HILL WALLACK LLP
ATTORNEYS AT LAW

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NEWSLETTER

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IN THIS ISSUE

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

Message From the Managing Partner

In order to meet the demands of clients who expect nothing less than cutting edge professional services, a law firm must be prepared to adapt to and embrace change. As time changes, so does **Hill Wallack LLP** which continues to grow and constantly assess our client needs for new legal approaches and services.

We are very pleased to announce that **Hill Wallack LLP** has opened an office in Bucks County, Pennsylvania with 10,000 square feet of office space at 777 Township Line Road in Newtown, Pennsylvania. **Hill Wallack LLP** has identified the Yardley/Newtown area as the appropriate venue for the next stage of the firm's evolution. Being a bigger part of Bucks County will afford our attorneys the opportunity to interact on a daily basis with the government, business and civic leaders of Pennsylvania.

The Newtown office consists of **Francis J. Sullivan,** partner-in-charge of the **Business & Commercial** and **Trusts & Estates Practice Groups.** Mr. Sullivan concentrates his practice in the representation of corporate entities and partnerships, buying and selling businesses and real estate, tax and regulatory issues, as well as obtaining and structuring financing to further his clients' business needs, growth and development. **Rosemary A. Sullivan,** partner of the **Trusts & Estates Practice Group** also works out of the Newtown office. She 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.

L. Stephen Pastor, a partner in the firm also works out of the Newtown office. Mr. Pastor has been with **Hill Wallack LLP** for over 20 years, and provides legal services to developers, financial institutions and other entities involved with real estate development and finance. He will also continue to serve various business entities, providing legal services on leases, contracts and associated business issues. Mr. Pastor is a member of the firm's **Real Estate, Banking & Secured Transations** and **Business & Commercial Practice Groups.**

In addition, associates, **Jeffrey G. DiAmico, Denise M. Bowman** and **Benjamin T. Branche** work out of the Newtown office as members of the **Business & Commercial** and **Trusts & Estates Practice Groups.**

I have much pride and confidence in the **Hill Wallack** organization, from my partners and associates, who are tough minded, business oriented advocates, to our staff, which is the most loyal and efficient group of people I have ever been associated with.

In this issue, we highlight some of the latest developments in the law. In our lead article *"Navigating the Pay to Play Morass"* partner, Paul Josephson and associate Lauren Bucksner discuss the penalties for political contributors who seek public contracts. *"NJ Supreme Court Preserves Rights of Common Interest Ownership Associations"* written by partner, Michael Karpoff concentrates on the ruling of free speech and assembly in a community association. Nicole Perdoni-Byrne gives insight into the terms and conditions of a partnership agreement in her article *"Partnership Agreements: It's In the Drafting"* while Brian McIntyre discusses smoking regulations in community association common elements in his article *"Protecting the Well-Being of Communities…"* Megan M. Schwartz outlines the public bidding process in her article *"Negotiation Rules Under Local Public Contracts Law For Award of Contracts Without Public Bidding"* while Christina Saveriano examines wiretapping and electronic surveillance in her article *"Beware What You Say—Someone Might Be Recording It"*. Denise Bowman alerts us to website prize promotion in her article, *"Online Sweepstakes As A Marketing Tool—Too Great a Risk."* Finally, Dana Lane brings us up-to-date on consumer protection laws in her article *"Home Improvement Contractors and Contracts…"*

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

– Robert W. Bacso

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Navigating the Pay to Play Morass

by Paul P. Josephson and Lauren E. Bucksner

With the recent launch of New Jersey's website tracking political contributions by public contractors, the focus on so-called "pay to play" practices has never been sharper. Over one hundred municipalities and counties have jumped aboard the pay to play bandwagon, one-upping state law by adopting their own restrictions and penalties for contributors who seek public contracts. The predictable result: a baffling assortment of state and local pay to play enactments. Chaos has resulted from the pursuit of this feel good approach to politics. Local pay to play's lack of uniformity, coupled with severe economic penalties, has led to a marked decline in overall political contributions by citizens and corporations, and amplified the clout of unions, which are unconstrained by these laws. The inevitable chilling of political speech resulting from fear of violating the cumbersome and voluminous regulations will undoubtedly worsen if more local governments enact their own restrictions on business and redevelopment entities.

Since 2005, New Jersey municipalities, counties and their agencies have been vested with the authority to adopt their own local pay to play policies with respect to public contracts. We have comprehensively surveyed the various local pay to play ordinances throughout the state, highlighting the areas in which various restrictions contrast with one another. Thus far, over one hundred and thirty pay to play ordinances have been enacted; approximately eighteen of those ordinances specifically restrict entities seeking redevelopment contracts and their professionals. Although some local entities have used the Center for Civic Responsibility's (CCR) Model Ordinance as a template document, most towns have modified their ordinances to reflect local political tastes. The need for uniform and predictable provisions has been disregarded, leaving New Jersey speckled with inconsistencies and would-be contributors befuddled.

While local policies must not contradict state requirements, many local ordinances cover additional businesses and impose additional disclosure requirements well beyond those proscribed by the state. Local pay to play often regulates business entities that are not necessarily restricted by state pay to play laws. This includes

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New Jersey Supreme Court Preserves Rights of Common Interest Ownership Associations

by Michael S. Karpoff

Community association governing boards may reasonably regulate conduct of their members on common property even if such regulation affects members' expressive activity, the New Jersey Supreme Court has held. In a unanimous decision in *Committee for a Better Twin Rivers v. Twin Rivers Homeowners Association,* the Court reversed the ruling of the Appellate Division of the Superior Court regarding speech and assembly and found that the New Jersey State Constitution did not override the association's regulations. The plaintiffs had argued that the association's rules regarding signs, use of the community room and access to the newsletter were unconstitutional, but the Supreme Court found them to be reasonable and to not violate constitutional rights. Hill Wallack LLP represented the association's president, Scott Pohl, in the case.

Twin Rivers is a planned residential development in East Windsor, New Jersey. It consists of 2,700 homes with a population of about 10,000. The Twin Rivers Community Trust owns the common property, and the Twin Rivers Homeowners Association serves as trustee and governs the use of the common property. A number of commercial properties and municipal facilities are located within the community's borders but are not part of the association.

