HILL WALLACK
ATTORNEYS AT LAW

Quarterly
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IN THIS ISSUE

Message From the Managing Partner

In this issue, we are pleased to introduce our newly formed *Automotive Dealers Business & Liability Practice Group.* Few industries have been faced with as rapid a change in statutory, regulatory and common law as the automotive business. The members of the *Automotive Dealers Business & Liability Practice Group* have extensive experience in representing automobile dealerships and provide the auto dealer with a vigorous defense in response to customer claims. They continually monitor the ever-changing laws governing automotive trades and devote significant time, effort and resources to this unique practice area. They are equipped to respond to any claim or issue, large or small, in any forum in a prompt and cost-effective manner, and because of this, they have gained their current reputation in representing dealers in business entity choices, acquisitions and sales, consumer defense, employment, franchise, environmental and regulatory law. In addition to defense and industry growth, the firm advises the automotive industry on areas of statutory compliance, claims handling practices and consumer fraud protection.

In our lead article *"When the Customer Refuses to be Happy",* Ed Herman, a Management Committee Member, relates his extensive experience in representing the automotive industry in the world of litigation. In *"Minority Auto Dealers: Succeeding Despite 9/11 and the Economy",* another Litigation Partner, Rocky Peterson focuses on the impact the economy has on minority auto dealers. Land Use Partner, Donald Daines provides insight into the zoning ordinances that affect the automobile dealer in his article *"Driving Around Land Use Law for Automobile Dealerships"* while another Litigation Partner, Julie Colin discusses claims of sexual harassment in the workplace in her article *"Employers Beware: Sexual Harassment Claims are on the Rise".*

Our lead Business & Commercial Partner Paul Watter and Associate, Len Collett examine the regulations for automobile franchises in their article *"Motor Vehicle Franchise Act",* while our Environmental Partner Niel Lewis explains the environmental concerns facing automobile dealerships in his article *"An Ounce of Prevention: Automobile Dealership and Environmental Risk Management".* Finally, Andrew McDonald educates automobile dealers on the Consumer Fraud Statute in his article *"Auto Dealers Beware".*

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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When The Customer Refuses To Be Happy

by Edward H. Herman

Car dealerships are unlike any other business in a very important way. The dealer does not design the vehicle, does not build the vehicle, has little if any input into what types of vehicles will be available for sale, and has very little input into the cost of the vehicle. The same vehicle can often be purchased down the street at a competitor's store for essentially the same price. Many other businesses have the same situation. However, the difference is in the emotion with which the customer buys a vehicle. There are very few, if any, purchases which evoke more of the buyer's emotion than the family automobile. The size, shape, color and style reflect the personality of the buyer, and the dealership must try to satisfy all of the customer's needs.

"In lemon law cases, a good working relationship with the zone personnel and others representing the manufacturer can help resolve many of the customer's concerns before costly litigation."

Customer Complaints Leading to Litigation

Many customer complaints do not involve the dealership directly but must be addressed in order to satisfy the customer. Marketing literature shows that the repeat customer costs the dealership less and produces more sales than all other forms of advertising. Therefore, it makes economic sense to try to satisfy your customer whenever possible. Having said that, we recognize that some customers do not want to be satisfied requiring the dealership to resolve those complaints as quickly and cost-effectively as possible.

Dealership litigation comes in a variety of forms, such as claims involving lemon-law, repair and service, personnel and cost. Often, several of these issues are blended together to form the basis of litigation. In almost every case, the claim results in litigation, at least in part, because of poor customer communication. What did the dealer promise, but fail to deliver to the customer? How did the dealer tell the customer that the warranty did not cover needed repairs? Did the dealership treat the dissatisfied individual as a "valued" customer? These are but a few of the issues to which the dealer must be attentive.

In lemon law cases, a good working relationship with the zone personnel and others representing the manufacturer can help resolve many of the customer's concerns before costly litigation. While the law allows the dealer to seek a defense and indemnity from the manufacturer for all manufacturing defects and design flaws, manufacturers usually refuse to accede to a dealer's demand until after costly legal fees and costs for inspections and discovery proceedings have been incurred. Thus, it is better to fix the problem with the manufacturer's assistance than to litigate who is responsible for the customer's dissatisfaction.

