HILL WALLACK LLP
ATTORNEYS AT LAW

Quarterly
NEWSLETTER

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IN THIS ISSUE

Message From the Managing Partner

This issue of the *Quarterly* highlights some interesting and complex legal issues that arose during the year from our client's diverse legal needs. Our goal is to keep you apprised of relevant changes in the law that may not only interest you but protect your business endeavors.

Our lead article *"Building Churches Often Contentious, Often Complex"* by Steve Eisdorfer concentrates on the construction or expansion of religious facilities. Ken Thayer in *"An Employer's Introduction to the Second Injury Fund"* discusses disability benefits to injured workers. Jeff DiAmico interprets the tax regulations of the PA Department of Revenue in his article, *"Pennsylvania Realty Transfer Tax Update…";* while Cherylee Judson examines personal injury damages under the Tort Claims Act in her article *"Apportionment of Fault to Public Entities = Fairness for Joint Defendants".*

Eric Kelner brings us up-to-date on foreclosure actions in *"Pendente Lite Sale, Why Sit Back and Watch a Sinking Ship",* while Tiffanie Benfer interprets the Americans with Disabilities Act in her article *"Does a Disabled Employee Seeking A Reassignment Have to Compete with the Rest of the Applicant Pool?"*

We hope that our *Quarterly* Newsletter is a valuable resource to our readers as **Hill Wallack** endeavors to provide informative, but interesting articles which deal with topics that are related to both your needs and interests. We welcome your suggestions for our future issues and we encourage you to contact the authors with any questions relating to the articles contained in this issue. Please feel free to e-mail your comments or suggestions on future topics of interest to info@hillwallack.com.

– Robert W. Bacso

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Building Churches Often Contentious, Often Complex

by Stephen M. Eisdorfer

In a recent opinion in a case entitled *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch,* the Federal Court of Appeals for the Third Circuit cast new light on the legal standards that govern local disputes over the construction or expansion of churches, synagogues, mosques, temples and other religious facilities.

Although Americans are among the most diligent churchgoers in the world, any attempt to construct a new religious building or to expand an existing one is virtually guaranteed to draw crowds of objectors. Sometimes the objections are stimulated by prejudice against religious or ethnic minorities, but attempts to construct or expand churches for even mainstream religions draw opposition.

As a result of this paradox, a large body of specialized state and federal law now governs disputes over the construction or expansion of religious structures. To properly deal with these disputes, religious organizations, local planning and zoning boards and the objecting neighbors need some understanding of this specialized law.

Constitutional Considerations

These matters sometimes involve issues of constitutional rights under the "free exercise clause" of the First Amendment to the United States Constitution or the parallel provisions of the New Jersey Constitution. As enunciated by the U.S. Supreme Court, if a local ordinance is "neutral" and "generally applicable" and any burden that it may impose on religious conduct — however severe — is only incidental to its neutral purpose, the "free exercise clause" offers no protection. Even where public officials are plainly responding to expressed religious prejudice or stereotyping by members of the public but refrain from expressing any such views themselves, their facially neutral and uniformly applied policies are immune from attack under the "free exercise" clause.

If, however, the local ordinance is not neutral, that is, it discriminates against religiously motivated conduct, or is not generally applicable, that is, it proscribes particular conduct only or primarily when religiously motivated, strict scrutiny applies. Then, even a modest burden on religious conduct violates the free exercise clause unless it is narrowly tailored to advance a compelling government interest.

Inherently Beneficial Uses Promoted

More commonly, however, these cases involve specialized principles of New Jersey zoning law. Independent of any constitutional or statutory prohibitions, the New Jersey courts have recognized that there are land uses that provide public benefits even if they are not permitted in particular areas. They have evolved a body of judge-made state law to require towns to accommodate these "inherently beneficial uses." Churches and other religious buildings were among the earliest "inherently beneficial uses" identified by the courts. Zoning boards must grant use or bulk variances for "inherently beneficial uses" such as churches or religious buildings if, on balance, the public benefit outweighs any detriment to the public good or impairment of the intent and purpose of the zoning plan and zoning ordinance.

As outlined by the New Jersey Supreme Court in *Sica v Board of Adjustment of Wall,* this evaluation involves a four-step analysis:

1) The zoning board must identify the public interest at stake. Some uses are deemed more compelling than others.

2) The board must identify any detrimental effect that will ensue from the grant of the variance.

3) Where feasible, the local board must attempt to minimize the detrimental effect by imposing reasonable conditions on the use.

4) The board must then weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.

In *Sica,* the Supreme Court declared that "[t]his balancing, while properly making it more difficult for municipalities to exclude inherently beneficial uses . . . permits such exclusion when the negative impact of the use is significant. It also preserves the right of the municipality to impose appropriate conditions upon such uses.'" While every application for approval of construction or expansion of a church or religious building involves its own particular facts, objectors repeatedly raise four issues: traffic, parking, noise, visual impact on the neighborhood. In considering the proposed use, the reviewing board must weigh any detriment which the use may cause to the neighborhood with respect to these factors against the presumed benefits of the use, decide whether there are ways to reduce any harmful impact, and determine whether, on balance, the anticipated detriments are substantially greater than the expected benefits.

In some instances, religious uses that are not expressly permitted by local zoning ordinances are entitled to operate even without variances. The courts have consistently held that home worship services, even if conducted on a regular basis and open to the public, are permitted "accessory uses" in residences as long as they remain small in scale. Where churches are permitted, other religious uses integrally related to the operation of the church's mission, such as a homeless shelter or a radio station, may also be accessory uses to the permitted use.

The Effect of RLUIPA

The *Lighthouse Institute* case, however, did not involve either the First Amendment or New Jersey zoning law doctrines governing "inherently beneficial uses" or "accessory uses." Rather, it involved a relatively new federal statute that also governs these disputes—the Religious Land Use and Incarcerated Persons Act (commonly referred to as "RLUIPA"). As its name suggests, this statute seeks, in part, to protect religious activities against certain types of local land use regulation.