Owners Challenged Association Rules

Several Twin Rivers owners formed the Committee for a Better Twin Rivers to attempt to change certain association rules and policies. They eventually filed suit against the association, the trust, the property manager, who was later dismissed from the case, and Mr. Pohl, who also had served as the editor of the newsletter. The plaintiffs challenged a number of rules regarding access to records and the membership list, confidentiality of board discussions, alternative dispute resolution and voting procedures, as well as signs, the community room and the association's monthly newsletter.

With respect to these latter three issues, the plaintiffs conceded that the First Amendment to the United States Constitution did not control, because the First Amendment restricts only government conduct, and instead relied upon the New Jersey State Constitution. They argued that the association's regulation limiting the number and location of members' signs, a rental fee and insurance requirement for use of the community room and editorial policies for the newsletter violated the State Constitution's free speech and right to assembly clauses, which can, under certain circumstances, apply to private property.

The defendants argued that the association's regulations were valid under the business judgment rule, which requires that board decisions be authorized by statute or the governing documents and not involve bad faith, self-dealing or unconscionable conduct. The defendants also maintained that because Twin Rivers is private property which does not invite public access, the State Constitution's protections do not apply and the rights of the parties are determined by contract principles. In addition, Mr. Pohl argued that any judicial or government review of the newsletter's editorial policies would violate *the association's* First Amendment rights to free speech and free press. The trial judge vacated a portion of the association's rules because there were insufficient standards, but he generally agreed with the defendants and upheld most of the regulations.

On appeal, the Appellate Division affirmed much of the trial court's

"New Jersey's Supreme Court thus confirmed that community associations which do not invite public access may adopt reasonable rules to regulate use of common property even if such regulations have an incidental effect on members' speech."

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Protecting the Well-Being of Communities: Controlling Smoking in Associations

by Brian J. McIntyre

> *"Where an association possesses a nuisance restriction, it may seek to enforce the restriction to ban smoking which does in fact bother other residents."*

Community associations have a responsibility to protect the health, safety and welfare of their members as they relate to community living. In this regard and in line with current trends, associations have begun to regulate smoking tobacco products within both units and common elements. Moreover, individual residents have started to take direct legal action against neighbors to prevent exposure to second hand smoke. Associations and residents have available several options to respond to the presence of second hand smoke within common interest communities.

It is well accepted that second hand tobacco smoke is detrimental to individuals who inadvertently are forced to inhale the smoke. In the context of community associations, many people have complained about being able to smell smoke emanating from neighbor units into their own units. In fact, the infiltration of second hand smoke from one unit into another is a potential health hazard to residents. Accordingly, associations and individuals affected by second hand smoke may seek legal remedies to prevent exposure to the smoke.

Associations Have Several Enforcement Options

Community associations are vested with the responsibility to oversee the property of the community and, to a certain extent, the welfare of their members. Associations potentially possess three legal avenues to address members' concerns about second hand smoke exposure. First, an association may seek to amend its governing documents to include a direct prohibition of smoking tobacco products within the community, both in the common elements and within the units. If successful, though, such an amendment may be challenged by a unit owner.

This remedy was recently upheld in a Colorado district court in a matter entitled *Christiansen v. Heritage Hills 1 Condominium Owners Association.* In *Christiansen,* a unit owner sought to invalidate an amendment banning smoking. The court upheld the amendment, finding that it was proper, reasonable, made in good faith and not arbitrary or capricious. Moreover, the court found that the amendment did not violate public policy or a constitutional right.

Like the association in *Christiansen,* a community may seek to amend its governing documents to prevent smoking within units and the common elements. However, passing such an amendment will depend upon obtaining enough membership support. If enough support can be obtained, this remedy is the most likely association action to be upheld if challenged in a court.

Second, an association's board of trustees or directors may seek to establish a regulation prohibiting smoking. This option is less favorable, as a court may determine the board never possessed the power to regulate the interior of a unit. Therefore, an association's board should only consider this alternative if its governing documents provide the power to regulate the interior of units.

Finally, where an association possesses a nuisance restriction, it may seek to enforce the restriction to ban smoking which *does in fact* bother

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Partnership Agreements: It's in the Drafting

by Nicole Perdoni-Byrne

The partnership agreement is the key document in dictating the terms, conditions and governance of a partnership. While such an agreement is analogous to a contract negotiated between the partners of the partnership, the Uniform Partnership Act ("UPA") contains certain statutory requirements that must be contained in a partnership agreement and cannot be modified or contradicted through negotiation. When a partnership agreement fails to provide for certain terms, the UPA provides for statutory gap fillers that will dictate and provide guidance under certain situations. There is some room for creative drafting when creating these agreements, but the drafter must always keep the provisions of the UPA in mind.

Statutory Prohibitions

N.J.S.A. 42:1A-4 provides that "relations among the partners and between the partners and the partnership are governed by the partnership agreement." But that same statute sets forth certain things the partnership agreement cannot do. It cannot unreasonably restrict the right of the partners to access the books and records. The agreement cannot reduce the duty of loyalty to the partnership and by the partners, proscribed by the UPA, in order to allow a partner to engage in conduct intentionally injurious to the partnership, nor can it unreasonably reduce the duty of care required to be given to the partnership. It cannot provide contrary rights of the court to expel a partner nor can it change the requirements set forth in the UPA to wind up the partnership business in certain instances. Pertaining to the limited liability partnership, the agreement cannot vary the law pertaining to this type of entity. The partnership agreement cannot restrict the rights to third parties provided for in the UPA.

Statutory Gap Fillers

There may be instances when a partnership agreement fails to provide for important and necessary terms that govern the partnership. The UPA provides provisions to fill those gaps. For instance, a partnership agreement may be silent as to who has authority to bind the partnership. The UPA provides for this situation in NJSA 42:1A-13, wherein section (a) states that "each partner is an agent of the partnership for the purpose of its business. An act of a partner . . . for apparently carrying on in the ordinary course of the partnership business or business of the kind carried on by the partnership binds the partnership." This apparent authority is negated in situations where the person with whom the partner was dealing knew the partner lacked the necessary authority to act on behalf of the partnership or received notification of same. Section (b) states that when a partner's act is not apparently for carrying on in the ordinary course of partnership business, his or her act will only bind the partnership if such act was authorized by the other partners.

