HILL WALLACK
ATTORNEYS AT LAW

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IN THIS ISSUE

Message From the Managing Partner

In our Summer '03 issue of the *Quarterly,* we continue in our efforts to inform you on recent developments in the law.

Our lead article, *"Another Reason to Carry Automobile Insurance in New Jersey"* by Michael Sweeney, stresses the importance of maintaining insurance coverage in New Jersey. Susan Inverso examines the government's homeland security strategy in her article *"Homeland Security: The Price of Compliance",* while Andrew Jacobson brings us up to date on liability safeguards for common interest ownership associations in his article *"Condominium Swimming Pool Rules Must Comply with The Federal Fair Housing Act."*

Keith Bannach alerts us to the steps which should be undertaken when a lawsuit arises in his article *"When Your Organization May be Sued, Proper Planning May Make a Difference",* while Mark Roney reviews campaign finance laws in his article *"The Election Law Enforcement Commission v. Freedom of the Press".* Alternative methods to settle legal disputes are addressed in Todd Greene's article *"Arbitration: Coming to the Contract Near You",* while Denise DaPrile discusses injured workers job protection in her article *"Employers Do Not Owe Injured Workers an Obligation to Keep a Job Available While Out on Disability".*

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

– Robert W. Bacso

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Another Reason to Carry Automobile Insurance in New Jersey

by Michael T. Sweeney

A recent New Jersey State appellate court decision underscores the importance of maintaining proper, current automobile insurance in New Jersey. Statutory law in New Jersey bars recovery for injuries sustained by an owner of an automobile which occur "as a result of an accident while operating an uninsured automobile." That statute supports the New Jersey law which requires that all automobiles registered in the State of New Jersey maintain coverage.

"…New Jersey law… requires that all automobiles registered in the State of New Jersey maintain coverage."

In the recent case of *Lightner v. Solis,* the Appellate Division held that a plaintiff could not sustain a cause of action for personal injury protection ("PIP") benefits if, at the time of the accident, there was a conscious determination to utilize a vehicle which was uninsured at that time. In that case, the plaintiff, Giselle Lightner, sustained an injury while she was sitting in the passenger seat of a parked automobile which was owned and registered to her and another person. She claims to have gotten into the car only to put on makeup and utilize its mirror. Lightner waited for the co-owner of the vehicle to arrive to then walk to a local store, she had no intention of driving the car at that time. While seated inside the vehicle, she was rear-ended by a car driven by the defendant.

It is significant to note that the vehicle had, in fact, been insured just over one month before this accident occurred, but that Lightner's insurance policy had been cancelled for non-payment of the premium. The plaintiff's vehicle was operable at the time of this accident, but had been sitting for some time and was moved from one side of the street to the other in order to avoid parking tickets. Plaintiff sustained injuries and sued her previous insurance carrier, Colonial Penn Insurance Company for PIP benefits. The court dismissed Colonial from the case finding no insurance coverage existed at the time of the accident due to plaintiff's failure to pay her premium. The defendant driver then moved to be dismissed from the case claiming that the plaintiff was barred from receiving the benefits of his PIP coverage since she failed to have her vehicle insured.

The Law Division Decision

The underlying court denied defendant's motion stating the language of the statute was clear in that the legislature utilized the word "operating" with regard to an uninsured plaintiff. The court would not consider plaintiff to have "operated" her vehicle at the time of the accident because she was on the passenger side of the vehicle, with no intention to operate. The court concluded that whether or not plaintiff was "operating" the vehicle at the time of the accident was a question

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Homeland Security: The Price of Compliance

by Susan E. Inverso

As the threat of terrorism has become an all too real fear in America, state and municipal governments are quickly taking steps to ensure that they are ready in case of future terrorist strikes close to home. Following President Bush's lead, virtually every state has formed security offices or appointed panels to assess gaps in their critical infrastructures, information systems and public health networks and to make recommendations for improvement to these systems and networks.

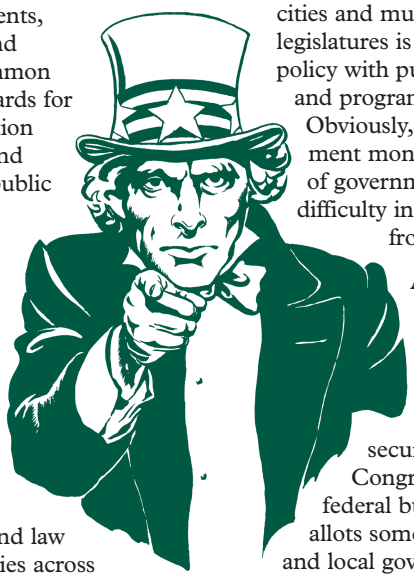
The success, however, of the United States' homeland security strategy depends on close cooperation among the branches of government, including federal, state and local and coordination with the private sector. States are planning to promote greater information sharing and better systems interoperability among justice and law enforcement agencies across all government levels, and it appears most state and municipal governments are in the early stages of evaluating their systems and responsiveness in the event of a terrorist attack. Unfortunately, upgrading or replacing information systems and installing cutting-edge technologies will be extraordinarily expensive.