RLUIPA has three key provisions that affect disputes over the construction of religious structures. First, *42 U.S.C. §2000cc(a)(1)* prohibits any government entity from imposing or implementing any "land use regulation" in a manner that "imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution" unless the government demonstrates that imposition of the burden on that person, assembly, or institution is both (a) "in furtherance of a compelling governmental interest" and (b) "the least restrictive means of furthering that compelling governmental interest."

Second, *42 U.S.C. §2000cc(b)(1)* and *(2)* prohibit any governmental entity from imposing or implementing a "land use regulation" in a manner

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"In some instances, religious uses that are not expressly permitted by local zoning ordinances are entitled to operate even without variances."

An Employer's Introduction to the Second Injury Fund

by Kenneth W. Thayer

> *"The Second Injury Fund gives employers a significant incentive to settle total disability matters in which the Fund will participate."*

The Second Injury Fund was created in 1923 in order to provide total and permanent disability benefits to injured workers in cases where the cause of the disability is due both to a prior disability and a subsequent compensable accident. Fund eligibility is predicated upon the prior disability plus the last compensable injury must render the injured worker one hundred percent disabled. The reason behind the creation of the Second Injury Fund was to allow injured workers who were not one hundred percent disabled the ability to find subsequent employment and encourage employers to hire injured workers. The employers were given an incentive to hire the injured worker by limiting the exposure the employer would face if a subsequent injury were to occur. The subsequent employer would only be responsible for their share of any injury and/or occupational exposure that occurred during their employment.

Calculation of Benefits

The Second Injury Fund bases total permanent disability awards upon a calculation of 450 weeks of disability. The employee is paid based on a calculation of 70% of the employee's wages, up to a maximum amount for the year of the injury as determined by the New Jersey Department of Labor. Questions must be addressed when a matter is presented before the Second Injury Fund: 1) Is the employee totally and permanently disabled?; 2) If so, is the total disability due to the last compensable accident combined with all prior disabilities or due to the last compensable accident only?; 3) If due to the former, then an allocation must be made as to the percentage of the 450 week award that will be paid by the employer and the Second Injury Fund. The payments are usually split based on the allocated percentage of the entire award. For example, if the matter were to resolve by way of a 70/30% split between the employer and the Second Injury Fund, the employer would be responsible for 70% of the total disability award of 450 weeks or 315 weeks. The Second Injury Fund would pay 135 weeks. The weekly payments are also subject to any offsets from Social Security Disability payments.

Fund Participation Benefits

The Second Injury Fund gives employers a significant incentive to settle total disability matters in which the Fund will participate. In such situations, payment of total disability benefits could be substantially less than if a partial permanent disability award was paid. The advantage comes when a Social Security Disability offset for total disability reduces the amount of the weekly payment. The offset only remains until the employee reaches the age of sixty-two. An additional benefit is that the payment of compensation benefits is for a finite period of time.

The employer knows the extent of their liability at the time of settlement of the claim. The court sets a date of totality. The date of totality is the date on which it is determined that the employee can no longer operate as a working unit. This is the date upon which the employer will begin to make total disability payments. Therefore the employer knows the exact date on which their liability for compensation

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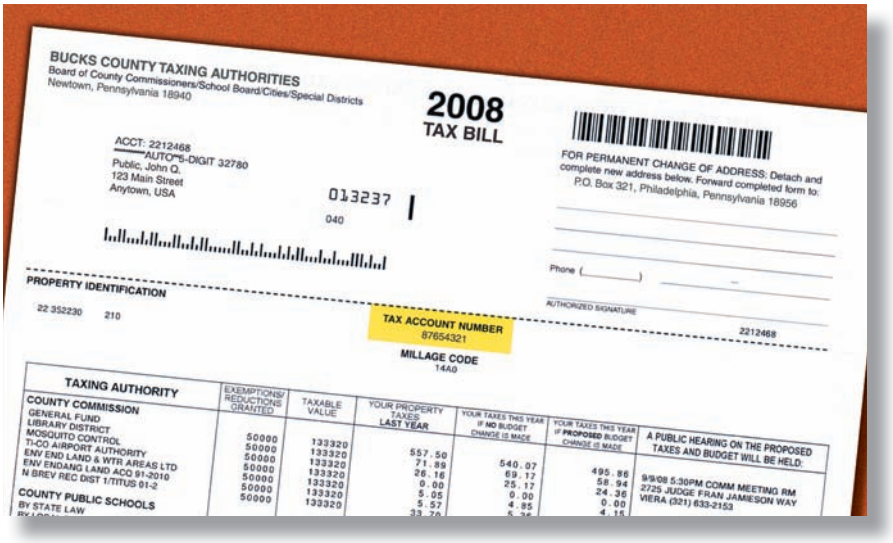
PENNSYLVANIA REALTY TRANSFER UPDATE

Amended Regulations Could Result in a Double Tax on Assignments of Purchase Agreements and Like-Kind Exchanges

by Jeffrey G. DiAmico

Assignments of agreements of sale and like-kind exchanges are now potentially subject to a double tax thanks to the Pennsylvania Department of Revenue's ("Department") December 15, 2007 amendments to the Realty Transfer Tax Regulations ("Amended Regulations"). The double tax has been confirmed as recently as April 18, 2008 when the Department revised its Realty Transfer Tax Bulletin 2008-01, which was originally issued on January 3, 2008 ("Bulletin"). The Bulletin was issued in an attempt to provide more detailed "guidance" on like-kind exchanges, assignments of agreements of sale, and other taxable events, through a series of hypothetical scenarios and the Department's explanation of the tax results for each scenario.


