon the particular circumstances of the foreclosure and bankruptcy case. Therefore, lenders should review their loan documents and consult their attorneys to revise the language of their documents to assure that they "clearly evidence" the parties' intent that such clauses survive the entry and satisfaction of judgment. Even if the loan documents do not contain such language, equity may dictate the award of certain fees and costs, including attorney's fees and costs, if the facts of the case support such an award.

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"Just Compensation"… cont.

(continued from page 3)

most principles of real property law, from erecting barriers to prevent his right to be seen. Therefore, a taking by a public authority takes nothing from him.

However, loss of visibility damages may be recoverable if increased development costs are incurred by the property owner as a result of the loss of visibility. For example, in *State by Com'r of Transp. v. Weiswasser,* the Court upheld a property owner's right to introduce evidence of damages resulting from loss of visibility as an element of the severance damages to the remainder property. The Court found that the loss of visibility would have a direct effect on the property owner's marketing costs in developing the property into single-family residences. Therefore, the Court held that "just compensation" requires compensation for the diminution of value to the remainder of property that is specifically attributable to visibility lost as a direct result of the partial-taking.

Conclusion

Understanding damage claims in eminent domain proceedings is very complex. Competent legal counsel is critical to evaluating your rights. **Hill Wallack LLP** has years of experience in handing eminent domain cases for both condemning authorities and property owners. Our assistance can make the difference between "just compensation" and unjust compensation.

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or of the State of New Jersey or of any other State or political subdivision;

- ✧ Media: This includes certain publication and dissemination of news items, advertising which does not constitute communication with the general public and similarly published information;

- ✧ Educational Forums: This includes the acts of a recognized school or institution of higher education, public or private, in conducting classes and similar activities in the normal course of its business;

- ✧ Religious Groups: This includes the acts of bona fide religious groups acting solely for the purpose of protecting the public right to practice the doctrine of such religious group;

- ✧ Political Parties: This includes the acts of a duly organized national, State or local committee of a political party;

- ✧ Uncompensated Non-Profit Testimony: This includes the acts of a person in testifying before a legislative committee or commission or similar public hearing; and

- ✧ Personal Expression: This includes the acts of a person in communicating with or providing benefits to a member of the Legislature, legislative staff, the Governor, the Governor's staff, or an officer or staff member of the Executive Branch under certain circumstances.

Each of these exceptions is itself limited by a specific type of activity or communication which is protected from the Lobbying disclosure requirements.

Additional Exemptions (Routine Communications)

The Act and ELEC's regulations also provide activity-oriented exemptions available to any person or entity. These exemptions are for any communication that is for a "routine, ministerial matter," and for participation in a task force, advisory board, or working group.

Communications of a routine or ministerial matter include communications to:

- ✧ Schedule a meeting date, time, and place;

- ✧ Request the status of an administrative matter;

- ✧ Request procedures or forms;

- ✧ Request information concerning requirements to comply with existing laws or regulations;

- ✧ Apply for a permit or license as required by law;

- ✧ Participate in an inspection required by law;

- ✧ Respond to an audit conducted pursuant to law;

- ✧ Make a contact as a salesperson for the sole purpose of selling goods or services;

- ✧ Inquire about the delivery of services or materials pursuant to an existing contract;

- ✧ Provide advice or perform services pursuant to an existing contract;

- ✧ Prepare documents and materials in response to a request for proposal or to participate at a bid conference after bid specifications have been established;

- ✧ Respond to a subpoena;

- ✧ Respond to a public emergency or condition involving public health or safety; or

- ✧ Provide a response to a detailed request for specific information.

While this is a complete listing from ELEC's regulations, it is not all-inclusive. That is, ELEC will consider whether a particular communication is "routine and ministerial" on a case-by-case basis if it is not included in this list.

Conclusion

These exemptions, while explicitly set forth in the statute and the regulations, have yet to be fully fleshed out and reliance and the full scope of these stated exemptions is unknown until some regulatory precedent is developed through ELEC or further guidance from the courts is provided. Thus, it is recommended that individuals or corporations consult their legal counsel if their activities with the State or local governments might be impacted by these restrictions and reporting obligations.

Hill Wallack LLP's attorneys can provide assistance to businesses of all types that have frequent interaction with State and local governments in complying with these and other registration, reporting and compliance requirements.

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Minivans and SUVs… cont. *(continued from page 7)*

characteristics as a "van" to place it within the second category of "automobile" as defined by the PIP statute.