The Communication Link

In July 2002, President Bush proposed launching a systematic national effort to harness science and technology in support of Homeland Security. Under the plan, the government was to consolidate most federally-funded homeland security research and development under a new Department of Homeland Security in order to "ensure strategic direction and avoid duplicative efforts."

The Bush plan addressed the deficiencies in the existing communications systems used by states and municipalities throughout the country. Perhaps the greatest deficiency recognized to exist in the communications systems is that most state and local "first responders" do not use compatible communications equipment. The President suggested that to better secure the country, government at all levels must link the vast amounts of knowledge residing within each government agency while ensuring adequate privacy.

Five major initiatives were established to implement the plan, each focusing on sharing information. Specifically, the initiatives are: to integrate information sharing across the federal government; integrate information sharing across state and local governments, private industry, and citizens; adopt common "meta-data" standards for electronic information relevant to homeland security; improve public safety emergency communications; and ensure reliable public health information.



Many public safety experts say there should be a greater emphasis on improving interoperability among all justice and law enforcement agencies across the board, as well as on providing links to systems that are not normally considered central to public safety, such as public health. There has been a push by the states and local governments, including New Jersey, to implement as many programs as necessary to accomplish the objectives set forth by the President.

Protecting Critical Information Technology Systems

The National Association of State Chief Information Officers ("NASCIO") has proposed a national blueprint to help state governments get a head start on protecting critical information technology systems. The group has released a technical assistance guide to help states develop enterprise-wide architectures, focusing on the design of underlying networks to make information sharing possible. Most recently, New Jersey joined eleven other states in Cyber-Threat Information Sharing, by becoming a member of the multi-state Information Sharing and Analysis Center (ISAC), which is modeled on private-sector centers.

In government, collaboration with Congress and among states, counties, cities and municipalities and their legislatures is essential to aligning policy with public law and resources and programs to desired outcomes. Obviously, in this fiscal environment monies are tight at all levels of government, creating an inherent difficulty in complying with the edict from Washington, D.C.

As such, governors, county executives and mayors, in turn, are seeking federal funds to augment budget dollars already allocated to homeland security initiatives. While Congress agreed on a 2003 federal budget that reportedly allots some $3.5 billion for state and local government spending on homeland security, experts agree that this sum constitutes less than half of what is needed. Thus, it is the municipalities throughout the State which are going to be placed with the daunting task of funding the security plan.

A plan for compliance with homeland security measures impacts the various functions provided by state, county and local governments. Hill Wallack can provide legal counsel to state, county and local government entities to ensure that government functions are preserved through compliance with federal and state homeland security policies.

"United States' homeland security strategy depends on close cooperation among the branches of government, including federal, state and local and coordination with the private sector."

Susan E. Inverso *is an associate of* ***Hill Wallack*** *where she is a member of the* ***Litigation Division*** *and* ***Administrative Law/Government Procurement Practice Group.***

Condominium Swimming Pool Rules Must Comply With The Federal Fair Housing Act

by Andrew L. Jacobson

Community associations may implement regulations restricting the use of their swimming pools by children in a well intentioned effort to safeguard the health and safety of those children and other association members. However, associations should review their swimming pool rules and policies to ensure that they do not violate the Fair Housing Amendments Act of 1988 (FHAA).

Title VIII of the Civil Rights Act of 1968, as amended by the FHAA, prohibits discrimination in housing based upon race, color, religion, sex, national origin, handicap or familial status and allows money damages for discriminatory practices. In the context of community association living, the FHAA bars discrimination in the provision of services and facilities and exposes common interest ownership associations to potential liability for violations, including money damages and fines.

Pool Rules May Not Discriminate Against Families with Children

The FHAA defines a family as at least one child under the age of 18 living with at least one parent or guardian. The definition includes pregnant women. Associations which adopt rules restricting or prohibiting the use of swimming pools by children may be subject to liability under the FHAA for discrimination based on familial status. However, an association may impose restrictions on children if such restrictions are reasonably related to health and safety concerns. Thus,

rules regarding the use of swimming pools by children may raise issues regarding the FHAA.

The case of *HUD v. Paradise Gardens* provides an example of rules deemed unlawful under the FHAA. The association in that case adopted rules providing that 1) no child under 5 years old was permitted in the pool or pool area, and 2) children between 5 and 16 years old were allowed in the pool only between 11:00 am and 2:00 pm. Homeowners filed a complaint against the association, the president, and the recreational facilities manager. The administrative law judge found that the restrictions discriminated against families with children and therefore violated the FHAA. The judge also concluded that these restrictions were not reasonable health and safety requirements and therefore were not exempt from the Act's prohibitions. The association and the individuals were ordered to pay approximately $10,500 in damages and fines to the homeowners and to the Secretary of Housing and Urban Development.