Questions will naturally arise as to how to quantify "other partners" when deciding what, in fact, is the ordinary course of business for a particular partnership and when is an act outside of the ordinary course of business an authorized act. NJSA 42:1A-21 sets forth a partner's rights and duties within the partnership. Section (j) states that when a difference arises among the partners as to a matter in the ordinary course of business it shall be decided by a majority of the partners. This Section goes on to state that an act outside the ordinary course of business of a partnership (and an amendment to the partnership agreement) shall be undertaken only with the consent of all of the partners.

"When a partnership agreement fails to provide for certain terms, the UPA provides for statutory gap fillers that will dictate and provide guidance under certain situations."

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Negotiation Rules Under Local Public Contracts Law for Award of Contracts Without Public Bidding

by Megan M. Schwartz

"New Jersey courts have noted the utility of the negotiation process to achieve the lowest responsible price for a municipality and/or other local contracting unit."

In certain instances, the Local Public Contracts Law grants municipalities the ability to award contracts for goods and services without adhering to all the requirements of public bidding. One specific example includes the negotiation process found in *N.J.S.A. 40A:11-5(3)*. Particular elements of the public bidding process are still required in connection with the negotiation process, including public advertising and award by the governing body. As explained below, the negotiation process is an important and flexible tool for municipalities and other contracting units in procuring needed goods and services without having to adhere to all the requirements of public bidding.

Criteria for Negotiation

Any contract, the amount of which exceeds the bid threshold (currently $21,000), may be negotiated and awarded by the governing body if the following criteria are met: requests for bids have been advertised on two occasions and

(a) No bids have been received on both occasions in response to the advertisement; or

(b) The governing body has rejected such bids on two occasions because it has determined that [the bids] are not reasonable as to price, on the basis of cost estimates prepared for or by the [contracting unit's] contracting agent prior to the advertising therefore, or [the bids] have not been independently arrived at in open competition; or

(c) On one occasion no bids were received pursuant to (a) and on one occasion all bids were rejected pursuant to (b), in whatever sequence.

After a municipality or other contracting unit has twice advertised for and rejected bids in accordance with the above, the contracting unit will be able to negotiate a contract and may award such contract for goods and/or services upon a two-thirds affirmative vote of the authorized membership of the governing body. However, such award may only be made if the following three conditions are met.

Award Without Public Bidding

First, the governing body may award the contract provided that the contracting unit's contracting agent has first made a reasonable effort to determine that the same or equivalent goods or services, at a cost which is lower than the negotiated price, are not available from an agency or authority of the United States, the State of New Jersey, the county wherein the contracting unit is located or some other municipality in close proximity. The contracting agent should document such efforts described above in the form of a memo to the file and to the governing body making the award.

Second, an award may only be made if the terms, conditions, restrictions and specifications set forth in the negotiated contract are not substantially different from those which were the subject of the initial advertisements for competitive bidding.

Finally, any minor amendment or modification of any of the terms, conditions, restrictions and specifications, which were the subject of competitive bidding, must be stated in the resolution of award. However, if after the second advertisement, the bids received are rejected as unreasonable in price, the contracting agent shall notify each responsible bidder submitting bids on the second occasion of the contracting unit's intention to negotiate. In other words, after the contracting unit's second unsuccessful attempt to procure the needed goods and/or services, each bidder must receive notice of its intention to negotiate.

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Beware What You Say—Someone Might Be Recording It

by Christina L. Saveriano

It could be a casual conversation at a local restaurant or a conversation on a more important subject over the telephone, but both are subject to being recorded without your knowledge. Under the New Jersey Wiretapping and Electronic Surveillance Control Act ("Act") *N.J.S.A. 2A:156A-3*, your conversation could be recorded and used without you even being aware of it having been done. As a result, you may want to be careful what you say and who you say it to.

The New Jersey Wiretapping and Electronic Surveillance Control Act

The Act provides that "any person who purposely intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication . . . shall be guilty of a crime of the third degree." However, the Act is subject to several exceptions. The most important exception is that a party to the conversation can consent to the recording of the conversation. That means that although you may not be aware that the conversation is being recorded, the other party to the conversation effectively consents by recording the conversation. Under the Act, the party recording the conversation has no affirmative duty to advise the other party that the conversation is being recorded because only one party to the conversation has to consent to the recording.

Thus, you may not be aware that your friend, colleague, family member or even spouse is recording a conversation in which you are a participant. Indeed, you may think that you are having a private conversation with another party that you would not expect to be recorded or ever made public, but it is possible that your conversation could be recorded and used at a later time. The bigger issue is how this could later be used to your detriment. One example is the case of *D'Onofrio v. D'Onofrio,* a family action where the mother challenged the admission of audio tapes containing conversations between her and her children under the Act. The mother and father were involved in a custody dispute over the couple's four children. The father taped telephone conversations between the mother and their children. Those tapes were considered by the court in awarding the father custody of the parties' children.

The court explained that "the taping of one's own . . . conversation with another, while an 'intercept' within the meaning of [the Act] is [not a violation of the Act]." In that matter, the court recognized the "consent exception" included the right of a parent to vicariously consent to the recording of his or her child's conversations. Thus, the tapes were properly admissible against the mother who was unaware that her private conversations with her children were being recorded.

Conversations in Public Under the Act

Further, any conversation occurring in public may be subject to recording. The issue is of greater concern now more than ever due to the increase in reality television programming. You never know where a television camera is lurking and picking up your conversation. With respect to the recording of such conversations, the courts have held that the recording is permitted either as an exception to

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"Under the Act, the party recording the conversation has no affirmative duty to advise the other party that the conversation is being recorded because only one party to the conversation has to consent to the recording."

