HILL WALLACK
ATTORNEYS AT LAW

Quarterly
NEWSLETTER

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IN THIS ISSUE

Message From the Managing Partner

It's 2003! Does anyone even remember Y2K? What simple lessons we have relearned since the "Millennium": preparation and diligence can render a dreaded problem harmless, while reliance on old assumptions (and a strong dose of naivety) can render us vulnerable to those who think outside the box. As we start a new year at **Hill Wallack,** our excitement about the future is both fostered by the continuing high expectations we have regarding the services that the firm strives to offer and tempered by an increasingly competitive business environment. Thorough, high quality and timely legal services have always been important goals to **Hill Wallack.** They are created through a complex blend of attorneys, dedicated staff and technology, seasoned with a large dash of common sense.

This issue of the *Quarterly* focuses on some recent changes in the law and events which affect our lives. Our lead article, *"Indiscriminate State Spending..."* by Patrick Kennedy and Len Collett concentrates on the requirements for state expenditures. Niel Lewis, in *"The Environment Of Deposits and Discharges..."*, discusses cost recovery for environmental cleanup. The operation of the endangered species act is outlined by Jessica Pyatt in *"Developing In Harmony with Nature..."*; while Anthony Gaeta examines the provisions for alimony in a final judgment of divorce in his article *"Alimony's Changed Circumstances."*

Alan Minato interprets the Home Ownership and Equity Protection Act in his article *"Home Ownership and Equity Protection Act Requires Lenders' Attention"*. Finally, Steve Banks discusses employment injuries in his article *"When Is An Employer Responsible For An Employee's Injury Outside of the Office?"*.

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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Indiscriminate State Spending: Are There Constitutional Protections?

(One Man's Struggle to Stop the Spending Frenzy)

by Patrick D. Kennedy and Len F. Collett

During the four-week period prior to the end of the reign of Acting Governor Donald DiFrancesco, over one hundred and fifty new pieces of legislation were passed by the legislature. Many of these bills contained requirements for additional State expenditures prior to the end of the 2001 fiscal year, June 30, 2002. During this same period, Governor-elect James McGreevey's transition experts postulated dire forecasts for the State's revenue picture, and the frantic public demanded that the Acting Governor not commit to the expenditure of any additional monies.

While the soon to be inaugurated Governor projected revenue losses of up to $1.9 billion, appropriation bills piled up on the Acting Governor's desk. Predicting doom, the McGreevey team also argued that the State Constitution required that the Governor certify that he had sufficient funds prior to signing any act which would appropriate funds for the remainder of the fiscal year. Acting Governor DiFrancesco refused to so certify. Although he admitted the fiscal outlook was diminished, he downplayed the public's fears that there would not be sufficient funds.

Into the fray came tax advocate Simeon Larson, represented by **Hill Wallack,** who filed suit seeking to enjoin the Acting Governor from additional spending without the constitutionally required certification of fund sufficiency. The matter was heard by the Honorable Judge Neil Shuster on December 26, 2001.

A Simple Concept – Don't Spend What You Don't Have and a Seemingly Clear Constitutional Mandate

Article VIII, section 2, paragraph two of the New Jersey Constitution states that:

> . . . No general appropriation law **or other law appropriating money for any State purpose shall be enacted** if the appropriation contained therein, together with all prior appropriations made for the same fiscal period, shall exceed the total amount of revenue on hand and anticipated which will be available to meet such appropriations during such fiscal period, as certified by the Governor. (Emphasis added).

As enacted, the Constitutional provision applies to all appropriation acts, including laws that call for supplemental appropriations. Despite its seemingly clear wording, before Judge Shuster, the State argued that it need only certify as to funds at the beginning of each year, that no further certifications would be required, and thus that supplemental appropriations could go unchecked.

Larson maintained that if the State's argument is correct, citizens will have no remedy to protect themselves from indiscriminate spending. Citizens are unable to overturn specific appropriations on the basis that there are unavailable funds because citizens have no access to all of the budgetary data available to the Governor. Moreover, when the reality of insufficiency of funds becomes evident and the need for new taxes arises, the offending enactments will be long past approved and funds expended.

Thus, a citizen must be able to challenge an offending appropriation and seek an injunction before it is signed into law to assure relief. Allowing relief only after the offending bill is signed will subject the process to a chaotic "run for the money" where citizens run to court to try to stop the expenditure of funds, and the beneficiaries of the bills run to spend the money.

The framers clearly did not wish the Courts to have to "balance" vested interests with the overriding concern relating to over-expenditure of taxpayer money. Therefore, a mechanism was created requiring certification prior to enactment. Under this mechanism, the Courts would then never need to face the task of actually determining if there are sufficient funds or balancing equities in overturning the offending enactment; the Governor would be required to do so for them.

Lastly, if citizens were required to wait until the end of the fiscal year, or until a budget crisis exists to challenge these supplemental appropriations, the Court would be unable to determine which prior appropriations actually threw the budget into a deficit in violation of the Constitution. Most importantly, by the end of the fiscal year, the money would already be spent. The framers provided for a certification procedure to avoid this chaos. If the Governor cannot certify that the State has sufficient revenues to cover new spending, then he is required to wait until new tax revenues are available to cover the shortfall.

Separation of Powers or Executive Anarchy?