In *HUD v. Murphy,* on the other hand, the administrative law judge upheld a swimming pool regulation requiring anyone under age 15 to be accompanied by an adult. It thus appears that associations may require children at pools to be accompanied by adults.

Another illustration of pool rules which probably are acceptable appears in *HUD v. Seaboard Arbor Management Services, Inc.* There, the condominium association prohibited all babies and small children not fully toilet trained from entering the swimming pool and barred baby strollers, walkers or play pens in the swimming pool area. Two homeowners alleged that these rules unlawfully discriminated.

The parties agreed in a settlement, approved by the administrative law judge, to focus the rules on sanitary and safety concerns regardless of age. The rules were amended to read: 1) "Any person who is incontinent or not fully potty trained must wear appropriate waterproof clothing when entering or being carried into the pool," and 2) "Only lounge chairs and similar chairs designed for use at a pool and wheelchairs are permitted in the pool area."

New Jersey State Sanitary Code

Associations may find further guidance in the public pool regulations of the New Jersey State Sanitary Code. For example, communities that might otherwise seek to prevent small children from using pool facilities in order to protect the health and safety of the community should consider the

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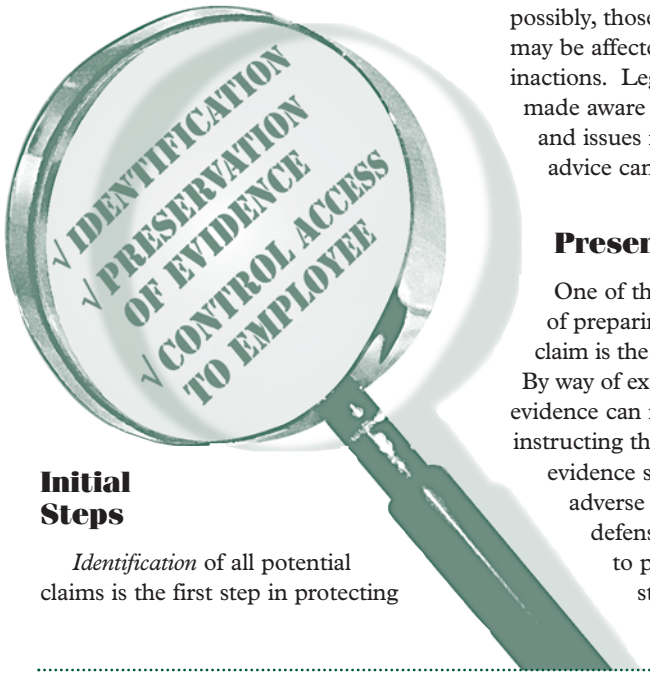
"Associations which adopt rules restricting or prohibiting the use of swimming pools by children may be subject to liability under the FHAA for discrimination based on familial status."

When Your Organization May Be Sued, Proper Planning May Make A Difference

by Keith B. Bannach

When an organization finds itself on the receiving end of a lawsuit, many opportunities to fully protect its interests may already be lost. Upon learning of any potential claim, it is important to *immediately* contact legal counsel to determine which steps should be taken to protect the organization's interests and preserve possible defenses. The myriad of issues which should be addressed early on range from the simple and practical, like identifying witnesses and preserving relevant documents, to the more legally technical, such as controlling adverse counsel's ability to interview employees without the organization's knowledge or consent.

Obtaining legal counsel promptly upon notice of a potential claim can make considerable difference in both the ultimate outcome of litigation and its impact on the organization's interests. Because, the number of issues for potential claims may be endless, there are some initial steps which should be undertaken when a potential claim arises to protect the organization's interests.



Initial Steps

Identification of all potential claims is the first step in protecting the organization's interests. The nature of a potential claim dictates the type and immediacy of the organization's response. For example, potential post termination claims by a problem employee are most effectively addressed *before* the employee is terminated. Pre-termination actions include proper documentation and counseling of the employee. These preliminary steps will help to ensure that all possible defenses are preserved and the employee's rights are not violated. However, an employee's intentional illegal act (such as assaulting another or stealing money) may require immediate and *responsive* action. Once any probable claim is identified, a detailed plan can be created and implemented to protect the organization's interests, and possibly, those of third parties who may be affected by your actions or inactions. Legal counsel must be made aware of the underlying facts and issues involved before adequate advice can be given.

"Obtaining legal counsel promptly upon notice of a potential claim can make considerable difference in both the ultimate outcome of litigation and its impact on the organization's interests."