BUCKS COUNTY TAXING AUTHORITIES
Board of County Commissioners/School Board/Cities/Special Districts
Newtown, Pennsylvania 18940

2008
TAX BILL

ACCT: 2212468
AUTO**5-DIGIT 32780
Public, John Q.
123 Main Street
Anytown, USA

013237
040

FOR PERMANENT CHANGE OF ADDRESS: Detach and complete new address below. Forward completed form to:
P.O. Box 321, Philadelphia, Pennsylvania 18956

Phone (_____)

AUTHORIZED SIGNATURE

PROPERTY IDENTIFICATION
22 352230 210

TAX ACCOUNT NUMBER
87654321

2212468

MILLAGE CODE
14A0

TAXING AUTHORITY	EXEMPTIONS/ REDUCTIONS GRANTED	TAXABLE VALUE	YOUR PROPERTY TAXES LAST YEAR	YOUR TAXES THIS YEAR IF NO BUDGET CHANGE IS MADE	YOUR TAXES THIS YEAR IF PROPOSED BUDGET CHANGE IS MADE	A PUBLIC HEARING ON THE PROPOSED TAXES AND BUDGET WILL BE HELD:
COUNTY COMMISSION						
GENERAL FUND	50000	133320	557.50			
LIBRARY DISTRICT	50000	133320	71.89			
MOSQUITO CONTROL	50000	133320	26.16	540.07	495.86	9/9/08 5:30PM COMM MEETING RM
TI-CO AIRPORT AUTHORITY	50000	133320	0.00	69.17	58.94	2725 JUDGE FRAN JAMESON WAY
ENV END LAND & WTR AREAS LTD	50000	133320	0.00	25.17	24.36	VIERA (321) 633-2153
ENV ENDANG LAND ACQ 91-2010	50000	133320	5.05	0.00	0.00	
N BREV REC DIST 1/TITUS 01-2	50000	133320	5.57	4.85	4.15	
COUNTY PUBLIC SCHOOLS			33.70			
BY STATE LAW						

Realty Transfer Tax

The Pennsylvania Realty Transfer Tax is imposed at the rate of one percent (1%) for the State and generally one percent (1%) for the local portion of the actual consideration paid, or to be paid, for the transfer of an interest in real estate. Some larger counties/municipalities charge a higher local rate, such as Philadelphia County which charges three percent (3%). When no consideration or nominal consideration is paid, the tax is based on the property's actual monetary worth computed through the use of assessed value for local real estate tax purposes and adjusted to the market value. The realty transfer tax is a joint and several tax in that all parties to the transaction (seller and buyer) are responsible for the payment of the tax. Traditionally, the payment is split between both parties.

Assignments of Agreements of Sale

The amended regulations provide that where a party assigns its agreement of sale to a business entity formed just before closing, the assignment and the deed from the original owner are two separate "transactions", each subject to realty transfer tax. This type of routine assignment is standard practice throughout the real estate industry, and until the recent amendment, was only taxed once upon the transfer of the deed. Although there may be no consideration for the assignment, the double tax will be based on the property's actual monetary worth computed through the use of assessed value for local real estate tax purposes and adjusted to the market value.

However, if the newly formed business entity was created prior to execution of the agreement of sale, the assignment from the buyer to the new entity may not be subject to an additional transfer tax, as long as the buyer was acting as an agent and executed the agreement on the new entity's behalf. Consequently, if you are contemplating entering into an agreement of sale with the intent of assigning the agreement to a business entity to be named later, it will be necessary to form the new business entity prior to entering into the agreement of sale; otherwise, pursuant to the Department, you will be responsible for two (2) separate realty transfer taxes.

Additionally, in addressing the issue of assignments of contracts for additional consideration, the Department will be taxing each assignment

"The realty transfer tax is a joint and several tax in that all parties to the transaction (seller and buyer) are responsible for the payment of the tax."

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Apportionment of Fault to Public Entities = Fairness for Joint Defendants

by Cherylee O. Judson

> *"... where liability is disputed, the CNA provides that the trier of fact ... shall place a total value on the injured party's damages and assess the percentage of negligence or fault of each party involved."*

Under the Tort Claims Act (TCA), a public entity or a public employee cannot be held liable for personal injury damages *unless* the plaintiff sustained a permanent injury as defined by the TCA. According to the TCA, damages will only be awarded against a public entity if the plaintiff can prove that he or she sustained a permanent loss of bodily function or permanent disfigurement that is substantial and incurred medical expenses of at least $3,600. On the other hand, unlike a public entity, a private individual is subject to liability without having the plaintiff meet such a threshold and demonstrate the severity of his or her injuries. With these different standards in place for a public entity and a private individual, one must ask what the impact is when a plaintiff's injuries are caused jointly by a public entity and a private individual.

Competing Standards Effecting Liability

Recently, the Appellate Division addressed this issue in *Bolz v. Bolz,* as it focused on the interplay of the TCA, the Joint Tortfeasors Contribution Law (JTCL), and the Comparative Negligence Act (CNA) when a plaintiff sustains injuries in an automobile collision between a private automobile and an automobile owned by a public entity and driven by a public employee. In *Bolz,* the plaintiff was a passenger in a private automobile and sustained a wrist fracture and neck and back injuries when a tractor trailer, owned by a public entity and operated by a public employee, backed into the vehicle in which plaintiff was a passenger. At the trial level, the judge instructed the jury that different standards applied to determine the liability of each driver: the plaintiff had to prove that the private, "host" driver was negligent and allegedly caused a "permanent injury" under the verbal threshold, while the plaintiff had to show that the public entity defendant was negligent resulting in a "substantial permanent injury" under the TCA. The jury concluded that the plaintiff sustained a permanent injury, but not a *substantial* permanent injury; thus, the jury did not address the question of comparative negligence, and a verdict was entered only against the private defendant for the full amount of the award. The private defendant appealed, contending that he was deprived of a determination of whether the public entity's negligence was a proximate cause of the accident and, if so, to what percentage.

In all negligence actions (including an automobile accident) where liability is disputed, the CNA provides that the trier of fact (usually the jury) shall place a total value on the injured party's damages and assess the percentage of negligence or fault of each party involved. The allocation of a percentage of fault is imperative because the CNA states that if a party is found to be at least 60% at fault, the plaintiff can recover the full amount of damages from that party. However, if a party is found to be less than 60% at fault, the plaintiff can only recover the percentage of damages directly attributable to that party's negligence. Furthermore, the underlying purpose of the JTCL is to promote the fair sharing of the burden of judgment by joint tortfeasors.