On its face, the Constitution mandates a certification from the Governor, coincident with the enactment of a statute containing an appropriation, as to the ongoing and anticipated availability of revenues to meet that appropriation during the fiscal year. In other words, the only individual with the complete picture of the State's current fiscal situation, the Governor, must certify that the appropriation will not result in a deficit.

Nevertheless, the State argued that an injunction would violate the Separation of Powers doctrine in that the order would infringe upon the Governor's "Constitutional Authority to decide which bills to enact into law" even though the suit did not seek oversight of the Governor's executive authority. Incredibly, the State argued that the only remedies for Mr. Larson were draconian; ". . . [i]f the Governor exercises his bill approval authority in a manner inconsistent with his Constitutional mandate, he must answer either to the electorate or the impeachment process." Neither the Court nor anyone present at the hearing gave credence to either of these remedies.

In support of his position, Larson argued that the "Powers" doctrine did not apply as it merely serves to ban one branch of government from interfering with the exclusive functions of another branch. Larson did not seek to compel the Governor to sign, veto, conditionally veto, or take no action on any particular bill. Nor did Larson ask the Court to dictate the manner in which the Governor certifies as to availability of funds and anticipated funds in enacting supplemental appropriations. Larson asked only that the Governor follow the Constitutional imperative to certify, in some manner, the sufficiency of revenue to cover supplemental appropriations.

Post Mortem

The Honorable Judge Shuster refused to dismiss the case as requested by the State, but he would not enjoin the Governor from signing bills containing appropriations, ruling that Constitutional separation of powers prevented him from doing so. He also ruled that he would not prejudge the actions of the Acting Governor, reasoning that he might not act on the appropriation bills on his desk after all, and if he did, perhaps would only do so while certifying as to the sufficiency of funds.

Although Mr. Larson and **Hill Wallack** were not successful on that day, by Friday, December 28, it became clear that their actions had not been totally in vain. Acting Governor DiFrancesco signed 17 bills on that Friday, including only two that contained appropriations. *But, in so doing, he line-item vetoed those appropriations, indicating that while he would enact the laws, the Departments would be required to find the funds for the enactments in their existing budgets.*

History may reflect that the Acting Governor would have protected the taxpayers and vetoed those appropriations regardless of Simeon Larson and his lawsuit. But we know that Simeon Larson made a small but important difference.

The case was subsequently dismissed as Governor McGreevey acknowledged and agreed to the certification process upon taking office.

Patrick D. Kennedy *is a partner at* ***Hill Wallack*** *where he is partner-in-charge of the* ***Administrative Law/ Government Procurement Practice Group.*** ***Len F. Collett*** *is an associate of the* ***Administrative Law/Government Procurement Practice Group.*** *They concentrate their practice in Administrative Law and Corporate Litigation including Public Procurement and Environmental Litigation with a particular emphasis on administrative, environmental and regulatory compliance.*

The Environment—Of Deposits and Discharges:

The Supreme Court Fashions A New Insurance Coverage Trigger for Leaking Landfills

by Nielsen V. Lewis

Modern environmental law has opened a floodgate of governmental enforcement and private cost recovery litigation to resolve issues of who bears the environmental risks and who ultimately must pay for cleanup. Given the staggering cleanup costs and damage claims involved, insurers have been dragged into the legal fray. The transactional cost of environmental insurance coverage litigation has been estimated as high as 70 percent of total cleanup costs. The good news is that after 20 years of coverage litigation battles, the New Jersey Appellate Courts have decided most of the major legal issues regarding coverage of environmental claims under standard comprehensive general liability (CGL) policies, reducing, in theory at least, the number of coverage disputes requiring intervention by the courts.

New Jersey insurance law takes unpredictable turns and the latest unexpected turn was the Supreme Court of New Jersey's decision last summer in *Quincy Mutual v. Bellmawr* concerning insurance coverage for cleanup of a leaking solid waste landfill. The Borough of Bellmawr was one of many potentially responsible parties sued by the United States to recover its cleanup costs at the Helen Kramer Landfill. Following years of litigation, the defendants settled the government's claims for $95 million, including a contribution of $449,036 from Bellmawr. After Bellmawr obtained indemnification for its settlement costs in an action against its CGL insurers, one of them, Quincy Mutual Fire Insurance Company, filed an action for contribution against Bellmawr's other insurers, including Century Indemnity Company.

The Trigger Of Coverage Before Quincy

Under the standard CGL policy, coverage is triggered by environmental property damage occurring during the term of the policy. Before *Quincy,* there was little question about the trigger of coverage in the case of polluting landfills. A distinction was drawn between the placement of wastes in a licensed landfill and a discharge of hazardous substances from the waste fill into the environment. Guidance was provided by court cases considering liability for pollution under New Jersey's Spill Act, which prohibits the unauthorized "discharge" of hazardous substances "into the air, water or land." Discharges found to create Spill Act liability have included releases of petroleum from tanks into soils and groundwater; discharges of mercury wastes from a chemical processing plant into environmentally sensitive meadow lands and waters of the State; leaking of hazardous wastes from drums and direct pouring of known toxic chemical hazardous wastes onto porous soil; leakage of chemical wastes from buried drums into surrounding soils and potable water supplies; and gasoline and diesel fuel leaking from underground storage tanks.