Preserving Evidence

One of the most obvious aspects of preparing for the defense of a claim is the preservation of evidence. By way of example, failure to preserve evidence can result in (a) a judge instructing the jury that the missing evidence should be deemed adverse to the organization's defense; or (b) the inability to prove an otherwise strong defense. Allowing evidence to be destroyed or altered (intentionally or negligently) may result in other severe sanctions or other penalties.

Preservation of evidence is more than keeping relevant files. Tracking employees and other witnesses with relevant knowledge of facts and documenting management decisions regarding the potential claim are also important. This could include employee disciplinary action, or the manner in which a defect is addressed. Discussions with counsel regarding the scope of an investigation, and whether it should be conducted, should be held in order to preserve all available defenses and privileges.

Control Over Adverse Counsel's Access To Employees, Including Former Employees

One of the most significant risks to an organization against which a claim is or may be made arises from unsupervised interviews of the organization's employees or former employees by claimant's counsel. During such "informal" interviews, employees may make unguarded statements which are not completely accurate or which are based upon either misinformation from other workers or misleading questions from claimant's counsel. With the exception of a small group of senior

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SPOTLIGHT

NEW ASSOCIATE

Thomas J. Hornbeck has joined **Hill Wallack** in its **Creditors' Rights/Bankruptcy Practice Group.** Mr. Hornbeck concentrates his practice in all matters of creditors' rights and bankruptcy, including workouts, foreclosures, replevin actions and collections. His extensive client list includes secured creditors, creditors' committees, debtors in possession and debtors and trustees in liquidation and reorganization proceedings. Mr. Hornbeck earned his law degree from Widener University School of Law and is admitted to practice in New Jersey and Pennsylvania. Mr. Hornbeck is a resident of Brick, New Jersey.

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APPOINTMENTS & RECOGNITION

Ronald L. Perl, a partner at **Hill Wallack** and partner-in-charge of the **Community Association Law Practice Group,** was recently named president of the Community Association Institute Research Foundation. The Community Association Institute (CAI) is a national organization dedicated to providing education and resources to approximately 250,000 residential condominium, cooperative and home-owner associations in the United States and to the professionals and suppliers who serve them. 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. Mr. Perl is nationally recognized for his work in the field of community association law and is a member of the National College of Community Association Lawyers. He has authored numerous publications and lectures frequently on issues related to community association law. He also teaches a course in Community Association Law at Seton Hall Law School in Newark.

Dakar R. Ross, an associate of the firm, where he is a member of the **Litigation Division** and **School Law** and **Municipal Law Practice Groups** was recently appointed as a member of the Advisory Council and consultant to the New Jersey Small Business Development Center in Mercer County. He will be serving as a consultant to The Entrepreneurial Training Institute program sponsored by the New Jersey Development Authority for Small Businesses, Minorities' and Women's Enterprises whose programs are managed by the New Jersey Economic Development Authority. A resident of Winslow, New Jersey, 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 States District Court.

Meridith F. M. Mason, an associate with **Hill Wallack,** and member of the Editorial Board of *New Jersey Lawyer, The Magazine* was recently featured as Special Editor for its recent Appellate Practice issue. The issue presented an assortment of articles written by practitioners and retired judges involved in appellate practice. Ms. Mason concentrates her practice in all matters of creditors' rights and bankruptcy, including workouts, foreclosures, replevin actions and collections. A resident of Ewing, NJ, Ms. Mason earned her law degree from Brooklyn Law School and is admitted to practice in New Jersey and New York.

Anthony N. Gaeta, an associate with the firm has been appointed to the Borough of Belmar Planning Board for a period of two years. The Belmar Planning Board hears petitions for the granting of construction and development variances and is generally responsible for the planning of commercial and residential development. Mr. Gaeta is a member of the **Administrative Law/Government Procurement Practice Group.** His principal area of practice is in the areas of economic and business development with a particular emphasis on municipal law and government affairs. He earned his law degree from Rutgers University School of Law - Newark. A resident of Belmar, NJ, he is admitted to practice in New Jersey and New York.

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SEMINARS

Rocky L. Peterson, a partner of **Hill Wallack,** where he is a member of the firm's **Litigation Division, Municipal** and **School Law Practice Groups** was recently a featured speaker at the New Jersey Institute for Continuing Legal Education Seminar *"School Law for the Non-School Law Practitioner".* Mr. Peterson gave a presentation on "Representing Bidders and Contractors in Dealings with School Districts". A graduate of Cornell University, Mr. Peterson received a degree in law from Cornell University School of Law. Prior to joining **Hill Wallack** in 1984, Mr. Peterson was a Deputy Attorney General for the State of New Jersey. He is admitted to practice in New Jersey, before the U.S. Court of Appeals for the Third Circuit, and before the U.S. Supreme Court. 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.