Construing the three key statutory schemes together (the CNA, TCA, and JTCL), the Appellate Division concluded in *Bolz* that, although a public entity is not liable to pay damages unless the plaintiff sustained a "substantial permanent injury" as defined by the TCA, the public entity remains a party whose liability must be apportioned under the CNA. A public entity, similar to a private individual, can be a "tortfeasor" if found to have

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Pendente Lite Sale, Why Sit Back and Watch a Sinking Ship?

by Eric P. Kelner, Esq.

Given the downturn in the economy and the falling housing market, secured creditors of commercial entities often find themselves in the undesirable position of commencing a foreclosure action, when at the onset of the action, the creditor is aware that it will likely not recover its lien amount. Additionally, during the foreclosure action, the creditor will be required to make advances for taxes, insurance and other necessary expenses to secure the property and protect its lien position, notwithstanding that the value of the property is likely decreasing during the proceeding. Under these circumstances, the secured creditor is on a sinking ship and the longer the foreclosure action takes, the greater the resulting deficiency will be once the sheriff's sale is complete.

The secured creditor may be under the impression that it must remain on the sinking ship through sheriff's sale and attempt to recover the deficiency from the individual guarantors, if any, which given the insolvent status of the business may result in minimal recovery. However, the secured creditor has an available alternative provided for by New Jersey statutes, which is largely underutilized, known as the *pendente lite* sale.

Procedure

A *pendente lite* sale is a sale of the property upon application of an interested party through a receiver or a sheriff prior to the obtainment of a final judgment of foreclosure, when the property is likely to decrease in value, and the continuing preservation of the property is not feasible, given the diminishing potential return on the property. This remedy is provided for by *N.J.S.A. 2A:50-31* as follows:

> When, in an action for the foreclosure or satisfaction of a mortgage covering real or personal property, or both, the property mortgaged is of such

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> *"... the secured creditor has an available alternative provided for by New Jersey statutes, which is largely underutilized, known as the* pendente lite *sale."*

SPOTLIGHT

NEW PARTNERS

Henry T. Chou has become a partner of **Hill Wallack LLP's** Princeton Office in the **Land Use Division** which encompasses its **Land Use Applications** and **Land Use Litigation Practice Groups**. He concentrates his practice in the land development application and permitting process and the litigation of land use matters. An honors graduate of the University of Georgia, Mr. Chou received his law degree from the Rutgers University School of Law. Following law school, he served a judicial clerkship with the Honorable Lawrence M. Lawson, Assignment Judge of Monmouth County. Mr. Chou is admitted to practice in New Jersey and Pennsylvania and the U.S. District Court of New Jersey.

Elizabeth K. Holdren has become a partner of the Princeton Office in the **Creditors' Rights/ Bankruptcy Practice Group**. She concentrates her practice in all matters of creditors' rights and bankruptcy, including workouts, replevin actions, commercial litigation and collections. A graduate of Douglas College, Rutgers University, Ms. Holdren earned her Juris Doctor degree from Rutgers University School of Law and is admitted to practice law in New Jersey, the United State's District Court for the District of New Jersey as well as Pennsylvania.

Thomas W. Halm, Jr. joins **Hill Wallack LLP** in the Princeton office as partner of the firm's **Creditors' Rights/Bankruptcy Practice Group**. Mr. Halm represents secured and unsecured creditors, financial institutions, hedge funds, creditors' committees, commercial landlords, asset purchasers, trustees, receivers, and lessors in both state and federal courts in bankruptcy, insolvency, and other creditors' rights matters. His practice encompasses commercial foreclosures, tax foreclosures, suits on defaulted loan/lease obligations, specific performance of contractual obligations, preference actions, fraudulent conveyance actions, civil RICO actions, professional liability actions, non-dischargeability claims, confirmation and cramdown hearings, adequate protection, use of cash collateral, stay relief motions, sales of assets, and other such proceedings. A cum laude graduate of Seton Hall University, Mr. Halm earned his law degree from Seton Hall University School of Law. He is a member of the Mercer County and the New Jersey State Bar Associations, the Turn Around Management Association and the American Bankruptcy Institute. Mr. Halm is admitted to practice in New Jersey, Pennsylvania and the U.S. Bankruptcy Court for the Eastern District of Michigan.

Timothy J. Duffy joins the firm as partner of the firm's **Real Estate** and **Business & Commercial Practice Groups** in the Newtown Office. Mr. Duffy concentrates his practice in the areas of commercial real estate, business transactions and commercial litigation. He represents businesses and individuals in real estate acquisitions and financing transactions, business formation, land use and development, and civil litigation. Mr. Duffy is a graduate of St. Joseph's University and The Dickinson School of Law, where he was a member of the Woolsack Honor Society. He was an intern to the Honorable Sylvia H. Rambo of the United States District Court for the Middle District of Pennsylvania. Mr. Duffy is an active member of the Bucks County Bar Association, currently serving on the Board of Directors and previously having served as Treasurer and as the Association's Solicitor. He also serves on the Board of Directors and Executive Committee of the American Red Cross, Lower Bucks County Chapter and is serving his second term as Vice-Chair. He is Vice-President/Boys Intramural Coordinator for the Upper Makefield Newtown Soccer Club, and is a member of the Upper Makefield Business Persons' Association.

APPOINTMENTS & RECOGNITION

Rocky L. Peterson, a partner in the Princeton Office of **Hill Wallack LLP**, where he is a member of the firm's **Litigation Division, Municipal** and **School Law Practice Groups** has satisfactorily completed the prescribed courses of study for the designation of Diplomate in New Jersey Local Government Law. The Diplomate in New Jersey Municipal Law is offered jointly by the Center for Government Services of Rutgers, the State University of New Jersey and the New Jersey Institute of Local Government Attorneys. A graduate of Cornell University, Mr. Peterson received a degree in law from Cornell University School of Law. Prior to joining Hill Wallack LLP in 1984, Mr. Peterson was a Deputy Attorney General for

the State of New Jersey. A member of the New Jersey State Bar Association, he has served as chair of both the NJSBA Minorities in the Profession and Bar/Law School Liaison Committees.