In contrast, the New Jersey courts have held that the mere placement of wastes at a disposal facility is not a "discharge" of hazardous substances under the Spill Act. They have stressed that a discharge does not occur unless there has been some interaction between hazardous substances and the surrounding environment. Clearly, there is no "discharge" of hazardous substances in a closed container unless it leaks. By analogy, courts have observed that the mere introduction of wastes into a sanitary landfill does not render the owner or operator liable for cleanup. New Jersey's solid waste management laws, which provide a statutory scheme for licensing and regulating solid waste collection and disposal facilities, including sanitary landfills, reinforce this conceptual difference between the deposit of wastes and discharges of pollutants into the environment.

A New Trigger Of Coverage For Landfills

In *Quincy,* the Appellate Division considered whether coverage for the landfill pollution was triggered under an early policy of Century. The policy was in effect when the Borough was depositing wastes at the landfill, but expired before contaminants discharged from the landfill into the groundwater. Following prior decisional law, the lower courts' analysis of the question was predictable. Because there had been no impact on groundwater while Century's policy was in effect, the trial court found that Century's policy was not triggered. Distinguishing deposits from discharges, it held that environmental property damage triggering coverage did not occur until contaminants in the landfill migrated into the groundwater. Since Century's policy expired before the deposits had an effect on the groundwater, Century had no coverage obligation. The appellate court affirmed the trial court's decision.

On further appeal, to the surprise of many observers, a majority of the Justices of the Supreme Court reversed, holding that Century's policy

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Developing in Harmony with Nature: Use of Habitat Conservation Planning Under the Endangered Species Act

by Jessica S. Pyatt

There are 79 different species of wildlife native to New Jersey currently listed as endangered or threatened by the New Jersey Division of Fish and Wildlife. All are protected under both the Federal Endangered Species Act ("ESA") and the New Jersey Endangered and Non-Game Species Act ("ENSA"). The discovery of a wood turtle, a timber rattlesnake, or even an American burying beetle on one's property can wreak havoc upon even the best-laid development plans. The rigidity of the Federal ESA and the New Jersey ENSA has struck terror in the hearts of landowners for almost 30 years. Recently, however, the U.S. Fish and Wildlife Service in cooperation with the New Jersey Division of Fish and Wildlife have attempted to make a little-known and little-used exception to these acts more accessible as part of an effort not only to recognize the burden these laws place on private property but also to more efficiently accomplish the purpose of protecting endangered or threatened species. A landowner may obtain an "incidental take permit" after submission of a habitat conservation plan ("HCP") that provides a plan whereby the landowner will dedicate certain resources to the conservation of the species on the property. In return, the U.S. Division of Fish and Wildlife will allow the landowner to complete a development project and promises that no additional regulatory burdens will be placed upon the landowner even if the laws change.

Operation of the Endangered Species Act

The United States Supreme Court has described the Endangered Species Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." The Act states that it is "unlawful for any person subject to the jurisdiction of the United States to…take any such species within the United States." The term "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." In addition, the term "take" has been interpreted to encompass habitat destruction such as that which would be accomplished through building, clearing, or digging.

There are two exceptions to the strict proscription against takings contained in the ESA and the ENSA. The first exception allows the Division of Fish and Wildlife to issue permits to "take" an endangered species for "scientific purposes or to enhance the propagation or the survival of the affected species." The second exception allows for the issuance of a permit if "such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." This section directs a landowner to submit a conservation plan which specifies (i) the impact that will result from the taking; (ii) what steps the applicant will take to minimize and mitigate such impacts, and what funding will be available to implement these steps; and (iii) what alternatives to taking has the applicant considered and why such alternatives are not feasible. Under this section, before a permit for an incidental taking can be issued, the Fish and Wildlife Service must determine whether the proposed taking will not significantly reduce the chances of the species' survival and recovery.

Until recently, obtaining a permit under this section was very expensive and time consuming, taking an estimated two years to complete. This is due in part to the period for public comment provided in the statute, however, it was also due to the ever-growing list of protected species, and the fact that another protected species could appear on the property at any time. Thus, the landowner really had no incentive to spend the time and money necessary to obtain an incidental take permit for one species when it was likely that the Division of Fish and Wildlife could impose new regulatory requirements at any time.

The Campaign to Promote Habitat Conservation Planning

In the last few years, the U.S. Fish and Wildlife Services attempted to reverse this trend by publicly touting the benefits of submitting a habitat conservation plan. FWS has also attempted to make the process easier and less-time consuming for applicants by creating a category of HCP for "low-effect" projects that will result in minor or negligible effects on protected species and their habitats. The low-effect permit process is expedited with the intent of inducing more landowners to develop and implement an HCP. In addition, the FWS has posted a great deal of public information relating to the process of developing and filing and HCP on its website (http://endangered.fws.gov). The intent of these efforts is to encourage landowners to consider conservation efforts as part of an overall development strategy.

There are three phases to the permitting process: (1) the HCP development phase, (2) the formal permit processing phase, and (3) the post-issuance phase. Although the FWS has attempted to streamlines these processes, they are part of a complicated and intricate regulatory scheme, and potential applicants are advised to consult with an attorney to advise and assist with this process to achieve the most efficient and favorable results.