The term "private passenger automobile" is a term of art used to distinguish such vehicles from "public" passenger automobiles (e.g. taxicabs) and private "freight" automobiles (e.g. trucks). As noted, the definition of "automobile" specifically includes a "station wagon type" vehicle not used as a public or livery conveyance for passengers. Although a vehicle may be used to promote a business, this does not preclude the vehicle from being classified as an "automobile" required to maintain PIP coverage.

Although a minivan or an SUV may customarily be used for "business, occupational, or professional purposes," it is not a "van." A van is usually understood to be an enclosed vehicle used for the transportation of goods or animals. In contrast, however, a minivan and an SUV are designed, equipped, and intended to be used precisely as a passenger automobile or station wagon. If the term "minivan" were not used in marketing, there would not be any basis to call it a van.

Analogous to the definition of a station wagon, a minivan is designed for passenger transportation as its interior is longer than a regular sedan; it usually has passenger capacity of six or more; it has rear seats that are readily folded or removed for light trucking; and there is no separate luggage compartment. Similarly, an SUV fits the definition of a "station wagon type" vehicle as it has similar design features. If sports utility vehicles did not qualify as automobiles, a large percentage of drivers on the road would be disqualified from PIP coverage, since there is an enormous usage of SUVs throughout the State.

Conclusion

There is no legislative intent for the no-fault laws to exclude private passenger vehicles simply because they are commercially owned and used in business pursuits. The motor vehicle's general status, as opposed to its general use, controls its classification. Accordingly, a minivan and an SUV fall within the first category of an "automobile" that mandates PIP coverage be maintained on these vehicles, regardless of whether the motor vehicle is used for commercial purposes.

The attorneys of the **Trial & Insurance Defense** and **Insurance Coverage Practice Groups** of **Hill Wallack LLP** stand ready to assist any person, business or insurer facing issues related to PIP coverage.

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Legislature Amends New Jersey's Law… cont. *(continued from page 11)*

Effect of this New Law on New Jersey Employers

The inclusion of "gender identity and expression" adds yet another consideration to the already expansive list of protected characteristics employers must be conscious of when making employment decisions. Simply put, employers are prohibited from allowing an individual's "gender identity or expression" from influencing all employment decisions, including, but not limited to hiring, firing, advancement and discipline. Failure to do so could expose an employer to liability from his or her employee, or from a prospective employee.

Additionally, as a protected characteristic under LAD, employers must provide their employees with a workplace that is free from harassment and discrimination stemming from an employee's gender identity. As such, an employer who discriminates against an employee based on gender identity by failing to safeguard an employee from workplace harassment based on the employee's gender identity, can be liable under LAD.

Moreover, the Act expressly states that an employer may enact and "require employees to adhere to reasonable workplace appearance, grooming and dress standards," as are deemed necessary. However, in doing so, the employer is required to permit an employee to "appear, groom and dress" in a manner "consistent with the employee's gender identity or expression." This means that an employer can require attire, such as formal business dress in the workplace, but an employer cannot bar a transgender individual from wearing formal attire that would be identified as that worn by the opposite sex.

Steps Employers Should Take to Comply with this Law

To ensure compliance with this new law, New Jersey employers should immediately update their employment handbooks, personnel and disciplinary policies and employee training programs regarding discrimination and harassment to include "gender identity or expression." Furthermore, an employer should carefully reexamine all workplace dress codes and requirements to ensure full compliance with the new law.

It is without question that the recent addition of "gender identity or expression" as a protected characteristic under LAD will have strong implications for New Jersey employers. To avoid liability, employers must take it upon themselves to begin steps that will ensure full and complete compliance. As such, it is of great importance that New Jersey employers take immediate steps to become fully familiar with the requirements and implications of this new law.

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…Single Asset Real Estate Case cont. *(continued from page 6)*

a debtor other than the business of operating the real property and activities incidental.

Applicable Caselaw

The Bankruptcy Court in rendering its opinion adopted the standard set forth *In re Philmont Development* with respect to whether the Affiliates' cases are single asset real estate cases. The four criteria which must exist before a bankruptcy case falls within the ambits of the provisions for a single asset real estate case are the following: (1) real property must constitute a single property or project, other than residential real property with fewer than four residential units; (2) real property must generate substantially all of the income of the debtor; (3) the debtor must not be involved in any substantial business other than the operation of its real property and the activities incidental thereto and (4) the debtor's aggregate non-contingent liquidated secured debt must be less than $4,000,000. The court acknowledged that the last provision is inapplicable in accordance with the change of the Bankruptcy Code.

The court found that it was undisputed that the Affiliates operations met the first two requirements as set forth in *Philmont.* Thus, the disputed issue was with respect to whether the debtor was involved in any substantial business other than the operation of its real property and the activities incidental thereto.