Our experience indicates that repair and service issues are the largest cause of unhappy customers as to the dealer. No amount of free coffee, state-of-the-art waiting rooms, or detailed estimates will make up for poor performance in the service bays. No amenities in the

service waiting area will overcome a service writer or manager who fails to recognize that she has been given the customer's most prized possession for safekeeping and repair. Time, care and skill are all required to satisfy the customer.

Recommendation to Avoid Litigation

How does the dealer, then, make its customer happy, avoid litigation and thus, improve its own bottom line?" We recommend the following four rules:

- Deal with the problems—they will not go away by ignoring them. Train your sales force, service personnel and management to treat the customer the way they, themselves, would want to be treated. Dealership employees are all drivers and understand the issues involved in purchasing and maintaining a car. Often, a small concession on the part of the dealership can make a huge difference.

- Recognize that, even when you are "right", it will cost you dearly to prove your point. It is often cheaper in the long run to make the customer happy, if possible, than to proceed to litigation.

- When hiring key personnel, make certain to invest the time and expense necessary to select such employees carefully and train them to deal properly with the customer. Do not make promises that cannot be kept. Always treat the customer with respect.

- Place an arbitration clause in the dealership's sale or lease contract. This forces a "refuses-to-be-satisfied" customer to go to arbitration rather than to court and may save the dealer significant time and expense in resolving the claim!

Whether it involves a $10.00 replacement part not covered under the warranty or a lemon-law rescission claim, litigation will be time consuming and expensive. Each case must be defended as vigorously as the most complex litigation. Discovery must take place both in the form of written interrogatories and oral depositions under oath. Dealership personnel are required to take time away from their duties to appear for testimony and to review the file materials to be used at trial which may require spending endless hours of sitting in court waiting for the case to get reached due to long dockets. Many of these cases are in the Special Civil Part of the Superior Court and, more often than not, the customer is not represented by counsel; he simply wants to tell the judge what the dealer did to him.

As a practical matter, of course, the dealer cannot avoid all lawsuits. Those which the dealer simply cannot resolve should be defended vigorously and vindicate its reputation for honest, fair dealing with the public. Hiring skilled lawyers that understand the special nature of the automobile business is essential.

Hill Wallack has defended many suits against automobile dealerships over the past 35 years in which we have demonstrated both our sensitivity to the special needs of the dealership and our ability to provide a vigorous, cost-effective defense to claims by customers who simply refuse to be happy. We stand ready to assist you in evaluating customer claims before suit or defending you once litigation has commenced.

Edward H. Herman *is a partner of* ***Hill Wallack*** *and partner-in-charge of the* ***Automotive Dealers Business & Liability Practice Group.*** *He has 30 years of experience representing automobile dealers. He concentrates his practice in the many issues facing automobile dealerships.*

Minority Auto Dealers; Succeeding Despite 9/11 and The Economy

by Rocky L. Peterson

"In response to a request of the National Association of Minority Automobile Dealers ('NAMAD'), several auto manufacturers participated in a moratorium limiting closings of minority dealers, who were experiencing financial difficulties."

Prior to 2001, the auto industry was surging after three record years of sales. The National Automobile Dealers Association ("NADA") reported sales of new vehicles in 1991 as 16.9 million; 17.4 million in 2000; and 17.1 million units in 2001. A drop in 2001 totals was projected to be a result of increased gas prices, massive layoffs and predictions of a recession.

NAMAD

Despite some overall growth, minority auto dealers from 1978 to 1998 had survived three recessions each one resulting in the closing of dealerships. In response to a request of the National Association of Minority Automobile Dealers ("NAMAD"), several auto manufacturers participated in a moratorium limiting closings of minority dealers, who were experiencing financial difficulties. The moratorium was necessary because minority dealers are less capitalized and are therefore less likely to weather economic storms. They simply cannot wait for the economy to turn if they do not have the cushion to wait out a recession.

The events of September 11, 2001 coupled with climbing gas prices, layoffs, stock market instability and the war on terrorism contributed to a downturn in sales and plummeting of profits. Sales for 2002 were estimated by NADA to be 16.8 million units. This slight decline in overall sales was partially due to introduction of zero percent financing which was generally helpful to minority automobile dealers.