Jeffrey L. Shanaberger, a partner in the Princeton Office and member of the firm's **Litigation Division** and **Trial & Insurance Practice Group**, was recently a featured speaker at the School Alliance Insurance Fund Risk Management Seminar. Mr. Shanaberger's presentation provided an overview of the Tort Claims Act, New Jersey's 35 year old statute that governs claims against public entities and their employees. The seminar addressed important current topics in school liability law including sexual misconduct of teachers toward students, bullying, sports-related injuries and common problems involving supervision and security of students and included a discussion of practical suggestions for addressing student accidents and claims in anticipation of 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.

Paul P. Josephson, partner-in-charge of the **Regulatory & Government Affairs** and the **Gaming Law Practice Groups** in the Princeton and Atlantic City Offices of **Hill Wallack LLP** and Principal of **Government Process Solutions LLC**, a Trenton public affairs and media affairs affiliate, was recently a featured panelist at CLE International's National *"Eminent Domain"* Super Conference held in Orlando, Florida. Speakers included top condemnation attorneys from around the United States. Mr. Josephson spoke to a national audience of attorneys on alternative dispute resolution and settlement of condemnation cases. His presentation focused on media and political strategies and the use of publicity and media to achieve early resolution of takings cases.

Mr. Josephson was also a featured panelist at the Lorman Education Services Seminar Conference *"Election Law in New Jersey."* Mr. Josephson gave his presentation on election law litigation and pay to play issues. Mr. Josephson concentrates his practice in Administrative Law and Litigation, including Election and Campaign Finance Compliance and Government Ethics, Redevelopment and Public Entity Law, as well as Gaming Law. A leader in Barack Obama's campaign, he has been elected as an Obama delegate to the 2008 Democratic National Convention in Denver. Mr. Josephson previously served as Chief Counsel to the Governor, and as Assistant Attorney General and Director of the Division of Law within the New Jersey Office of the Attorney General. Mr. Josephson graduated from Montclair Kimberley Academy. He earned his undergraduate degree from the University of Michigan, and his J.D. with honors from the National Law Center at George Washington University.

Francis J. Sullivan, partner of **Hill Wallack LLP** in the Newtown office, where he is partner-in-charge of the firm's **Business & Commercial Practice Group** was recently elected as 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 University 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. He is a member of the American Bar Association, the Pennsylvania Bar Association and the Bucks County Bar Association.

Nielsen V. Lewis, a partner of **Hill Wallack LLP** in the Princeton Office, was recently a featured panelist at the environmental seminar, *"When Can You Really Rely On An NFA Letter?"* The seminar was part of an all-day program, *"Brownfields: Emerging Issues in Redevelopment,"* co-sponsored by the Rutgers Office of Continuing

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Does a Disabled Employee Seeking a Reassignment Have to Compete with the Rest of the Applicant Pool? Maybe!

by Tiffanie C. Benfer

Under the Americans with Disabilities Act (ADA) an employer cannot discriminate against a qualified individual with a disability. The courts collectively agree that a qualified individual with a disability is someone who with or without a reasonable accommodation can perform the essential functions of the position the individual holds or seeks. In order to determine whether a function is essential a number of factors are examined on a case-by-case basis. Examples of reasonable accommodations include modified work schedules and reassignment to a vacant position.

The 3rd Circuit has determined when an employee brings a failure-to-transfer claim against his/her employer the employee has the burden of establishing:

(1) there was a vacant, funded position;

(2) the position was at or below the level of the employee's former job; and

(3) the employee was qualified to perform the essential duties of the job with reasonable accommodations.

Should an employee set forth all three elements, then the employer must show that the reassignment would impose undue hardship. Otherwise, failure to reassign could be a violation of the ADA.

Failure to make a reasonable accommodation to an individual with known physical or mental limitations for an otherwise qualified employee is an act of discrimination unless the accommodation would impose an undue hardship on the operation of the employer's business. Should the accommodation be unreasonable or impose an undue hardship then the employer is not obligated to accommodate the employee. This leaves the courts faced with the responsibility of defining what constitutes an unreasonable accommodation and what accommodations result in undue hardship for an employer.

A job reassignment is an accommodation commonly requested by disabled employees. The courts have determined that the ADA does not require an employer to create a new position for a disabled employee seeking a reassignment. In *U.S. Airways, Inc. v. Barnett*, the Supreme Court concluded that a reassignment is unreasonable if it violates the employer's established policy of a seniority system. However, an employee is not left out in the cold simply because an employer has an established seniority system. The Supreme Court adopted an exception to this rule. In certain circumstances, "special circumstances" can trump an employer's seniority policy.

Neither the Supreme Court nor the 3rd Circuit have squarely addressed whether placing a qualified, but not the most qualified candidate, in a vacant position is a reasonable accommodation. It has been suggested that if a disabled employee is not required to compete equally with the rest of the applicants, this would convert the ADA, a non-discriminatory statute, into a mandatory preference statue that

places an "unreasonable imposition on the employers and coworkers of disabled employees." *EEOC v. Humiston-Keeling, Inc.* While this line of reasoning makes a strong argument, it has the high probability of leaving a disabled employee out of a job. One can only hope that the court would recognize once again that in certain circumstances, "special circumstances" should trump the employer's policy.

Most recently, the 8th Circuit in *Huber v. Wal-Mart* considered whether a reasonable accommodation includes giving a current disabled employee preference in filling a vacant position even though the employee is not the most qualified candidate for the job. In this particular case the employer, Wal-Mart, asserted that it had a nondiscriminatory policy to hire the most qualified applicant, and therefore, the employee was not entitled to be reassigned to the vacant position without competing with the other applicants.

The court agreed with Wal-Mart that the ADA *does not* require an employer to turn away a superior applicant in order to accommodate the disabled employee. In essence, Wal-Mart did not have to show that the disabled employee did not qualify for the job, but rather, was not the best candidate for the job to establish the accommodation as unreasonable.