SPOTLIGHT

NEW OFFICE

Hill Wallack LLP announced the opening of an office in Newtown, Pennsylvania, further expanding the firm's presence with an additional location in Bucks County. The new office location is 777 Township Line Road, Suite 250 in Newtown, PA. Hill Wallack LLP will bring 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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NEW ATTORNEYS

Lauren E. Bucksner has joined the firm in its **Regulatory & Government Affairs** and **General Litigation Practice Groups.** She will concentrate her practice in commercial litigation, family law, municipal law and regulatory law with a focus on corporate compliance issues. Ms. Bucksner earned her law degree from Widener University School of Law. She previously served as a Judicial Law Clerk to the Honorable Max A. Baker, Presiding Judge, Family Part and the Honorable Mark H. Sandson, J.S.C., Atlantic County Superior Court, Atlantic City, NJ. A resident of Jamison, PA, she is admitted to practice in New Jersey and Pennsylvania.

Dana M. Lane has joined **Hill Wallack LLP** as a member of the **Administrative Law/Government Procurement Practice Group.** She will concentrate her practice in administrative law, regulatory compliance and corporate litigation including public procurement, employment and government litigation. Ms. Lane earned her law degree from New York Law School. She previously served as a Judicial Law Clerk to the Honorable Alexander P. Waugh, Jr., Presiding Judge, Chancery Division, Middlesex County Superior Court. Ms. Lane is a resident of Hamilton, NJ and is admitted to practice in New Jersey and New York.

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APPOINTMENTS & RECOGNITION

Francis J. Sullivan, a partner in **Hill Wallack LLP's** Newtown office, where he is partner-in-charge of the firm's **Business & Commercial Practice Group** was recently appointed as President of the Family Service Association of Bucks County. The Family Service Association was founded in 1953 and is a private non-profit, non-sectarian, human service agency whose mission is to protect, maintain, strengthen and enhance individuals and families and their social and psychological functioning. Services and employment are provided in a nondiscriminatory manner, without regard to race, sex, color, national origin, ancestry, religious creed, disability, age, or limited english proficiency. 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.

Thomas F. Carroll, III and ***Stephen M. Eisdorfer,*** partners in the firm were recently presented with the New Jersey Builders Association 2006-2007 Associates Appreciation Chairman's Awards. The Chairman's Award is given to Associate members whose contributions deserve special recognition for their many contributions to the home building industry. Mr. Carroll received the Chairman's Award for his legal contributions and Mr. Eisdorfer received the Chairman's Award for his contributions in affordable housing. Messrs. Carroll and Eisdorfer are partners of the Land Use Division which includes the firm's Land Use Applications, Land Use Litigation and Environmental Applications Practice Groups. Mr. Carroll concentrates his practice in the development application process and the litigation required in the course of land development. He has significant experience in the land development application and permitting process, and has a practice concentration on the litigation of land use matters at the trial level and in the appellate courts. He is past Chair of the Land Use Law Section of the New Jersey State Bar Association. A resident of West Windsor, New Jersey, he has authored numerous articles and presented seminars concerning land use issues. 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. A resident of Highland Park, New Jersey, he has authored numerous articles and presented seminars concerning land use issues.

Jeffrey L. Shanaberger, a partner at **Hill Wallack LLP** and member of the firm's **Litigation Division** and **Trial & Insurance Practice Group,** was recently a featured speaker at The Insurance Council of New Jersey/New Jersey Defense Association 2007 Insurance Defense Law Joint Seminar. Mr. Shanaberger's presentation focused on premises liability and the current state of the law on such topics as

liability for injuries involving defective sidewalks and shade trees, injury to emergency responders; and injuries to spectators at the State's many professional sports arenas. A fully-experienced trial attorney, Mr. Shanaberger has a practice concentration in trial and appellate practice, emphasizing insurance coverage and defense in matters of governmental, public entity, civil rights, and real estate contract litigation. Mr. Shanaberger graduated with honors from Rutgers University and received his law degree, *cum laude,* from New York Law School. He is a member of the Middlesex and Mercer County, New Jersey and New York State Bar Associations, Defense Research Institute and the New Jersey Defense Association.

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

Nielsen V. Lewis, a partner of **Hill Wallack LLP,** has authored two articles concerning No Further Action ("NFA") letters of the New Jersey DEP and "innocent purchaser" defenses under the N.J. Spill Act designed to promote the acquisition and redevelopment of previously-contaminated properties by innocent developers. The first article, *"Municipalities and Brownfield-Contaminated Properties,"* appeared in *New Jersey Lawyer Magazine,* the magazine of the New Jersey State Bar Association. The second, *"Proceed With Caution: Pitfalls of Relying On A No Further Action Letter,"* was published in the *New Jersey Law Journal.* Requests for reprints, or inquiries concerning the articles or the firm's Environmental Practice Group, may be directed to Mr. Lewis at (609) 734-6308 or nvl@hillwallack.com. A frequent lecturer and writer on environmental and insurance topics, he is a past Chair of the NJSBA's Insurance Law Section, a member of its Environmental Law and Dispute Resolution Sections, and a Master of the Justice Stewart G. Pollock Environmental American Inn of Court. Mr. Lewis is admitted to the Superior Court Roster of Court-Approved Mediators. Mr. Lewis received his undergraduate degree from Princeton University and his law degree from the University of Michigan Law School. He is admitted to practice in New Jersey, the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit.

Denise M. Bowman, an associate in **Hill Wallack LLP's** Newtown office, where she is a member of the firm's **Business & Commercial Law Practice Group,** was recently elected to the Board of Directors of the Bucks County YWCA. The mission of the YWCA is the elimination of racism, the empowerment of women, and peace, justice, freedom and dignity for all people. The Bucks County YWCA is a non-profit organization which has provided services and programs to women, children and families since 1954. All YWCA programs are designed to strengthen and improve the lives of Bucks County residents. Ms. Bowman concentrates her practice in the representation of corporate entities and partnerships, buying and selling businesses and real estate and also the representation of individuals and businesses in insurance, commercial litigation, bankruptcy and general business matters. Ms. Bowman earned her law degree in 1998 from Temple University School of Law where she was Executive Editor of the Temple Political and Civil Rights Law Review. During law school, she clerked for the Honorable John T. J. Kelly of the Pennsylvania Superior Court. Prior to law school, Ms. Bowman earned a Bachelor of Arts degree from the University of Delaware. She is admitted to practice in Pennsylvania and New Jersey and before the United States District Court for the Eastern District of Pennsylvania and the United States District Court for the District of New Jersey.