Although the cost and expense required to obtain an incidental take permit under section 10(a) of the Endangered Species Act may be a deterrent to landowners, the FWS has attempted to streamline the process in

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SPOTLIGHT

NEW PRACTICE AREA

We are proud to announce the addition of a **Public Finance Practice Group.** "From the founding of **Hill Wallack** in 1978", said Robert W. Bacso, Managing Partner of the firm, "we have managed our growth by developing practice areas, identified by client needs, by creating innovative solutions to recurring issues presented to us. Today, we announce another major advance: the arrival of an experienced **Public Finance Practice Group** providing a full range of corporate, finance and transactional legal services to business clients."

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NEW PARTNERS

Paul N. Watter has joined the firm as a partner and head of its **Public Finance Practice Group.** Mr. Watter represents an extensive list of clients in all areas of Banking & Secured Transactions, Securities, Finance and Corporate Law and acts as Bond Counsel. Mr. Watter earned his law degree from Rutgers University Law School and is admitted to practice in New Jersey, New York, U.S. District Court, District of New Jersey and the U.S. Court of Appeals, Third Circuit. He is a member of the United States District Court for the District of New Jersey and a member of the United States Third Circuit Court of Appeals.

The firm recently added a distinguished partner, ***Nielsen V. Lewis*** to the **Environmental Practice Group.** Mr. Lewis has over twenty years of experience in the areas of environmental law, solid and hazardous waste law, insurance law, general civil litigation and land use and development. Since entering into private practice, he has focused on counselling and representing private companies, municipalities and individuals in environmental and land use disputes and litigation. Before entering private practice, Mr. Lewis served as a Deputy Attorney General of the State of New Jersey providing legal counsel to the New Jersey Board of Public Utilities. In that capacity, he gained extensive administrative law experience and enjoyed an intensive appellate practice before the New Jersey Superior Court, Appellate Division, and the Supreme Court of New Jersey. Mr. Lewis earned his law degree from the University of Michigan Law School and 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. He is a member of the American, New Jersey State, Mercer County and Princeton Bar Associations.

Michelle M. Monte, formerly a senior associate with **Hill Wallack,** has become a partner of the firm in its **Creditor's Rights/Bankruptcy Practice Group.** Ms. Monte concentrates her practice in all matters of creditors' rights and bankruptcy, including workouts, foreclosures, replevin actions and collections. Her extensive client list includes some of the country's largest secured creditors, and her work deals with debtors in possession and debtors and trustees in liquidation and reorganization proceedings. She earned her law degree from St. John's University School of Law and is admitted to practice in the State of New Jersey and the United States District Court for the District of New Jersey.

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NEW ASSOCIATES

Andrew T. McDonald has joined **Hill Wallack** as an associate in the firm's **Administrative Law/Government Procurement Practice Group.** He concentrates his practice in General Litigation, Administrative, Environmental and Regulatory Compliance. Mr. McDonald earned his law degree from Seton Hall University School of Law and previously served as Judicial Law Clerk to the Honorable Lawrence M. Lawson in Monmouth County, NJ. He is a resident of Howell, NJ and is admitted to practice in New Jersey.

Nicole Perdoni-Byrne has joined the firm in its **Banking & Secured Transactions Practice Group.** Ms. Perdoni-Byrne 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. She earned her law degree from Seton Hall University School of Law and is admitted to practice in the State of New Jersey. She is a resident of the Borough of Helmetta.

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APPOINTMENTS & RECOGNITION

Edward H. Herman, a partner with **Hill Wallack** has been re-appointed Chairperson of the Workers' Compensation Substantive Committee of the New Jersey Defense Association. He is past-president of the Association. Mr. Herman has been practicing law for more than 30 years, is a recognized authority throughout New Jersey in workers' compensation law and is a Certified Workers' Compensation Attorney by the New Jersey Supreme Court. He also presides as Municipal Court Judge in Spotswood, as well as Municipal Court Judge in the Boroughs of Helmetta and Highland Park. Mr. Herman is a member of the firm's **Litigation Division** and partner-in-charge of the **Workers' Compensation Practice Group.** His principal area of practice is in the representation of major self-insured corporations, insurance companies and clients of third-party administrators in the defense of workers' compensation claims, as well as defense of tort liability and environmental litigation.

Thomas F. Carroll, III, a partner of **Hill Wallack** and member of the firm's **Land Use Division,** recently was a featured speaker at the National Business Institute seminar entitled *"Current Issues in Subdivision and Zoning Law"*. Mr. Carroll provided fellow attorneys, engineers, surveyors and other professionals with an update

on the current state of zoning and land use law affecting the State of New Jersey. Mr. Carroll 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. A member of the Board of Directors of the New Jersey State Bar Association's Land Use Section, Mr. Carroll has authored numerous articles and presented seminars concerning land use issues.

Ronald L. Perl, partner-in-charge of the firm's **Community Association Law Practice Group,** was recently elected as Chair-Elect of the Community Association Institute Research Foundation. The Community Association Institute (CAI) Research Foundation is a national, non-profit 501(c)3 organization founded in 1975. The Foundation is the driving force for common interest community research, development and scholarship. CAI, founded in 1973, is the only organization both recording the history and identifying trends in residential community association living. There are more than 205,000 community associations across the country, reflecting the growth of community-based solutions to modern housing problems. The CAI Research Foundation serves as the catalyst for positive change in the community association industry by illuminating future trends and opportunities, supporting and conducting research, and mobilizing resources.