However, in *AKA v. Washington Hospital*, the 10th Circuit reached a very different conclusion on this very issue. The court concluded that under the ADA when a disabled employee asks for a reassignment the employer must award a vacant position to the disabled employee even though the pool of applicants includes more qualified individuals.

In *EEOC v. Humiston-Keeling, Inc.*, the 7th Circuit suggests that the ADA does not require an employer to give a disabled employee priority over a more qualified applicant as long as the employer has an established policy to hire the most qualified applicant.

"Failure to make a reasonable accommodation to an individual with known physical or mental limitations for an otherwise qualified employee is an act of discrimination unless the accommodation would impose an undue hardship on the operation of the employer's business."

What Does This Mean?

It is safe to say that an employer does not have to violate an established seniority system to accommodate a disabled employee's request for a job reassignment. The question that remains is whether the Court is willing to extend this theory so that employers are required to turn away superior candidates. It appears that it is a legitimate possibility that the Supreme Court will consider this issue given the fact that the lower courts have been unable to reach a consensus. Should the Court adopt the decision in *Wal-Mart*, an employer will simply have to show that the employee was not the best candidate in order to avoid liability under the ADA.

How Does This Affect an Employer?

Should an employer decide to assert this position when a disabled employee requests a reassignment, the employer should at the very least be prepared to demonstrate that it has an established non-discriminatory policy to hire the most qualified applicant. Otherwise, the court may find this assertion pretextual, leaving the employer vulnerable for liability under the ADA.

How Does This Affect an Employee?

Should the Supreme Court agree with the court's decision in *Wal-Mart*, a disabled employee will face additional hurdles in order to make a successful claim against an employer for a failure to accommodate. An employee will have to be prepared to challenge an employer's contention that it has established non-discriminatory policy to hire the most qualified applicant.

One potential way to pierce the employer's policy is the argument that the employer has failed to consistently implement its policy, therefore, a departure from this policy would not impact the employer's business. Another response could be the policy contains exceptions, and therefore, another is unlikely to matter. Should the decision in *Wal-Mart* be adopted by the high court, the prospect that a reassignment will deemed unreasonable will enhance.

Before making critical decisions about or affecting a potentially disabled employee's employment status, consultation with legal counsel can assist the employer in making the right decision and avoid liability. **Hill Wallack** has a team of employment attorneys who have handled these issues and counseled their client-employers with such difficult employment decisions.

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Building Churches Often Contentious, Often Complex cont. *(continued from page 3)*

that (a) "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution" or (b) "discriminates against any assembly or institution on the basis of religion or religious denomination."

Finally, *42 U.S.C. §2000cc (b) (3)* prohibits any governmental entity from imposing or implementing a "land use regulation" that (a) "totally excludes religious assemblies from a jurisdiction" or (b) "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."

Varying Interpretations

In most instances, the key provision of RLUIPA is the provision barring the imposition or implementation of any "land use regulation" in a manner that "imposes a substantial burden on the religious exercise." Congress chose not to define "substantial burden" but rather left the interpretation of that phrase to the courts. The Supreme Court has not construed this phrase, and the lower federal courts have interpreted this statutory term in quite different ways.

In *Civil Liberties for Urban Believers (C.L.U.B.) v. City of Chicago,* the Seventh Circuit Court of Appeals construed it to mean a burden "that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." By contrast, in *Midrash Sephardi, Inc. v. Town of Surfside,* the Eleventh Circuit defined the term to mean "more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." Neither the Third Circuit nor the New Jersey courts have yet addressed this issue definitively.

Lighthouse Institute focused on a different question: What constitutes treatment of "a religious assembly or institution on less than equal terms"? Lighthouse Institute sought to use its building in downtown Long Branch for a church. Long Branch's zoning ordinance prohibited churches on the site but permitted government buildings, schools, colleges, assembly halls and motion picture theaters. The Court of Appeals held that because the city could not explain why a church would have an impact on the objectives of the zoning ordinance different or greater than any of the permitted uses, the city had violated the "equal terms" provision of RLUIPA.

Before the case was ultimately decided, though, the city replaced the zoning ordinance with a redevelopment plan that permitted theaters, cinemas, performance art venues, restaurants, bars and clubs, culinary schools and dance studios on the site, but not churches and synagogues. The city's expressed purpose was to create a "vibrant" and "vital" downtown community centered on entertainment and retail uses. The Court of Appeals held that because New Jersey's liquor statutes prohibit the issuance of liquor licenses within 1,000 feet of a church, the construction of a church in the area would have a different and greater impact on objectives of the ordinance than would the permitted non-religious uses. It therefore concluded that the redevelopment plan did not treat the church "on less than equal terms" under the provision of RLUIPA.

The court held that Lighthouse was not entitled to an order permitting it to use its building as a church because the use of its property was now governed by the lawful redevelopment plan. It held, however, that Lighthouse was entitled to seek damages and attorney fees because it had previously been prevented from using its building as a church by the unlawful prior zoning ordinance.

A New Way of Thinking

As the *Lighthouse Institute* case suggests, RLUIPA changes the way towns and their boards must deal with development applications. Once the proponents of the religious structure have established a "substantial burden" or treatment "on less than equal terms," the burden shifts to the government entity to justify any restrictions it places on churches or religious structures. The presumption of validity that courts otherwise attach to local governmental actions does not apply. The case also changed the stakes. A victim now can bring suit and can secure not only injunctive relief but also damages and attorney fees.

Applications for approval of religious facilities thus can be complex. Applicants, reviewing boards and objectors must consider constitutional issues, the benefit of the proposed use, accessory uses and RLUIPA. Cases can be brought in either federal court or state court. There are often difficult procedural and substantive issues. Moreover, the courts have sometimes construed RLUIPA and the "inherently beneficial use" and "accessory use" doctrines in non-intuitive ways. Parties involved in such matters therefore are well advised to seek legal advice before acting.