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

Online Sweepstakes as a Marketing Tool—Too Great a Risk?

by Denise M. Bowman

> *"The vast majority of states have enacted statutes regulating sweepstakes and related areas of the law, including gambling and illegal lotteries."*

Although the term "sweepstakes" may bring to mind visions of oversized checks and life-changing sums of money, more often than not, sweepstakes involve much smaller prizes, such as a free lunch or a one month free membership to a gym or karate studio offered as part of an overall marketing plan to promote a business, brand, product or service.

For example, a restaurant seeking to attract a larger lunch crowd, and business professionals in particular, may advertise a weekly drawing of business cards for a free lunch. Similarly, a karate studio may offer a month of free tuition for the student whose name is randomly drawn from a box of referrals.

Because most businesses, especially those who deal directly with the public, have and are actively using their respective websites, it is important to consider the legal implications that online advertisement of such sweepstakes may have on these businesses. For example, does requiring a participant to obtain Internet access and apply for the sweepstakes online violate the golden "no purchase necessary" rule?

The vast majority of states have enacted statutes regulating sweepstakes and related areas of the law, including gambling and illegal lotteries. Each of these statutes is slightly different; however, each one expressly requires that a participant *not* be required to provide the sweepstakes promoter any "consideration" to enter the sweepstakes. It is this "no purchase necessary" requirement that distinguishes a legal sweepstakes from an illegal lottery.

But what exactly constitutes consideration? It is well established that payment of any sum to the sweepstakes promoter, other than nominal postage, is consideration. However, beyond the prohibited payment of money, the concept of consideration is less clear. For example, some states have held that requiring a participant to visit the store or place of business to enter the sweepstakes does not constitute consideration. Other states, however, have taken the contrary position that *any* conduct required of the participant that provides a benefit to the sweepstakes promoter is consideration and renders that sweepstakes unlawful gambling.

When requiring a participant to obtain Internet access to enter the sweepstakes, the law is even less clear, even among administrations within the same state. For example, several years ago the Florida Department of State deemed Internet access to constitute consideration. As a result, promoters of sweepstakes that triggered the Florida statute began offering a free method of entry as an alternative to the online option. In recent years, however, Florida has changed its position.

In addition to the "consideration" issue, which becomes more complicated with online sweepstakes, those businesses which choose to use the Internet to advertise their sweepstakes must be careful not to otherwise run afoul of the many state statutes that may be triggered by their particular prize promotion. Businesses that utilize the sweepstakes or prize promotion as a marketing tool and advertise locally through a newspaper or in their own places of business may have some level of comfort that potential participants will be limited to residents of the state in which the business is located and/or perhaps a neighboring state, and, accordingly,

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Home Improvement Contractors and Contracts: Know Your Rights and Obligations

by Dana M. Lane

If you are in the business of selling home improvement products or services in New Jersey, your business activities are governed by New Jersey's consumer protection laws, which include a list of specific statutory and regulatory requirements that may apply to you. The failure to follow these requirements can expose you to crippling litigation and substantial awards of damages and fees. What you do not know, or follow, could impact your rights if you find yourself in a dispute with a disgruntled consumer.

New Jersey views the rights of its consumers to be paramount. For this reason, New Jersey consumer statutes and administrative regulations aim to protect consumers when they enter into contracts for various goods and services. In particular, home improvements are a heavily regulated area of consumer contracting. Home improvements encompass a wide array of services and products, including residential remodeling, painting and repairing, and all of the products and materials necessary to complete these types of projects. Home improvement contracts can be for the labor or services and/or for the materials necessary to complete home improvements. Contractors and sellers of home improvements must comply with many specific and detailed requirements when entering into these contracts.

Constructing A Compliant Home Improvement Contract

Every consumer contract must comply with a basic set of requirements. If a contract is required to be in writing, the original terms and conditions of the consumer contract and any changes subsequently made to the contract must be in writing and signed by the parties. Specifically, if a home improvement contract is for a purchase price of $500.00 or more, the contract and any subsequent changes must be in writing and signed by the parties.

All written home improvement contracts must include the contractor's legal name, business address and registration number. Additionally, it is important to include a detailed description of the work to be done and of the products and materials to be used. The Division of Consumer Affairs requires products and materials to be described by model, make, size, type, grade, quality and quantity. The more detailed the contract is in this regard, the more capable all parties will be to adequately and timely complete the project.

The start date for the project must be stated in the contract as either a firm date or a time period, such as "within 6 weeks of the date of the contract." If the project fails to begin on time, the contractor must provide the customer with a written explanation of why the work is delayed. A home improvement contract must also include the financing, warranty and guarantee information, the Consumer Affairs toll-free telephone number, a copy of the contractor's commercial general liability insurance certificate with a minimum coverage amount of $500,000.00 per occurrence and the insurance company's telephone number. If someone other than the seller/contractor will serve as general contractor for the project, that person's name, business address and contractor registration number must also be specified in the contract.

"Home improvement sellers and contractors must register with the New Jersey Division of Consumer Affairs in order to lawfully advertise and conduct a home improvement business."

The 3-Day Right To Rescind

Upon execution of the home improvement contract, the consumer has the right to cancel the contract for any reason before midnight of the third business day. To do so, the consumer must either cancel in writing by certified mail or hand deliver the cancellation to the contractor's business address. Specific language must be included in every home improvement contract to alert the consumer of the 3-day right to rescind, which can be found in the New Jersey Contractors' Registration Act.

Once a proper cancellation occurs, the contractor must refund any payments previously made by the consumer. If a financing agreement was executed in connection with the home improvement contract, that agreement must also be cancelled without any penalty to the consumer. The contractor must then mail both the refunded payment(s) and written notice of the cancelled financing to the consumer within 30 days of the cancellation.