Jeffrey L. Shanaberger, a partner with **Hill Wallack** has been appointed Chairperson of the Public Entity Law Substantive Committee of the New Jersey Defense Association. Mr. Shanaberger is a member of the firm's **Litigation Division** and **Trial & Insurance Practice Group.** A fully-experienced trial attorney, Mr. Shanaberger has a practice concentration in trial and appellate practice, with and emphasis in insurance defense and matters of professional, governmental and public entity, civil rights and product liability.

In a major victory for towns in New Jersey, the Federal Court of Appeals has ruled that builders of nursing homes and other similar facilities could not use the federal civil rights laws to circumvent local zoning procedures. The Appeals Court refused to permit the developer of a proposed 95-bed facility in Scotch Plains to bypass the local zoning board and to present the key proofs in its case for a zoning variance directly to the federal courts. It upheld the decision of the zoning board denying approval for the facility. ***Stephen M. Eisdorfer,*** special counsel for Scotch Plains, hailed the decision as a victory for home rule. "In New Jersey, we count on local government to make fair and responsible decisions concerning zoning and land use. Permitting nursing home developers to bypass local procedures and to make their cases directly to the courts conflicts with this system. It undermines responsible decisionmaking by local zoning boards." Mr. Eisdorfer, a partner in the firm's **Land Use Division,** represented Scotch Plains throughout litigation and in the argument before the Court of Appeals.

Dakar R. Ross, an associate of **Hill Wallack** where he is a member of the **Litigation Division, School Law** and **Municipal Law Practice Groups,** recently appeared as a featured guest on the Community Affairs Program for WTSR 91.3FM speaking on Faith-based initiatives and general legal topics in the Trenton Community. A resident of Westhampton, NJ, Mr. Ross received his law degree from Rutgers University School of Law and is admitted to practice in the State of New Jersey and the United District Court.

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SEMINARS

Craig W. Summers, a partner of **Hill Wallack** and member of the **Workers' Compensation Practice Group,** was recently a featured speaker during a seminar *"The Workers' Compensation Ergonomics and Safety Update".* This practical, two-day seminar was designed for human resource managers and provided informative, up-to-date, effective solutions to the problems arising in the workplace. Mr. Summers concentrates his practice in the representation of major self-insured corporations, insurance companies and clients of third-party administrators in the defense of workers' compensation claims, as well as defense of tort liability. He is a resident of Turnersville, New Jersey.

Kenneth E. Meiser, a partner of **Hill Wallack,** was recently a featured speaker at the National Business Institute Seminar entitled *"Major Land Use Laws in New Jersey".* Known for his role in several precedent-setting legal decisions including Mount Laurel I and II, Mr. Meiser is a partner of the **Land Use Division** which includes the firm's **Land Use Litigation** and **Environmental Applications Practice Groups.** This one-day seminar provided practical solutions to the problems that current environmental and land use regulations create in the transfer, development and financing of commercial, industrial and residential real estate.

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COMMUNITY INVOLVEMENT

In a continuing community involvement effort, the **Hill Wallack** Softball Team, in conjunction with the Mercer County Bar Association, recently captured the championship at the recent Mercer County Bar Association Corporate Charity Softball Tournament for "Families First". A commitment to community and community service organizations has been and continues to be hallmark of **Hill Wallack.**

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

Alimony's Changed Circumstances

by Anthony N. Gaeta

A Final Judgment of Divorce is usually anything but "final." Almost all provisions of a Final Judgment of Divorce are subject to modification by a court upon a showing by a litigant of a "permanent, involuntary change of circumstances." This also applies to the provisions for alimony in a Final Judgment of Divorce.

Changes to the Law Governing Alimony Awards: The Marital Standard of Living

Though the award of alimony by a court is not based upon gender, most alimony awards are paid by the husband to the wife because the husband, more likely than not, is the primary wage earner. The factors that courts have often used to determine an alimony award are the duration of the marriage, the age, physical and emotional health of the parties, the parties' earning capacities, the length of time away from the job market, the amount of time by a party spent rearing children, and any other factor that the court deems relevant.

In the May of 2000, the New Jersey Supreme Court further refined the definition of alimony and held that alimony is the amount of support necessary to "maintain the supported spouse in a lifestyle reasonably comparable to the standard of living enjoyed during the marriage." The effect of this decision required New Jersey's family courts to take testimony from the parties concerning the standard of living enjoyed during the marriage at the actual time of divorce. For couples divorced both prior to and subsequent to May of 2000, establishing the marital standard of living is now essential for a court to entertain any application to modify the alimony award regardless of when the parties were divorced.

The marital standard of living is often determined by the parties' answers to the following questions: What kind of cars did you drive? How many times per week did you go out to dinner? Where did you purchase your clothes? How many times per year did you go on vacation? From these questions the court can evaluate and define the marital standard of living.

If a party was divorced prior to May of 2000, odds are that there was no testimony taken pertaining to the marital standard of living at the time of the parties divorce. Upon application to a court by a party to modify an alimony award and where no testimony was taken at the time of the divorce, a court will almost always order a new trial in order to determine the marital standard of living. Without such testimony, courts do not have a sufficient basis to grant or deny an application to modify alimony. It is helpful to keep in mind that in any application to modify alimony, courts are comparing past circumstances to present circumstances in order to determine whether or not there has been a change in circumstances sufficient to justify a modification of an alimony award.