In an effort to assist all automobile dealers after September 11, the manufacturers began to implement zero percent financing. The University of Michigan's Office for the Study of Automotive Transportation states that as a result of zero percent financing,

> sales picked up significantly in the last quarter of 2001, thus helping to offset the impact of September 11, 2001 on car dealership profits. For minority dealers, particularly the zero percent financing was not a 100% cure-all. A lot of the minority clients were not eligible for the incentives and could not participate in the program. Hence sales of some minority dealers continued to decline.

Based on total number of sales, 2002 was the fourth best year in history for auto sales. In an effort to continue this rise, minority automobile dealers have attempted to maximize opportunities for themselves in a variety of ways. Manufacturers have assisted dealers with incentives such as rebates and zero percent interest. Reduction of inventory has also allowed dealers to reduce holding costs and interest charges. Staff

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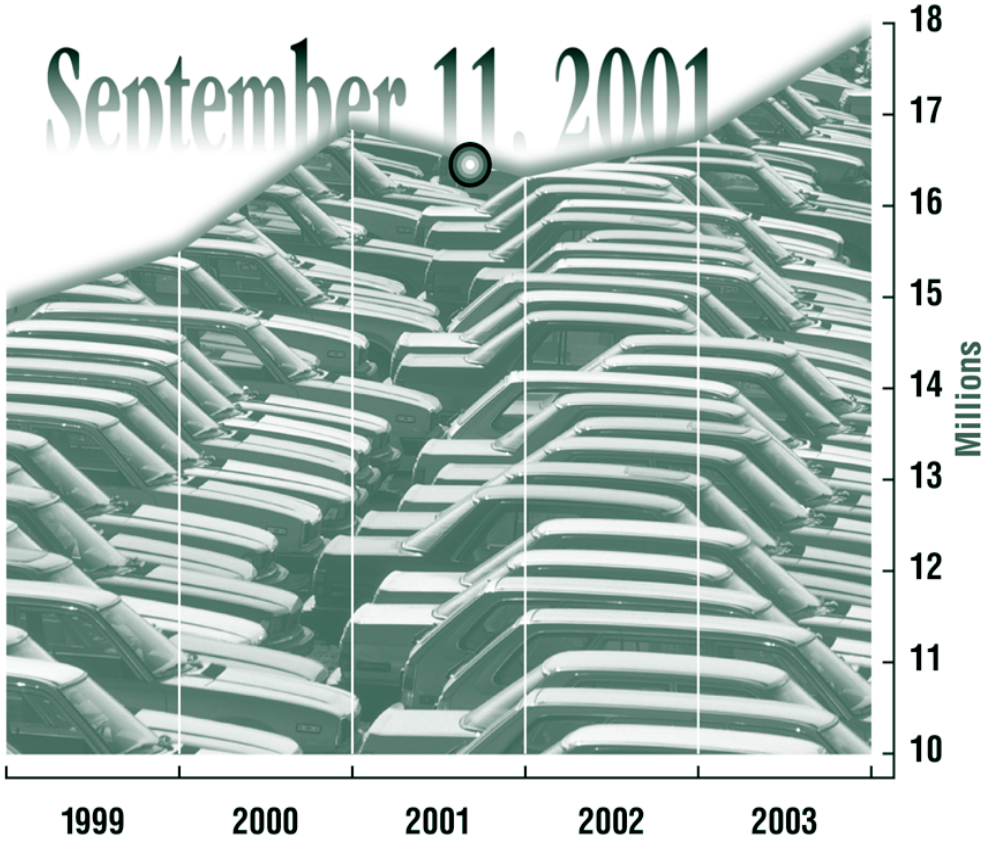

Employers Beware: Sexual Harassment Claims Are On the Rise

by Julie Colin

In the past few years, the fastest growing number of complaints in the civil courts of the State of New Jersey have been related to claims of harassment in the workplace. These issues can vary from discriminatory practices to improper termination. Most problematic for New Jersey business owners are suits arising from claims of sexual harassment which are increasing at an alarming rate. Of course, no businessman can protect himself from unfounded claims or unauthorized acts, but all businesses should ensure that they are in complete compliance with our state laws against any form of harassment in order to avoid liability when a claim is made.