Illegal Acts and Practices

Pursuant to various New Jersey statutes and regulations, there are specific acts and practices that home improvement sellers and contractors must avoid. For instance, a contractor cannot tell a consumer that his or her property will serve as a "model home" or "advertising job" once the home improvement is completed. A price reduction for a home improvement in exchange for use of a home as a model or advertisement is also prohibited. Other banned acts and practices include bait selling, misrepresenting competitors and requiring final

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Navigating the Pay to Play Morass cont. *(continued from page 2)*

redevelopers and professionals serving redevelopers, an area municipalities have not specifically been authorized to regulate.

Moreover, locally enacted requirements usually affect a broader range of businesses and contracts than the state rules. Pursuant to the state's pay to play law, applicable in all 566 municipalities and 21 counties, only businesses who seek or perform "non fair and openly bid" municipal contracts for municipalities valued in excess of $17,500 are restricted from giving to municipal officials and their political parties. But many of these local ordinances restrict contributions and require disclosure of contributions by any entity seeking a new contract in excess of $17,500, even if the contract is awarded pursuant to a "fair and open process". Businesses and their owners must be aware of applicable local pay to play policies, as ignorance can lead to especially harsh financial sanctions including contract termination and debarment.

Likewise, the types and amounts of contributions prohibited by these local enactments vary widely. Every local pay to play ordinance details specifically what types of contributions are prohibited, to whom a contribution may or may not be made, the permissible amount of contributions, and for what time period the restriction lasts. Some municipalities allow vendors and their owners to contribute up to $300, while others allow only $250 or less still. Some outright prohibit any contribution whatsoever, in clear violation of constitutional safeguards that allow for at least some symbolic, if de minimis, contribution as a demonstration of political support for a candidate or party.

Don't Try This At Home

Attempting to comply with local pay to play laws on your own can leave you and even your attorney feeling trapped in a web of impenetrable restrictions, disclosure requirements, and penalties. If you take an unintentional wrong turn, violations may or may not be curable. All is not lost however, and you need not retire from the crucial act of participating in politics simply because you wish to do business with government. At **Hill Wallack LLP,** we recognize the importance of your participation and are poised to help. But with the wildly inconsistent local rules now in place, there is no one-size-fits-all approach. With our vast knowledge of all pay to play rules, we can advise you on your particular circumstances and help you avoid pay to play problems.

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

Lauren E. Bucksner *is an associate in the firm's* ***General Litigation*** *and* ***Regulatory & Government Affairs Practice Groups.***

Online Sweepstakes… cont.

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only the statutes of those particular states may be triggered.

However, once a business chooses to utilize the Internet to advertise the sweepstakes and solicit online entries, that business may trigger the laws of several states and even international law if it does not expressly exclude residents outside of its particular home state from participating. Because of the significant time and expense associated with assuring compliance with other nations' laws, most often it is preferable to limit entries to only residents of the United States. Additionally, because several state statutes are particularly problematic and in some instances require the promoter to register with the State, post a bond and/or pay filing fees, it also is worthwhile in many cases to limit participants to only residents of the state in which the business is located and possibly another state if its border is located nearby.

Sweepstakes have been, and remain, an important marketing tool for many types of businesses, especially those which are community - based. Accordingly, it is important that businesses take appropriate measures to maximize the positive effect of the sweepstakes as a marketing device while minimizing the potential for running afoul of applicable state and federal statutes and related case law regulating this and related areas of the law. To accomplish this goal, such business owners should consult legal counsel to do the following:

1. Identify which statutes, if any, are triggered by the particular sweepstakes involved and the requirements;
2. Determine whether advertising the sweepstakes on the Internet broadens the scope of potentially triggered statutes; and
3. Provide an interpretation of all potentially triggered statutes to permit the business to determine whether it is worthwhile to advertise on the Internet and accept applications online and/or specifically exclude residents of certain states from participating in the sweepstakes.

The gaming attorneys of **Hill Wallack LLP** are well versed in sweepstakes matters and stand ready to assist you before you launch your next promotion.

Denise M. Bowman *is an associate of the* ***Business & Commercial Law Practice Group*** *of* ***Hill Wallack LLP*** *in the Newtown, Pennsylvania Office.*

New Jersey Supreme Court… cont. *(continued from page 3)*

reasoning. However, it concluded that the State Constitution's speech and assembly provisions protect members' expressive activities on the private property. It therefore remanded the case to the lower court to reconsider the rules regarding signs, the community room and the newsletter, utilizing the constitutional standard. The defendants appealed that decision to the New Jersey Supreme Court.

No Constitutional Violation

In an opinion with potential national implications, the Supreme Court rejected the plaintiffs' position and reinstated the trial court's decision. To reach its conclusion, the Court applied a test it had crafted in 1980, in *State v. Schmid,* to determine when the State Constitution's speech provision applies to private conduct.

Schmid held that the State Constitution speech clause grants broader rights than the First Amendment to the United States Constitution and that when private property permits public access for purposes of speech, constitutional protections come into play. The Court stated that in determining whether to apply constitutional protections to private property, it needed to decide three issues: (1) the nature, purposes and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. Using that test, the Court held that Schmid's conviction for trespass for distributing political leaflets at Princeton University was unconstitutional because the university had made itself a public forum for speech and the defendant's activities were consistent with the university's purpose.

In *New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty Corp.,* the Court expanded on the Schmid test by adding that after looking at the three prongs, there must be a balancing of the expressional rights and the private interests. It then held that large regional shopping centers could not prohibit the distribution of political flyers on their property because they had become public centers.

Although the Pennsylvania Supreme Court has not expressly adopted the *Schmid/Coalition* test, it has applied similar reasoning. In *Commonwealth v. Tate,* the Pennsylvania Court held that when Muhlenberg College invited the director of the FBI to speak at a public symposium, it made itself subject to the Pennsylvania Constitution's speech protections and thus could not constitutionally prosecute for trespassing protesters distributing leaflets on campus. Later, in *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co.,* the Court declined to apply similar constitutional protection in a shopping center, unlike the New Jersey Court, but it reaffirmed that the Pennsylvania Constitution's free speech clause applies to private property if the owner permits the property to be used as a forum for public issues.