Changes in Circumstances

As previously mentioned, the terms of a Final Judgment of Divorce, including an alimony provision, are always subject to modification upon a showing of a permanent, involuntary change in circumstances. But what is a change in circumstances relative to an alimony award? What makes a change in circumstances permanent and involuntary? And how does this inquiry affect the amount of alimony?

These questions can be addressed by the following example, but always keep in mind that the disposition of any "change in circumstances" application depends upon the court's evaluation of the specific facts of each case.

Assume that a former husband is paying alimony to his former wife. Assume further that he earns enough money to meet his alimony obligation. If the husband were to lose his job, this loss of employment would be a change in circumstances: his income would be reduced to the point where he could not meet his alimony obligation. However this "change" must also be found to be "involuntary" and "permanent" before a court will grant any relief.

If the husband was fired from his job because he violated his employer's drug policy and used illegal narcotics, then the change in circumstances will most likely be deemed to have been brought about by husband's "voluntary" conduct, and therefore his application to reduce the amount of his alimony obligation will most likely be denied. If, however, the change in circumstances was caused by circumstances beyond the husband's control, such as a downturn in the economy, then the husband's termination may be found to be "involuntary."

Assuming that the change in circumstances is found to be involuntary, the court would then inquire as to whether or not the loss in income which resulted from the husband's termination is "permanent." A court may require the husband to demonstrate that he has made a good faith attempt to find comparable employment before the change in circumstances is deemed "permanent." If the husband finds comparable employment, or if the court finds that the husband should be able to find comparable employment, his change in circumstances will be deemed "temporary," and his application to modify support will be denied.

Should similar factual circumstances befall the wife, she may apply to the court for an increase in the alimony award. The court will apply the same factual analysis to such an application. If the court finds that she has suffered a permanent, involuntary change in

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Home Ownership and Equity Protection Act Requires Lenders' Attention

by Alan M. Minato

Predatory lending, that is, unscrupulous conduct engaged in by some lenders when providing selected types of consumer mortgage loans, harms consumers, contributes to high foreclosure rates, and hurts legitimate lenders. Several states apply consumer protection laws to prevent such practices. However, current federal law also imposes requirements in order to protect borrowers. For example, lenders who provide consumer mortgage refinancing and home equity loans must comply with the "Home Ownership and Equity Protection Act of 1994" (HOEPA).

HOEPA amended the "Truth in Lending Act". It was intended to address deceptive and unfair practices in home equity lending and established new requirements for certain high rate and high fee loans.

Disclosures Required

HOEPA applies to a loan if the annual interest rate exceeds U.S. Treasury security rates of comparable maturity by more than ten percent or the total points and fees which must be paid by the consumer exceed eight percent of the loan amount (or an adjusted annual figure set by the Federal Reserve Board which is based upon the Consumer Price Index). HOEPA does not apply to reverse mortgages, new purchases, or construction or home equity lines of credit.

If a loan is subject to HOEPA, the lender must make certain disclosures to the borrower at least three days before the loan is finalized. The lender must provide the borrower written notice that the loan need not be completed even though the loan application has been signed. In addition, the notice must disclose the annual percentage rate of interest charged for the loan, must indicate that the consumer can lose his or her home if he or she fails to make the mortgage payments and must provide the amount of the regular payments. The consumer must be given three business days to cancel the loan transaction after receiving the disclosures and must acknowledge receipt of these notices. These disclosures are in addition to any required by the Truth in Lending Act.

HOEPA prohibits the use of certain loan features and transactions. Specifically barred are:

- Small monthly payments which do not fully pay off the loan and which cause an increase in total principal debt;
- Default interest rates higher than pre-default rates;
- Rebates of interest upon default calculated by any method less favorable than the actuarial method;
- Loan repayment schedules which consolidate two or more periodic payments that are paid in advance from the loan proceeds;
- Balloon payments with less than five-year terms, where the regular payments do not pay off the principal balance and a lump sum (balloon) payment of more than twice the amount of the regular payments is necessary. (There is an exception for bridge loans of less than one year);
- Failure to disburse home improvement loans directly to the consumer, jointly to the consumer and the home improvement contractor, or to an escrow agent; and
- Engaging in a pattern of lending based on the collateral value of the property securing the loan without regard to the consumer's ability to repay the loan.

Penalties Can Be Severe

If a lender violates HOEPA, the borrower may have the right to sue for statutory and actual damages, attorneys' fees, and costs of suit. In addition, the consumer may be able to cancel the loan.

Recent lawsuits charging predatory lending have resulted in the payment of huge monetary settlements. For example, in September, 2002, the Federal Trade Commission announced that Citigroup, Inc. which had acquired national mortgage lender Associates First in 2000, will pay $215 million to resolve charges that Associates First had engaged in and resulted in systematic and widespread deceptive and abusive lending practices.

A prominent case involved Household International, one of the largest lending companies in the United States. In October, 2002, Household agreed to settle allegations it violated consumer fraud laws in 19 states and the District of Columbia. The cases alleged that Household had misrepresented loan terms and had failed to disclose fees for credit life insurance and other items. The allegations centered on loans made to "sub-prime" borrowers, those who have tarnished credit records or low incomes. Under the settlement, Household will pay between $387.5 million and $484 million to borrowers who took real estate loans between 1999 and the present. Household also agreed to provide more information to potential borrowers and to cap points and origination fees among other things.