Many business owners have taken the initiative to ensure that their workplace establishes a policy against harassment. Such policy is usually found within the office handbook or policy manual. Many business owners mistakenly believe that once a policy against sexual harassment is written into such a manual, they are protected from claims that may be made. Such a belief is not only misplaced, it is dangerous.

The New Jersey Law Against Discrimination was created by the legislature in order to provide even more protection than is provided to all citizens under the Federal Constitution. While the New Jersey law provides protections against many types of discrimination such as age, national origin, and race, it is primarily seen as a tool to provide relief from sexually harassing situations. Over the years, sexual discrimination has been divided into two distinct categories. First, the law prohibits discrimination based on the gender of an individual, and second, the law prohibits discrimination based on sexual advances. Although these two issues are distinct, they are often blended together in claims brought by employees. Often, a female employee will claim that a co-worker treated her differently than he would any other employee based on her gender, and that the disparate treatment included sexual advances.

Employer Responsibilities to Employees

Many employers believe that the policy manual prohibiting such sexual harassment provides a safety net when such claims are made. Our New Jersey courts, however, have become increasingly more protective of the victim, and employers must take affirmative, preventative action beyond a simple written policy to protect against devastating exposure. As recently as 2002, our New Jersey Supreme Court set forth several factors to consider when determining whether an employer could be held liable for the harassment in the workplace. The court found that in addition to a written policy against harassment, an employer must establish a system by which employees clearly are informed of the manner in which a complaint can be voiced. Additionally, an employer is charged with the responsibility of monitoring the workplace to ensure that compliance with its policy is maintained. In order to achieve such compliance, an employer must provide, in addition to written material, training with regard to its intolerance of harassing behavior. Finally, the court found that the employer must demonstrate a commitment from the highest level of management to a policy of a harassment-free workplace.

In devising this criteria, the court emphasized that it is the responsibility

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Driving Around Land Use Law for Automobile Dealerships

by Donald R. Daines

Many planning boards and zoning boards are not familiar with the unique needs of automobile dealerships. Even though automobile dealerships might be a permitted use within a zone, all too often the zoning ordinance requires many design and site plan features that directly frustrate and undermine the business of marketing and selling automobiles. This makes it necessary for the dealership to obtain either variances or waivers from these zoning requirements in order to be able to operate the dealership properly and competitively. These issues arise both with new dealerships and when seeking to improve and enhance existing dealerships.

Zoning Requirements

A typical zoning requirement at odds with automobile dealerships pertains to landscaping. Many communities require that new landscaping be installed along the street frontage of any new commercial use in order to create an aesthetic screen minimizing the visibility of the commercial business. This, however, directly frustrates the ability of the dealership to display its inventory of shiny automobiles as visibility is necessary for the dealership to compete. In addition, landscaping near the vehicles often attracts birds which interfere with the dealerships ability to keep and maintain clean vehicles. Therefore, waivers or variances from the landscaping requirements must be identified and sought during the application and approval process.

Another requirement in most zoning ordinances specifies the placement of plants, such as "planters" or "islands" throughout the "parking area". While this requirement might be beneficial to a shopping center to break-up the parking lot for pedestrians walking to and from their cars, it is generally not conducive to a dealership's storage and display of inventory. Customers are usually not permitted in the inventory area, with the vehicles being retrieved by dealership employees who are very experienced in driving and parking vehicles within the storage area. The scattering of plantings throughout the inventory/display area would, in addition to attracting birds and blocking visibility, also create problems with snow removal. Thus, relief from such ordinance requirements must sometimes be sought when before the planning board or zoning board.

"Even though automobile dealerships might be a permitted use within a zone, all too often the zoning ordinance requires many design and site plan features that directly frustrate and undermine the business of marketing and selling automobiles."

Parking space dimension requirements found in ordinances can also present automobile dealerships with the need to request relief from the reviewing board. The standard customer parking space dimension requires a much larger area than is needed for inventory or storage. Typically, the zoning ordinance requires a parking space large enough to accommodate opening of all vehicle doors including passenger doors. The zoning ordinance anticipates a model shopping mall parking lot configuration and usage so that people can comfortably enter and exit their vehicles.