Analysis

The court in reaching its determination took a practical approach as to whether the Affiliates engaged in any substantial business other than the operation of its real property and felt that what needed to be considered was "whether the nature of the activities are of such materiality, that a reasonable and prudent business person would expect to generate substantial revenues from the operation activities-separate and apart from the sale or lease of the underlying real estate."

The Court offered a comparison of a country club, hotel or casino to the Affiliates' business of selling homes. In the example, the country club, hotel or casino are the operating entities where they would generate revenue from such functions as catering, operating restaurants or selling merchandise. These functions would generate income separate and apart from the land owner's income generated by leasing the real estate. Meanwhile, in the *Kara* matter, the Affiliates, even if they provided ancillary functions such as building homes or marketing the properties, these functions were merely incidental to the Affiliates' efforts to sell these homes rather than an independent income stream such as in the country club example. Thus, the Court held that the Affiliates' cases were in fact single asset real estate cases as the Affiliates were unable to meet the requirements as provided for in *Re Philmont.*

Conclusion

The Court in *Kara Homes, Inc.* bankruptcy case has set forth a pragmatic standard for determining whether a debtor's case is a single asset real estate case. Prior to this decision, bankruptcy courts in other jurisdictions have analyzed this issue, have applied the third criteria as set forth in *Philmont* and utilizing similar fact patterns and reached a different result as there was no clear test as to what qualified as a "business other than operation of its real property." However, the ruling set forth in *Kara Homes, Inc.* now provides a defined test as to whether the debtors were involved in any substantial business other than the operation of its real estate and will most likely result in more consistent decisions in single asset disputes.

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…the Intoxication Defense cont.

(continued from page 5)

defense. An employee can freely admit to being intoxicated at the time of the work place accident and still receive benefits as long as a contributory factor existed which led up to or caused the accident. An extreme example would be if the intoxication contributed to 99% of the cause of the accident and that 1% as attributed to outside factors. Per *Tlumac,* an intoxication defense by the employer would fail and benefits would be forthcoming. On the other hand, the same fact pattern presented in a municipal criminal matter could expose the intoxicated employee to various fines, penalties, and incarceration while barring civil recovery. Where the criminal statutes and courts have deterred and punished such behavior, the workers' compensation act and the current holding in *Tlumac* have rewarded.

The responsibility for any change currently resides with the Legislature. Currently, a proposed bill (S2166) is pending which would bar a worker from receiving benefits if intoxicated at the time of injury or death. Until the time such legislation is enacted, employers must be made aware that an intoxicated employee who is injured in the course of employment may still be entitled to temporary disability benefits, medical treatment and a functional loss disability award, when the intoxication is not the sole cause of the injury.

The attorneys of Hill Wallack LLP stand ready to assist any employer or insurer faced with issues of Workers Compensation insurance coverage, including those posed by the intoxication of an injured employee at the time of his or her injury.

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…Prevailing Wage Act… cont. *(continued from page 10)*

construction work on publicly-owned property is now subject to the Prevailing Wage law, even when the property is leased to a private business and the private business contracts for the construction work. (Press Release dated April 26, 2007)

Maintenance Not Covered Unless Public Funds Used

Under the revised Act, all construction, reconstruction, demolition, alteration, custom fabrication or repair work, done on any property owned by a public body is now considered "public work" requiring payment of prevailing wages, whether or not the work is paid for by public funds. "Maintenance work", which is defined in the Act to mean the repair of existing facilities when the size, type or extent of the facilities is not changed or increased, is not affected by the revisions. As was the case before the amendment, maintenance work is only considered "public work" when a public body is actually contracting for and paying for the maintenance.

The implications of the revised Act are significant. Tenants occupying space in public buildings when they fit-out their space or cause construction or repair work to be conducted on the premises may now have to comply with the Act as such work can become "public work" by virtue of it being done on public property. Likewise, any lessee of public property or state-owned infrastructure who performs construction or repair work on the property will be affected by the revised law, and will need to pay the wage rate determined by the Commissioner for each trade, or be subject to administrative and criminal penalties. In short, in New Jersey a whole new set of work just became "public work" as far as the Prevailing Wage Act is concerned.

Now is the Time to Evaluate Compliance

Individuals and businesses who conduct their business on public property in New Jersey should take the time now to evaluate their compliance with the revised Prevailing Wage Act. Considering the possible administrative sanctions, potential debarment and the risk of criminal penalties under New Jersey's False Claims Act, there is no time like the present for a full check-up for all entities involved with the public sector.

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