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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 "CancerCare, Inc.". 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.

The Election Law Enforcement Commission v. Freedom of the Press

by Mark A. Roney

> *Amendment I*
>
> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*

The New Jersey Election Law Enforcement Commission (E.L.E.C.) is vested with broad investigatory powers to ensure that the state's financial disclosure and campaign finance laws are followed. Typically, newspapers in New Jersey with large circulation and daily readership have no problems with protecting their sources or staff from intrusive state agencies. But what happens when the power of E.L.E.C. runs headfirst into the free speech protections afforded newspapers which do not have the same circulation base or publish on a more infrequent basis? The answer is not as clear as one may think.

What Type of Statement Will Trigger E.L.E.C.'s Investigatory Powers?

If a statement is made which involves a direct appeal for the election or defeat of a public question or candidate for political office, whether via e-mail, advertisement, broadcast over the radio or television, the statement will be deemed a "political communication contribution" and trigger the jurisdiction of E.L.E.C.'s reporting and investigatory powers. While E.L.E.C.'s jurisdiction in this type of direct appeal to the voting population does not conjure images of a government agency stifling free speech, E.L.E.C. has a much broader ability to investigate "political communication contributions" which can easily infringe on a newspaper's ability to publish articles concerning political figures.

E.L.E.C. regulations define a statement as being a "political communication contribution" triggering reporting responsibilities if the statement is: (1) made within 90 days of the date of any election in which the candidate on whose behalf the communication was made, or in the case of a candidate for Governor in a primary year, on or after January 1st of the primary year; (2) the statement is circulated or broadcast to an audience substantially comprised of persons eligible to vote for the candidate; (3) the communication contains a statement or reference concerning the governmental or political objectives or achievements of the candidate; and, (4) the production, circulation or broadcast of the communication is made in whole or in part with the cooperation of, prior consent of, in consultation with, or at the request or suggestion of, the candidate.

Therefore, any time a newspaper publishes an article or opinion piece on a candidate for governor in an election year, they are potentially exposing their operations to the prying eyes of E.L.E.C. During election years, newspapers are a major vehicle utilized by candidates to obtain name recognition and to inform the general public of their positions on the issues. The mere act of disseminating useful information about candidates to the general public should not expose a newspaper to potential investigations by E.L.E.C of their professional and financial activities.

Are There Limits to E.L.E.C.'s Ability to Investigate Newspapers?

While the burden of requiring compliance with E.L.E.C. regulations in the case of a candidate may make sense, requiring individuals or newspapers to comply with E.L.E.C. investigations has the potential to violate a newspaper's right to keep confidential sources of profession and financial information. However, E.L.E.C. does not have entirely arbitrary regulations regarding the free speech rights of newspapers. A newspaper may be exempt from the reporting requirements of E.L.E.C. if the *newspaper can prove* that it is a *bona fide* newspaper. The problem is that E.L.E.C. regulations do not provide any guidance on what constitutes a *bona fide* newspaper.

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Arbitration: Coming To A Contract Near You

by Todd D. Greene

Many of us have heard the term "arbitration", but what exactly does it mean? Usually arbitration is used in conjunction with labor disputes or a professional athlete's salary negotiation, but few people may have actually gone through the process. Increasingly, in today's society, contracts are prepared in commercial transactions with terms requiring that disputes arising from the agreement to be submitted to arbitration. The following presents a brief overview of the process of arbitration and discusses the pros and cons of its use.

So What Is Arbitration?

Arbitration is a mode of alternative dispute resolution also referred to as "ADR." In contrast to litigation, the parties do not settle their differences in a civil courtroom with a judge and jury making the decision. Rather, the parties submit their dispute to one or more arbitrators outside of the courtroom setting. The arbitrator, while not a judge, has quasi-judicial power to investigate, weigh the evidence presented and to render a final decision to resolve the matter, which is enforceable by a court judgment.

The arbitration process begins by the opposing sides selecting a neutral third party to hear their controversy. Once selected, the parties' attorneys may meet with the arbitrator and one another to discuss the issues in dispute and decide on a time frame for their resolution. The parties will then generate a formal Arbitration Agreement, which incorporates all the issues to be resolved. Only the disputes identified in the Arbitration Agreement will be decided by the arbitrator.

Once these preliminary steps are taken, the parties will present their cases to the arbitrator. The proceedings may or may not be recorded and often do not abide by the rules of evidence used in traditional litigation. When the parties have completed their presentations, the arbitrator will render a final decision.