Schmid/Coalition Test the Rule

Twin Rivers reaffirmed the *Schmid/Coalition* test. The Supreme Court found that the plaintiffs had failed to satisfy any of the prongs of the test. The primary use of Twin Rivers is for private residences. The property is for the exclusive use of the residents, and any incidental public access does not rise to the level of a public invitation. Moreover, the rules in question provide a mutual benefit to the residents and are necessary to maintain the nature of the community. The Court also explained that the rules are reasonable and have only a minor effect on the plaintiffs' ability to communicate, so balancing the respective interests favors the association.

Contrary to much of the publicity about the case, the Court did not eliminate residents' rights or allow community associations to suppress speech. As the Court pointed out, association members have rights granted by statutory provisions such as the Planned Real Estate Development Full Disclosure Act and the Non-Profit Corporation Act, the terms of the community's governing documents, the association's fiduciary duty to its members and public policy. The Court also stated that it was not ruling out applying constitutional protections in an appropriate case but did not indicate what circumstances would call for such intervention. However, if an association invites public speech or makes itself a public forum, the *Schmid/Coalition* test will weigh more heavily in favor of constitutional protection.

New Jersey's Supreme Court thus confirmed that community associations which do not invite public access may adopt reasonable rules to regulate use of common property even if such regulations have an incidental effect on members' speech. Through this power, common interest ownership communities can preserve aesthetics, protect residents' security and promote cooperative communal living without the need to satisfy constitutional standards. On the other hand, the Court made clear that association members do have remedies against boards who abuse their power.

Members do not have an unfettered right to speech, and the association need not fund members' speech. However, boards must allow opportunities for residents to express themselves, in order to enable participation in community affairs. The *Twin Rivers* decision preserves the authority of each association governing board to balance members' interests, impose reasonable restrictions and determine how best to meet the needs of the community.

Michael S. Karpoff *is a partner in the* ***Community Association Law Practice Group.*** *He is a member of the national College of Community Association Lawyers of the Community Association Institute (CAI).*

…Controlling Smoking in Associations cont. *(continued from page 4)*

other residents. In this context, the association would be seeking to prohibit certain individuals from smoking because the second hand smoke bothers other residents. This action is a reactive option and cannot be used until a member complains about another member's smoking habits. Whether the association can enforce such a rule will depend upon whether the smoke is deemed to constitute a nuisance. Nonetheless, this may be the best alternative and path of least resistance in dealing with a specific second hand smoke situation.

Individuals Have Additional Remedies

Community residents are not limited to the actions of an association and may seek their own legal remedies to prevent exposure to second hand smoke. Such remedy entails filing a lawsuit seeking an injunction preventing an individual from smoking in areas which will affect others through exposure to second hand smoke. The person filing the suit must actually be exposed to second hand smoke and cannot simply hypothecate that second hand smoke exposure may occur sometime in the future. In legal terms, this means that the plaintiff has standing and the case is ripe for adjudication.

The potential causes of action are too many to list. However, several of the more relevant theories are as follows: 1) the smoke is a public nuisance inhibiting the common law right to "fresh and pure air;" 2) the second hand smoke affects the member and thereby an association's failure to address the problem is a violation of the Federal Fair Housing Act provisions prohibiting discrimination; 3) permitting second hand smoke constitutes negligence; and 4) the second hand smoke may also constitute harassment, trespass, constructive eviction, intentional infliction of emotional distress or battery. Although these theories are potential causes of action, each case is fact specific, and their application may vary. However, the monetary cost to file suit and prosecute an action may be prohibitive. Therefore, a member's best course of action is to first seek a remedy through the community association. If the association is unable to resolve the problem, a lawsuit against the offender may be appropriate.

Accordingly, common interest communities and their residents have options to prevent exposure to second hand smoke. In light of the health risks created by second hand smoke, restricting or eliminating it is entirely justified. Association residents are more knowledgeable of the problems and are more likely to seek help to avoid exposure. Associations can play an important role in providing a healthier environment. Should an association or resident be uncertain as to the appropriate manner in which to eliminate exposure to second hand smoke, the advice of legal counsel should be sought.

Brian J. McIntyre *is an associate in the* ***General Litigation*** *and* ***Community Association Law Practice Groups.***

Beware What You Say… cont.

(continued from page 7)

the Act or due to the fact that the participants had no expectation of privacy because the conversation took place in a public area.

This issue was recently reviewed by the court in *Kinsella v. Welch.* In that matter, the plaintiff claimed that a news program violated the Act when the program's producer videotaped the plaintiff in a hospital emergency room. While plaintiff was in the emergency room, NYT Television was taping a television program.

Under the consent exception, the court held that if the videotape recorded any communication between plaintiff and the Jersey Shore medical staff, the Act would not apply because Jersey Shore consented to NYT's videotaping. The impact of that holding is that you could be recorded without your knowledge, and the recording is legal because someone else consented to the taping.

In addition, conversations recorded in public are not generally protected by the Act because there is no reasonable expectation of privacy with respect to conversations had in public. However, in cases where someone is challenging the recording of a conversation, the following factors are considered by courts to determine whether an individual had any reasonable expectation of privacy in publicly accessible places: (1) the volume of the communication or conversation; (2) the proximity or potential of other individuals to overhear the conversation; (3) the potential for communications to be reported; (4) the affirmative actions taken by the speakers to shield their privacy; (5) the need for technological enhancements to hear the communications; and (6) the place of location of the oral communications as it relates to the subjective expectations of the individuals who are communicating.

Conclusion

Under the consent exception to the Act is it is possible that you could be recorded by another without them having to advise you that they are recording your conversation. Such conversations could have an impact on you later and could be used in a legal proceeding.

If you have any questions regarding this or any legal matter, the experienced attorneys of **Hill Wallack LLP** are ready to assist you.

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

Home Improvement… cont. *(continued from page 11)*

payment or the signing of a completion slip before a project is completed or before copies of all necessary inspection certificates are given to the consumer.