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Pennsylvania Realty Transfer Update . . . cont. *(continued from page 5)*

as if they were multiple transactions. For example, in the Bulletin the Department provides the following Scenario #4: S and B enter into a contract for the sale of real estate for $1,000,000, B gets certain approvals and then assigns the contract to C for $2,000,000 for a total purchase price to C of $3,000,000, and C gets additional approvals and then assigns the contract to D for $5,000,000 for a total purchase price of $6,000,000. Under this scenario, S ultimately sells the property to D and only receives $1,000,000, and the realty transfer tax was previously only assessed on this amount. Under the new amended regulations, each assignment will be subject to realty transfer tax, resulting in a realty transfer tax being imposed on the following "transactions": (a) the $1,000,000 transfer from S to D, (b) the $3,000,000 assignment from B to C, and (c) the $6,000,000 assignment from C to D.

Obviously, such an interpretation by the Department will result in significant additional taxes to the parties involved, unless and until they are challenged.

1031 Like-Kind Exchanges

In a traditional forward 1031 Like Kind Exchange, the taxpayer assigns its agreement of sale to a qualified intermediary ("QI"), but direct deeds the property to the buyer. In a reverse 1031 Exchange, the replacement property is acquired prior to the disposition of the relinquished property and is "parked" with an exchange accommodation titleholder ("EAT"), who "parks" the property until the taxpayer sells the relinquished property. Previously, the general position was that the QI/EAT was as an agent for the taxpayer for realty transfer tax purposes, and therefore exempt from transfer tax.

However, the amended regulations include a provision specifically stating that neither a QI nor an EAT is the agent of the taxpayer (Regulation § 91.153(d)), which means that transfers to and from a QI and/or an EAT may be subject to the realty transfer tax. Ultimately the Department clarified in Scenario #5 of its Bulletin that in a forward 1031 Exchange, it is immaterial whether the QI is an agent of the taxpayer since the QI never takes title to the property. Accordingly, the QI is viewed as a mere facilitator to the conveyance, and the assignment does not result in an additional Realty Transfer Tax. In a reverse 1031 Exchange, the EAT acquires and transfers the replacement property to the taxpayer. Since the EAT actually takes title to the property, the deed is subject to an additional Realty Transfer Tax.

The updates to the Pennsylvania Realty Transfer Tax Regulations make only one thing clear . . . there will be numerous challenges to the Department's "guidance" in their explanation of the double tax.

You may be able to appropriately plan in advance to address many of the concerns raised by the Pennsylvania Department of Revenue's recent Amended Regulations. If you have any questions in connection with your real estate transaction, the members of the Real Estate Division stand ready to assist you.

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Apportionment of Fault . . . cont.

(continued from page 6)

been negligent, which negligence is a proximate cause of plaintiff's injuries. Thus, even if the public entity may not ultimately be responsible for a judgment (because a plaintiff's injuries do not meet the threshold standard of the TCA), apportionment of fault must be assessed in order to protect the private individual from bearing the full weight of a judgment if he or she is less than 60% at fault.

Ensuring Fairness for Joint Defendants

As guidance, the Appellate Division has provided some instruction on how cases where liability is at issue between a private and a public defendant should proceed. With respect to each defendant, two separate questions should be asked: (1) was this defendant negligent; and (2) if so, did the negligence proximately cause plaintiff's damages? If more than one defendant was negligent and the negligence proximately caused the damages, a third question must be asked to assess the percentage of fault attributable to each defendant. Thereafter, the final question of whether a plaintiff established a substantial permanent injury proximately caused by the public entity should be presented. If necessary, a party may also present separate categories of damages, i.e. pain and suffering, economic loss, etc., prior to fixing the amount of damages. This process will ensure that the end result will be consistent with competing statutes such as the TCA, CNA, and the JTCL, and that defendants are only held accountable for their respective share of liability.

The litigation attorneys at **Hill Wallack LLP** are experienced in handling complex litigation involving both public and private entities and employees. Please feel free to contact us should you have the need to discuss any issues relating to a civil matter.

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Spotlight . . . cont. *(continued from page 9)*

Professional Education, the NJ Chapter of the National Brownfield Association and the Society of Women Professionals, held in New Brunswick, New Jersey.

Mr. Lewis was recently the program chair and a featured speaker at a Brownfields redevelopment seminar devoted entirely to No Further Action ("NFA") letters of the New Jersey Department of Environmental Protection. The seminar was sponsored by the New Jersey Institute of Continuing Legal Education, a joint venture of the New Jersey State Bar Association, Rutgers–The State University of New Jersey and Seton Hall University.

Mr. Lewis recently addressed the 59th Annual Atlantic Builders Convention in Atlantic City hosted by the New Jersey Builders Association. A panelist on an educational program devoted to special issues in Brownfields redevelopment, Mr. Lewis spoke on an issue of vital importance to redevelopers, *"When Can You Rely On A No Further Action (NFA) Letter?"* Partner-in-charge of **Hill Wallack LLP's Environmental Law Practice Group**, Mr. Lewis counsels and represents corporations, public entities and individuals on a wide range of environmental and land use matters, including local development applications; environmental permitting; regulatory compliance; and environmental litigation, including complex CERCLA (Superfund), RCRA and New Jersey Spill Act disputes. 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.

Anthony Muscente, Jr. a partner of **Hill Wallack LLP** in the Princeton office has been elected as a Trustee to serve on the Mercer County Bar Foundation. The Foundation was formally charted in 1995 and carries out charitable functions on behalf of the legal profession in Mercer County to provide funding for educational and charitable programs as well as scholarships. The Foundation donates money to the K.I.T.E.S. (Kids Instructed in Tolerance through Education) program and the Mercer County Legal Aid Society and award law school scholarships.

Mr. Muscente was also recently a featured panelist at the ISLES Financially Fit Homeowner Workshop *"Are You Already a Homeowner"*. The workshop focused on the steps a homeowner should take to stay on top of their finances and helpful hints to prevent foreclosure. Mr. Muscente is a partner in the **Real Estate Division** including the **Banking & Secured Transactions Practice Group**. He concentrates his practice in all aspects of commercial real estate acquisition and development, with particular emphasis on complex negotiations, banking and secured transactions, including: acquisition finance, construction financing and refinancing, loan modification, restructuring and loan documentation. Mr. Muscente previously served as Deputy Attorney General at the New Jersey Department of Law and Public Safety in the Division of Law, Environmental Permitting and Counseling Section. He earned his law degree from Southwestern University School of Law in Los Angeles, California and his B.A. from Cornell University, College of Arts & Sciences in Ithaca, New York. He is admitted to practice in New Jersey and the District of Columbia.