The rules governing arbitration in New Jersey emanate from three sources: the state's common law; the New Jersey Arbitration Act; and the New Jersey Alternate Procedure for Dispute Resolution Act. However, New Jersey Courts, however, have held that if the parties do not clearly state that they are proceeding under the Act, it will be assumed, in most cases, that the parties are proceeding under the common law. See *Heffner v. Jacobson.*

Under common law arbitration, only agreements to arbitrate, made after a dispute arises, are enforceable. Thus, agreements to arbitrate future disputes are voidable. However, common-law agreements to arbitrate do not have to be in writing to be enforced. Yet, a party seeking to enforce an arbitrator's award must file a contract alleging damages based on the other party's breach of the arbitration award.

In contrast to the common law, the Act, *N.J.S.A. 2A:24-1, et seq.*, permits parties to enter into agreements to arbitrate before and after a dispute arises. The agreement, however, must be in writing to be enforced. Additionally, if a party fails to submit to arbitration when there is a binding agreement, the Act permits the injured party to obtain a court order to enforce the arbitration agreement. The Act also permits the court to stay litigation pending arbitration of a valid arbitration agreement.

The last statute involving arbitration is the New Jersey Alternate Procedure for Dispute Resolution Act or ("NJDRA"), *N.J.S.A. 2A:23A-1, et seq.* In order for the NJDRA to apply, the parties must specify in their arbitration agreement that the statute controls. The major difference between the NJDRA, the Act and common law arbitration is that the Court Rules regarding discovery apply to arbitrations under NJDRA. Under the Act, discovery is limited by the arbitration agreement. In contrast, discovery under the NJDRA is confined only by the rules of court, thus, the parties can conduct depositions, exchange interrogatories and other forms of discovery.

It should be noted, however, that an arbitration award will not be set aside without substantial justification. Under the NJDRA and the Act, an award can only be vacated if the rights of a party were prejudiced by corruption, partiality of a supposedly neutral arbitrator was found, the arbitrator exceeded his or her powers, or the arbitrator failed to adhere to the procedures articulated in the respective Act. *N.J.S.A. 2A:24-8; N.J.S.A. 2A:23A-13(c).* Furthermore,

"…the process offers faster resolution than the courts."

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Employers Do Not Owe Injured Workers An Obligation To Keep A Job Available While Out On Disability

by Denise A. DaPrile

A frequently asked question by many employees, who are injured on the job, is whether their job would be available to them when they are able to return to work. Surprisingly enough, if the employee is not in a union or under a contract which specifies that the employee's job should remain available, or that the employee has a specific amount of "leave" time before the position is deemed no longer available, the employee may be without a job.

Recent Decision

The decision in *Malone v. Aramark Services* addresses this issue. In *Malone* an employee had been injured on the job and, as a result, was out of work for over one year. When he attempted to return to work, the employer advised that there was no longer a position available, and he was discharged from that employment.

The employee in that case attempted to amend his complaint to add a cause of action for breach of a duty to hold his job open. The motion to amend the complaint to include this count was denied because under New Jersey law there is no such cause of action.

The Court in *Malone* specifically pointed out that New Jersey is "an employment at will State" and as such, an employee may be discharged from employment for any reason, with certain very specific exceptions. The exceptions include union-related job protection, or if there is an employment protection contractual exception. In *Malone,* there was no contractual employment exception nor was there any union involvement. As the employee was out of work for over a year, the Court found that employer had the right to deem his job position no longer available.

Other Avenues of Law

Federal law provides injured workers with additional job protections when out of work due to a work related injury. Under the Federal Family and Medical Leave Act (FMLA), an employee is allowed twelve weeks of leave. That individual cannot be fired due to the inability to work during that time frame. However, this only applies to an employee out of work to care for an injured or ill family member, not as a result of the worker's own illness, injury or disability.

Other than the FMLA, an employee may also have rights under the New Jersey Law Against Discrimination (NJLAD), as well as the Worker's Compensation Act. Under NJLAD, injured workers have protections afforded to them under the laws prohibiting discrimination against the handicapped, namely the American with Disabilities Act (ADA). Under ADA, the employee may take a leave of absence from work in order to recuperate or receive treatment as reasonable accommodation by the employer, but the extent of such leave would depend upon the facts of the case. However, even under the ADA such a leave may not be for an extended or indefinite period of time. Even with the protections afforded by the ADA, NJLAD and the FMLA, there is no blanket requirement that leaves must be granted to an employee, who would not be able to perform the job's essential tasks. In fact, under the NJLAD, where leaves of absence are in excess of one year, Courts have determined that the employees are not capable of performing their essential job functions. Also under NJLAD, excessive absenteeism need not be accommodated even if the absenteeism is caused directly as the result of the disability otherwise protected under the Act.

Under the Workers' Compensation Law (NJSA 34:15-7 et seq.), an employee injured on the job is afforded certain benefits including medical care, as well as, temporary disability payments of compensation. In addition, an employer is prohibited from retaliating against an employee who seeks workers' compensation benefits under N.J.S.A. 34:15-39.1. In the event there is some type of violation of this statute and there is evidence of retaliation, a common law claim may arise which would entitle

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...Insurance in New Jersey cont. *(continued from page 2)*

of fact that should be developed at the time of trial to be resolved by a jury. The judge refused to expand the statute beyond what he believed was "clear and unambiguous language." The matter was then settled, but the defendants appealed the denial of the motion for summary judgment.