The consequences of violating lending regulations thus can be very serious. Lenders are required to be aware of them and to comply with them. The failure to abide by the regulations can become quite expensive. To reduce or eliminate risk, questions regarding appropriate lending practices and how best to comply with applicable laws should be referred to legal counsel.

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When Is An Employer Responsible For An Employee Injury Outside of the Office?

by Stephen R. Banks

Although an employee's liberty is imputed when they leave their home to head to work, recovery for an injury to and from their "place of employment" is subject to limitation. Historically, 1911 legislation contained no definition of employment. It provided compensation only "when employees were injured or killed in accidents arising out of and in the course of employment" N.J.S.A. 34:15-7. This language was specifically defined only for accidents that occurred "while the employee is doing what they are employed to do during the time of employment and the place he is to be at that time." *Bryant Ad mx v. Fissell.* The theory behind the definition was that injuries sustained during routine "going and coming" travel to work were not compensable because they yielded no special benefit to the employer. However, equitable arguments and social exceptions resulted in two forms of judicially created exceptions: premises injuries and off-site injuries. The cases reviewing various factual scenarios carved out numerous exceptions, almost overshadowing the purpose of the law.

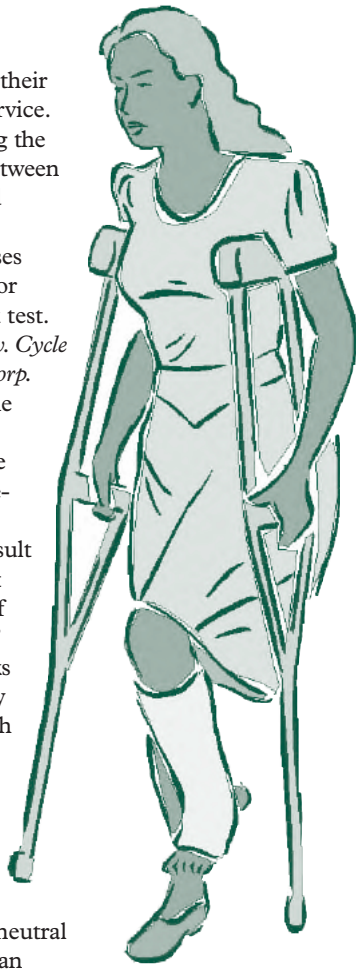
…routine "going and coming" travel to work were not compensable because they yielded no special benefit to the employer.

To limit these exceptions, N.J.S.A. 34:15-36 was enacted in 1979. It provided a more specific definition of employment: *that it should commence when an employee arrives at the employer's place of employment, excluding areas not under the control of the employer, provided when the employer's place of employment, the employee shall be deemed to be in the course of employment when the employee is engaged in the direct performance of duties assigned or directed by the employer, but the employment of employee paid travel time by an employer for time spent traveling to and from a job site or of any employee who utilizes an employer authorized vehicle shall commence and terminate with the time spent traveling to and from a job site or the authorized operation of a vehicle on business authorized by the employer.*

On Premises Injury

This legislation was interpreted in *Livingstone v. Abraham & Strauss* to limit the extent of compensation for all off-premises accidents, but not to change established views of on-premises injury. The Court in *Livingstone* reviewed a factual pattern wherein an employee at a shopping mall, who was hit by a car walking from a designated area of the parking lot to the store. The Court found the employer liable based on the fact that the employer forced employees to park in this part of the lot. By requiring this, it became an employer-owned lot and satisfied the element of control. From this case, a framework of analysis was enacted wherein the Division of Workers' Compensation has primary jurisdiction to decide if a case is compensable under N.J.S.A. 34:15-7. The Court must then determine if the injury "occurred during employment" under the premises test. The pivotal issues for interpretation under these rules are: (1) where was the site of the accident **(and)** (2) did the employer have control of the property or area where the accident occurred? Control as defined in the Compensation Act differs from control in the formal property sense since it is more expansive and includes more than the four walls of an office plant. Control exists when the employer owns, maintains, or has exclusive use of the property.

Pursuant to N.J.S.A. 34:15-1, an employee's injuries must also arise "out of" the employment, and the risk must be what an employee has to do with fulfilling their contract of service. When defining the connection between the injury and employment, New Jersey uses the "but for" or positional risk test. See *Coleman v. Cycle Transformer Corp.* In applying the "but for" test, there are three identified categories of risk, which may result in an accident arising "out of employment." These are risks (1) distinctively associated with the employment, such as an employee getting fingers caught in a machine, (2) neutral risks, such as an employee struck by lightening, and (3) personal risks, which arise from personal proclivities of an employee and have a minimal connection to employment. Distinctly associated or neutral risks are compensable while accidents resulting from personal risks are non-compensable.



Application of this framework resulted in recovery in *Brower v. ITC Group.* The Court found that an injury was compensable which occurred after an employee punched out at the end of a working day and fell descending a stairwell in a multi-tenant office building. In *Ehrilich v. Strawbridge and Clothier,* liability attached when an employee was injured in a fall on a metal staircase that was part of the store premises because the employer exercised control over it, and employees were required to exit the store by it. The Court did not permit recovery in

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Alimony's Changed Circumstances cont. *(continued from page 8)*

circumstances, the court will evaluate the husband's financial position and determine whether an increase in support, based upon the standard of living enjoyed during the marriage, would be equitable given the parties' current circumstances.