Denise M. Bowman, an associate in the Newtown office of **Hill Wallack LLP**, where she is a member of the firm's **Business & Commercial Law Practice Group**, was recently appointed to serve on the Executive and Nominating Committees of the YWCA of Bucks County. She has been a member of the Board of Directors since March 2007 and currently serves as co-chair of the Fund Development Committee. The Bucks County YWCA is a non-profit organization which provides services and programs to women, children and families since 1954. Its mission is the elimination of racism, the empowerment of women, and peace, justice, freedom and dignity for all people. 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, partnerships, and individuals in insurance, commercial litigation, bankruptcy, real estate 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. 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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Pendente Lite Sale, Why Sit Back and Watch a Sinking Ship? cont. *(continued from page 7)*

> a character or so situated as to make it liable to deteriorate in value or to make its care or preservation difficult or expensive pending the determination of the action, the Superior Court may, before judgment, upon the application of any party to the action, order a sale of the mortgaged property to be made at public or private sale through a receiver, sheriff, or otherwise, as the court may direct.

Thus, in accordance with the statute, any party to the action can make an application for a *pendente lite* sale of the mortgaged premises prior to sheriff's sale. This procedure allows the creditor to prevent the mounting expenses to secure the property during the foreclosure procedure and to prevent the further decrease in value of the mortgaged premises. It is a life raft for the secured creditor on a sinking ship.

Standard for a *Pendente Lite* Sale

The statute provides that a *pendente lite* sale can occur if the property is likely to deteriorate in value or to make its care or preservation difficult or expensive pending the determination of the action. However, there is no set standard as to when the court will allow the sale of the property prior to sheriff's sale. For example, the statute does not provide that, if the value at the property decreases by 50%, or if it would cost the creditor over $50,000.00 to secure the property a *pendente lite* sale can be ordered. Rather, the court must determine each application for a *pendente lite* sale on a case-by-case basis.

Further, there is minimal caselaw to guide the court as to whether a specific application falls within the standard set forth in the statute. However, one such case that does address *pendente lite* sales is *Mortgage Electronic Systems, Inc., v. Rothman*. In *Rothman*, the mortgages on the property exceeded the market value of the property by approximately $5 million. Thus, the mortgagee made an application to permit the property to be sold prior to sheriff's sale, as the interest on the loan was not being paid and the mortgagee was also paying the municipal taxes on the property. In that case, the foreclosing mortgagee would most likely not be reimbursed for the payment of taxes or the interest, as the value of the property was significantly lower than the liens on the property.

While the mortgagor did not object to the foreclosure of the property, the mortgagor objected to the *pendente lite* sale on the basis that the mortgagee could not demonstrate deterioration in value of the property or difficulty in its care or preservation. Notwithstanding that the mortgagee in *Rothman* failed to demonstrate same, the court held that the fact that the mortgagee would not be reimbursed for the payment of taxes and because the lien exceeded the value of the property, brought the circumstances within the ambits of the statute authorizing a sale *pendente lite*.

The court stated that the purpose of the statute is to prevent impairment to the financial position and security of the mortgagee. Further, as the mortgagee would be required to advance taxes, and interest would continue to accrue during the pendency of the foreclosure, the property's value was being impaired. Accordingly, the court found that a *pendente lite* sale was appropriate, in accordance with the statute.

Therefore, as the case of *Rothman* demonstrates, the courts look at the totality of the circumstances and apply the facts of that specific case to determine whether it meets the purpose of the statute. A creditor, which is in the position of either having a property that is decreasing in value, or is expending significant amounts to secure the property without the likelihood that these amounts will be recouped, should strongly consider making the application to sell the mortgaged property *pendente lite* to attempt to maximize its return on the property. This can be accomplished by first seeking the appointment of a receiver to effectuate the *pendente lite* sale or by seeking to have the sheriff's office sell the property by court order prior to sheriff's sale.

Conclusion

It is becoming quite common that a creditor finds itself in the position that it has a security interest in property that is decreasing in value or is expensive to secure without the likely ability to recoup the expenditure. While this creditor may feel that it is on sinking ship during the foreclosure proceeding due to a decreasing property value and a mountain of expenses, the option of selling the property through a *pendente lite* sale is an avenue for preventing the further diminution in return for the creditor. **Hill Wallack LLP** has extensive experience in effectively marking *pendente lite* applications on behalf of creditors.

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An Employer's Introduction to the Second Injury Fund cont. *(continued from page 4)*

payment will begin. The employer also knows the end date of payment of benefits based upon prior settlement discussions with the representative of the Second Injury Fund. Whether the time period is 315 weeks or 150 weeks, the employer will know to the exact date what the extent of their liability will be.

Responsibility for Future Medical Treatment

The employer is however responsible for medical care for the remainder of the employee's life. The medical benefits to be provided are specific to the body part that was the basis for the last compensable accident. All other future medical benefits will be the responsibility of either Medicare or a private third party insurance carrier.

Fund Payments

The Second Injury Fund will begin payments at the completion of the employer's responsibility and will continue to make payments until the conclusion of 450 weeks. At this point the Second Injury Fund can request the employee to undergo a physical examination to determine if the medical condition remains permanent. If so, compensation benefits will continue for the life of the employee.

The only time the employer will be required to provide future benefits would be if the compensable medical condition required additional treatment. All employer based compensation benefits end at the time of Second Injury Fund involvement. Employers should be aware of the existence of the Second Injury Fund based on the fact that a total disability case with Fund participation could mean considerable savings when compared to a large partial permanent payment.

The attorneys of **Hill Wallack LLP** stand ready to assist any employer or insurer faced with issues of Workers Compensation insurance coverage.

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