The Appellate Division Affirms

The Appellate Division addressed several cases that shed light on the legislative intent behind other provisions in the statutory scheme of requiring a registered vehicle to be insured as a condition of eligibility for various benefits. From this sampling, the court gleaned that a host of circumstances involved uninsured vehicles that should be individually analyzed to determine the owner's eligibility to sue for economic and non-economic loss. The court held that the analysis for such a determination must focus upon the intent of the owner with regard to whether or not to operate the uninsured vehicle at or around the time of the accident. The court held that the underlying court was correct in denying the motion for summary judgment based upon the facts of the case, and that such a determination should not be resolved on a motion for summary judgment based upon the facts at hand.

The court held that a prima facie case of exclusion has been established under when an insurer comes forward with proof that the owner or registrant of an automobile registered or principally garaged in New Jersey, who is seeking PIP benefits, lacks PIP coverage. The PIP claimant must then come forward and prove that the vehicle was not being operated at the time of the accident, based on a conscious determination to prevent its use, as demonstrated by the conduct of the owner. The burden of producing evidence that the vehicle was not being operated then shifts to the claimant, but the ultimate burden of persuasion must not ultimately shift from the insurer.

The court further held that the record was unclear and void of any facts as to the frequency of plaintiff's use of the uninsured vehicle aside from moving the vehicle from one side of the street to the other in order to avoid parking violations. For example, the record was unclear as to whether or not plaintiff owned another vehicle at the time, whether that vehicle was insured, the automobile's operability, whether the vehicle was licensed and contained appropriate license plates, and the prior use of the vehicle in relation to the subject accident. Pursuant thereto, the matter was remanded for a determination to be made after a plenary hearing by the motion judge, who the Appellate panel deemed the proper fact finder regarding the question of operation of the motor vehicle.

Despite the apparent yearly increases in automobile premiums and news of growing number of uninsured motorists operating vehicles on the busy streets of the area, the New Jersey legislature seems to gain support from the appellate court in its attempt to ensure that all vehicles maintain compulsory insurance coverage. The mandate of proper and current coverage not only protects insured drivers from losses sustained while operating a vehicle, but also covers and extends PIP benefits to non-drivers. As this case demonstrates, the failure to comply with the legislative mandate of compulsory insurance may bar an injured party from recovery of benefits once considered implicit.

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When Your Organization May Be Sued... cont. *(continued from page 5)*

management personnel involved in litigation management and control, adverse counsel is permitted by law to conduct these informal interviews. However, proper and prompt action by the organization before such interviews take place may provide significant protection.

With the assistance of counsel, it should be determined whether previously identified employees with knowledge of relevant facts may be represented by the organization's counsel. This protection may also be extended to former employees, if appropriate. In rare instances — such as an employee intentionally injuring a co-worker — a conflict of interest may prevent the organization from representing the employee. For employees with possible conflicts of interest, the organization should discuss with counsel the propriety of retaining separate counsel for those individuals. If the organization decides to extend its representation to its employees, counsel should discuss the representation with the employees, including the need to avoid making statements about the incident unless counsel is present. Of course, employees or former employees may decline an offer of representation where there may be a number of reasons in a given case why the organization should not make any offer of assistance.

Even if organizational representation is not extended, employees have an absolute right to refuse to participate in informal interviews by the claimant's counsel or investigator. It is imperative to discuss with counsel whether to advise employees of this right, and the manner by which the information is communicated, in order to avoid any misunderstanding or confusion of the organization's actions.

Conclusion

When an organization becomes aware of a potential claim, prompt and preemptive measures should be taken to protect the organization's interests. There are many wide-ranging areas of concern for which detailed legal analysis may be required. The lawyers at Hill Wallack are ready to assist you in preparing for any potential claim which may be brought. Remember, *proper planning* does make difference.

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Condominium Swimming Pools... cont. *(continued from page 4)*

following rules from the Sanitary Code in lieu of an outright prohibition:

• All children in diapers must wear plastic pants with snug fitting elastic waist and leg bands. Do not wash out soiled diapers in the bathing water.

• Children should be encouraged to use the restroom before entering the water. Immediately report any "accidents" you observe in the bathing waters to a lifeguard.

Since these regulations are permitted for public swimming pools, they should be acceptable for private pools.