These examples highlight the strong public policy of protecting consumers in New Jersey. A more expansive explanation of the various illegal acts and practices can be found in the Division of Consumer Affairs Administrative Rules governing Home Improvement Practices.

Home Improvement Contractor Registration

Home improvement sellers and contractors must register with the New Jersey Division of Consumer Affairs in order to lawfully advertise and conduct a home improvement business. However, there are limited exemptions to this registration requirement outlined within the New Jersey Contractors' Registration Act. If no exemption to the registration requirement applies, the seller or contractor must complete a registration application with the Division of Consumer Affairs, provide proof of commercial general liability insurance with a minimum of $500,000.00 coverage per occurrence, disclose particular criminal background information in a required disclosure statement and pay the appropriate registration fee.

Once registered, the contractor's assigned registration number must be included on all home improvement contracts, sales documents and advertisements. The registration number must also be displayed at all business locations and on all commercial vehicles registered in New Jersey that are leased or owned by the contractor and used for completing home improvements, except that the number need not be displayed on vehicles leased or rented to customers.

Contractors must update any changes in information included in a registration application within 20 days of the change and update any changes in information included in the mandatory disclosure statement within 30 days of the change. Insurance policy changes must also be promptly submitted to the Division of Consumer Affairs.

A home improvement contractor's registration can be suspended or revoked if it is found to have been obtained through fraud or misrepresentation. Negligent and/or criminal acts may also form a basis for registration suspension or revocation.

If a contractor knowingly fails to register or follow registration renewal procedures, it is subject to a fourth degree crime. Furthermore, municipalities in the State of New Jersey cannot issue construction permits to unregistered home improvement contractors.

To ensure that the registration system is working properly, the Division of Consumer Affairs provides all registered home improvement contractors with a toll-free telephone number that must be included on all home improvement contracts. The purpose of the toll-free hotline is to provide consumers and contractors with information about registered contractors and the registration process. Interested parties may also access an informative link on the New Jersey Division of Consumer Affairs website at www.nj.gov/oag/ca/home.htm.

Practical Implications

These rules and regulations exist to protect consumers and to regulate a large area of consumer contracting. In reality, these statutes and regulations protect both consumers and contractors, as these types of contracts can be complex and can potentially lead to a variety of problems when home improvement projects are not satisfactorily completed. The failure to heed the requirements can expose the offending contractor to awards of treble damages and attorneys' fees, as well as potential class action lawsuits for nonconforming contracts.

The attorneys of the **Administrative Law/Government Procurement Practice Group** of **Hill Wallack LLP** stand ready to assist retailers and contractors in the areas of consumer contracting and consumer fraud, including contract review and on-site training for your sales force.

Dana M. Lane *is an associate in the* ***Administrative Law/Government Procurement Practice Group*** *of* ***Hill Wallack LLP.*** *She concentrates her practice in Administrative Law and Corporate Litigation including Public Procurement and Environmental Litigation with a particular emphasis on administrative and regulatory compliance.*

Partnership Agreements… cont.

(continued from page 5)

Conclusion

The partnership agreement is a document that the partners should take great care in drafting. While it can be treated as any other contract, terms of which can be negotiated between the parties, there are certain rights and requirements proscribed by the UPA that cannot be bargained for or negotiated away. On issues that fail to be addressed by a written partnership agreement, the UPA provides for gap filler provisions in order to resolve any open issues among and between the partners. Included in these gap filler provisions are statutes pertaining to control and authority of the partnership. It is best to consult with your attorney to assure that you fully memorialize and carefully draft the partnership agreement to provide for the complete understanding of the partners of the partnership.

Nicole Perdoni-Byrne *is an associate at* ***Hill Wallack LLP*** *where she is a member of the* ***Real Estate Division*** *and the* ***Banking & Secured Transactions Practice Group.*** *She concentrates her practice in all matters of banking and secured transactions, including: acquisition finance, construction financing and refinancing, loan modification, restructuring, loan documentation, workouts, foreclosures and closings.*

Negotiation Rules… cont. *(continued from page 6)*

Thereafter, each bidder must be afforded a reasonable opportunity to negotiate. The governing body shall not award such contract unless the negotiated price is lower than the lowest rejected bid price submitted on the second occasion by a responsible bidder, is the lowest negotiated price offered by any responsible bidder, and is a reasonable price for such goods or services. Accordingly, the contracting unit should follow this process and document the notice submitted to each bidder on the second occasion of its intention to negotiate.

New Jersey courts have noted the utility of the negotiation process to achieve the lowest responsible price for a municipality and/or other local contracting unit. The Appellate Division has noted that where negotiation is permissible under the above-described statute, the contracting unit has great flexibility and may use any conceivable business method to accomplish the goal of obtaining the lowest available price. Specifically, in a case entitled *Interstate Waste Removal Co., Inc. v. Board of Com'rs,* the court found:

> There is no magic or uniform procedure which must be utilized. So long as it is structured to accomplish the purpose of the legislation, namely, to achieve the lowest available price from a responsible bidder, and the former bidders are given an opportunity to participate, the municipal officials have fully complied with their statutory duty.

Again, as described above, under no circumstances can award be made to a vendor at a price that is higher than the lowest rejected bid submitted on the second occasion. Accordingly, municipalities and local contracting units should negotiate the award of contracts for goods and/or services in the manner described above.

Municipalities and other contracting units armed with the above knowledge can ensure they are administering the negotiation process in accordance with statutory requirements. The attorneys in **Hill Wallack LLP's Administrative Law/Government Procurement** and **Municipal Law Practice Groups** are experienced and knowledgeable in representing municipalities and other contracting units concerning compliance issues.

Megan M. Schwartz *is an associate in the* ***Administrative Law/Government Procurement Practice Group*** *of* ***Hill Wallack LLP.*** *She concentrates her practice in Administrative Law including Public Procurement with a particular emphasis on administrative, environmental and regulatory compliance.*

HILL WALLACK LLP
ATTORNEYS AT LAW

PRSRT STD
US POSTAGE PAID
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