There are also other circumstances that would justify a decrease in an alimony award. Since alimony is by definition the amount of support that is "necessary to maintain the supported spouse at the standard of living enjoyed during the marriage," once the supported spouse is able through her own income to maintain herself in a lifestyle reasonably comparable to the standard of living enjoyed during the marriage, the alimony award can be reduced in whole or in part. Under this theory of changed circumstances, the focus is not on the husband's ability to pay alimony, but rather on whether the wife is, or should be, in a position to support herself in whole or in part. If a court finds that the wife is able to maintain herself at the marital standard solely as a result of her own income, then a court will most likely eliminate the husband's alimony obligation.

The Role of Counsel

A finding of changed circumstances is always dependant upon the evaluation of the litigant's application by the Family Part Judge. Trial courts in the Family Part have broad equitable powers. The court's factual findings, and the conclusions flowing from those findings, are extremely difficult, if not impossible, to appeal. It is therefore essential for a litigant to be represented by counsel at the time that the court establishes the marital standard of living and for any subsequent modification application.

Experienced attorneys will not only be able to effectively represent his or her client's interests before the court, but will also have knowledge of the judge who is assigned to the case. This knowledge is crucial because judges utilize different philosophies when deciding these issues. Without the knowledge and experience of counsel, the litigant may waste valuable resources arguing a position that is premature and lacking in supporting documentation.

Though theoretically there is no such thing as a "final" Final Judgment of Divorce, establishing the marital standard of living forms a permanent basis from which the court will decide all future applications for modification of alimony. And each successive application to modify alimony will serve to evaluate the parties' circumstances relative to the marital standard of living.

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The Environment... cont. *(continued from page 4)*

was triggered by the insured's initial deposit of wastes in the landfill. In an ironic twist, the Court did so relying on the testimony of Century's own expert witness—testimony intended to get Century out of the case. At trial, the expert had testified without contradiction that it was impossible for wastes deposited at the landfill by Bellmawr to have reached the groundwater before Century's policy had expired.

While testifying, however, Century's expert had described a progressive and unalterable process by which the deposit of wastes in the unlined landfill eventually exceeded its capacity to absorb liquids, leading to the groundwater contamination in question. Based on this aspect of the testimony, the State's high court ruled that the original act of depositing Bellmawr's wastes in the landfill triggered coverage under Century's policy because it set in motion a progressive and irreversible process of environmental property damage inevitably causing the groundwater pollution. It returned the case to the lower courts to determine an appropriate allocation of liability between the two insurers with triggered policies.

Looking Ahead

After *Quincy,* it is fair to say that insurers and insureds alike will view leaking landfill coverage disputes in a new light. The mere act of depositing wastes in a landfill may have important implications for determining the trigger of coverage and deciding disputes over allocation. The outcome of future disputes may, in fact, depend on the specific factual proofs at trial, including expert testimony, as was the case in *Quincy.*

There should be no shortage of future landfill coverage controversies. According to one study by the Department of Environmental Protection, hundreds of municipal landfills were closed in the 1950's to the 1980's without modern environmental safeguards. Many of these landfills, characterized by some as "ticking time bombs," are believed to be leaking hazardous substances into the environment. The Department has estimated that it may cost $800 million to $1.1 billion to clean up latent pollution caused by all such landfills in the state. They need only to be unearthed.

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Harmony with Nature... cont.

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an attempt to make the ESA more effective as well as to more equitably balance the interests of landowners against the strict provisions of the act. It is anticipated that this program will have beneficial effects for both the wood turtle and the private property owner.

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When Is An Employer Responsible... cont.

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Zahner v. Pathmark, where a Petitioner was injured in a slip and fall at a supermarket while shopping after work because it did not arise from employment.

Off Premises Injury

Regarding off-premises injuries, the Workers' Compensation Statute does not allow compensation for accidents occurring outside of an employer's control except in a "special mission" and "travel time" exception. The special mission exception allows compensation at any time for employees when (a) required to be away from conventional places of employment **and** (b) if engaged in the performance of job duties. The travel time exception allows portal to portal coverage for employees during (1) paid for travel time to and from a distant job site **or** (2) using an employer authorized vehicle for travel time to and from a distant job site. *Zelasko v. Refrigerated Food Ex. Zelasko* dealt with an employee, who was injured after parking his truck at an off-site location not furnished by the employer. The Court strictly interpreted these tests and concluded that because the driver was off-premises his workday had ended, and he was no longer engaged in the direct performance of his duties assigned by this boss. The Court also denied recovery under the travel exception stating that the Petitioner was not in an "authorized vehicle" because he was not going to or coming from a distant job site. Older cases such as *Correria v. Maplewood Equip. Co.* found recovery where a worker was injured in an otherwise unexplained deviation. However, new cases have stressed the "direct performance" language of the 1979 amendments to the statute and denied recovery in such recent cases as *Jumpp v. City of Ventor,* where an employee was injured picking up his personal mail at the post office after deviating from his assigned route.

The Court's findings and Workers' Compensation Act show a willingness to find compensability for on-site injuries. However, off-site injuries are still held to a strict standard, which means that a detailed itinerary up to the time of injury must be obtained and carefully reviewed in all relevant circumstances.

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