Qualified Age Restricted Communities Exempt

FHAA provisions prohibiting discrimination against children at association swimming pools may not apply to communities that are restricted to persons 55 years of age or older. In general, the FHAA provides an exemption to the rules prohibiting discrimination based on familial status for such communities (deemed "housing for older persons" by the FHAA). Communities that deny use of facilities to families with young children on the assumption that they are "housing for older persons" should consult with counsel to confirm that they meet the tests for such an exemption.

It is apparent from the cases that a rule which restricts children's use of a pool, but which is not reasonably related to protecting residents' health and safety, such as adult-only swim periods or the prohibition of swimming by certain age groups, will likely violate the FHAA. However, by implementing carefully considered rules which focus on health and safety concerns rather than age, an association can protect the pool environment without the risk of sanctions. Associations and managers should review their pool restrictions for compliance with the FHAA and raise any questions with legal counsel.

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...Disability cont.

(continued from page 9)

the injured worker to file for compensatory and punitive damages against the employer.

Conclusion

Overall, despite the fact that current law does provide substantial protection and benefits to injured workers, an employee's job is not protected if he or she is out for a substantial amount of time. As the Court reasoned in the *Malone* case, while the laws prohibiting discrimination against the handicapped require some reasonable accommodations, holding a job opened for an extensive or indeterminate amount of time may become unreasonable. Thus, an employee's job is not required to be held open for as long as it takes the employee to recover from a work related injury.

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Arbitration... cont. *(continued from page 8)*

the courts will only modify an award if there is a miscalculation of figures or a mistake in the description of a person, thing, or property referred to in the award; or the arbitrator has made an award on an issue not submitted for arbitration, and the award may be corrected without affecting the merits of the award; or the award is imperfect in a matter of form. *N.J.S.A. 2A:24-9, N.J.S.A. 2A:23A-13(e)*.

The Benefits of Arbitration

Proponents of arbitration claim that the process offers faster resolution than the courts. It is common for a civil dispute to take over a year before it is brought to court. Since arbitration is private, the timing of the matter is contingent upon the preparation of the parties instead of the caseload of the courts. Thus, an arbitrator's decision can come in a matter of months instead of years. Furthermore, arbitration can be more cost effective. By limiting discovery and the time it takes to resolve an issue, the parties often expend less money preparing for and arbitrating a matter than litigating in court.

In addition, the parties have great flexibility in selecting an arbitrator. The freedom to choose an arbitrator is especially beneficial to highly technical disputes. Many parties believe that it is advantageous to have an arbitrator who works or worked in their field because the arbitrator is familiar with the normal course of conduct and terms of the trade.

The Disadvantages of Arbitration

One disadvantage of arbitration is that most proceedings are based on limited discovery. By limiting discovery, both sides may never be able to acquire the facts necessary to accurately evaluate the controversy. Thus, the arbitrator's decision may be flawed because the information presented is incomplete. In addition, most proceedings, as discussed above, do not use the rules of evidence. While this might allow for the free flow of information, the protections the rules provide are essentially waived.

Conclusion

Arbitration often costs less and is more expeditious than traditional litigation. However, great care must be taken to ensure that valuable rights are not waived by the terms of an arbitration agreement. The assistance of an experienced attorney is essential for any individual or entity seeking to enter an agreement with an arbitration clause.

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The Election Law Enforcement... cont. *(continued from page 7)*

Without providing a definition of a newspaper, one must look to other situations where newspapers are protected from divulging sources or producing financial information. The most analogous scenario in which state statutes or regulations are balanced against the press' right to free speech and its corollary protections is the application of the "Newsperson's Privilege." The "Newsperson's Privilege" protects newspersons from disclosing information that they have received in the course of pursuing professional activities. If the privilege is asserted correctly, the newsperson has no duty to testify or produce documents either to a grand jury or in a court of law.

The statute creating the privilege defines a newspaper as "a paper that is printed and distributed ordinarily not less than frequently than once a week and that contains news, articles of opinion, editorials, features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at a United States post office as second class matter." Unfortunately, the definition of a newspaper does not protect fledgling papers or newspapers that are printed on a monthly, rather than weekly or more frequent, basis or free publications.

The mere fact that a newspaper is in its nascent stages should not remove the newspaper's privilege to protect its sources and to create and publish a product that is free from the overzealous scrutiny of a regulatory agency investigating alleged violations of its regulations. Moreover, a newspaper should not have to be afraid to approach or print an article with the consent or cooperation of a candidate for political office because the printing of an article could trigger the subpoena power of E.L.E.C.

Courts in New Jersey have broadly construed the protections afforded newspapers in connection with the "Newsperson's Privilege." However, no court has yet to make a determination regarding E.L.E.C.'s power to investigate the financial and professional activities of newspapers. It would be unfortunate indeed if small or emergent newspapers find themselves in the position of thinking twice about taking a stance on political issues or the endorsement of individual candidates for fear of receiving a letter from E.L.E.C. "requesting" information regarding the publication of certain articles.

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