Because the dealership stores and displays its inventory in an area not open to the customers, a standard parking stall is unnecessary. Obtaining approval of a smaller space for each vehicle not only increases the number of vehicles that can be stored within the same area, but also reduces the amount of pavement and impervious

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Motor Vehicle Franchise Act

by Paul N. Watter and Len F. Collett

The Motor Vehicle Franchise Act *(N.J.S.A. 56:10-16, et seq.)* was passed into law in 1982 to regulate the granting, relocation, reopening, reactivation, or establishment of motor vehicle franchises and retail businesses by motor vehicle franchisors in the same line as existing franchises (the "Act"). The Act established the Motor Vehicle Franchise Committee and set forth the circumstances, with limited exceptions, under which a motor vehicle franchisor is permitted to grant, relocate, reopen or reactivate a franchise or establish, relocate, reopen or reactivate a business. Further, the Act sets forth an administrative hearing process through which existing franchises can protest pending grants or reactivations of franchises by the franchisor.

The Act was amended in 1985 to prohibit manufacturers, distributors and importers of motor vehicles from engaging in the business of new car sales to prevent the replacement of the State's independently-owned franchises with manufacturer-controlled dealerships. The Act was again amended in 1991 to prohibit the manufacturers, distributors and importers of motor vehicles from engaging in the retail sale of used motor vehicles except through their franchisees (i.e., motor vehicle dealers).

Specific guidelines are set forth in the Act to protect existing franchises when their franchisor establishes additional franchises that would infringe on the existing franchises' market area. In that regard, the Act prohibits a motor vehicle franchisor from granting, relocating, reopening or reactivating a franchise, if the franchise will be harmful to either an existing franchise or to the public interest.

"The Act sets forth circumstances under which it is presumed that the grant or reactivation of a franchise or business will injure existing franchisees or the public interest."

Procedural Steps to Protect Your Franchise

To ensure that existing franchises are afforded the protections required by the Act, prior to the grant, relocation, reopening or reactivation of a franchise or business, franchisors are required to give advance written notice to all of its existing franchisees in the same line within an eight mile radius from a proposed franchise or business; or, if there are no existing franchisees within an 8-mile radius, the franchisor must provide notice to the next closest existing franchisee in the same line within a 14-mile radius.

Thereafter, any affected franchisee within the market area can file a protest with the Motor Vehicle Franchise Committee. The protest must be made within 30 days of receipt of the notice or 30 days after the end of any appeal procedure provided by the motor vehicle franchisor, whichever is later. The Act requires any protest to set forth all of the protesting franchisee's reasons for objecting to the granting or reactivation of a franchise including a statement of the facts and supporting affidavits for all issues raised in the protest. When such a protest is filed, the franchisor and the franchisee are notified in writing by the Committee, and a determination is made to either hear the protest itself or to transmit the protest to the New Jersey Office of Administrative Law (the "OAL") for a hearing. Regardless of whether the hearing is conducted by the Committee or is heard by the OAL, the hearing is conducted as a contested case in accordance with the provisions of New Jersey's "Administrative Procedure Act," which sets forth procedural rules and processes for the resolution of disputes at the agency level.

Any testimony taken at the hearing is required to be under oath and

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SPOTLIGHT

NEW PARTNER

Paul P. Josephson, who for the past eight years has served as a senior legal advisor to New Jersey Governor James E. McGreevey, recently joined **Hill Wallack** as partner-in-charge of its **Regulatory and Government Affairs Practice Group.** Mr. Josephson, previously served as Assistant Attorney General and Director of the Division of Law within the New Jersey Department of Law and Public Safety. In that capacity, he managed a 550-attorney division responsible for all civil representation of the State of New Jersey, as well as all principal departments and agencies. He served as Governor McGreevey's Chief Counsel and Chief of Authorities representing the Governor on more than 50 bi-state and state transportation, development and environmental authorities. Before that, he served as General Counsel to Governor McGreevey's 1997 and 2001 gubernatorial campaigns and represented many of the state's top elected officials. Prior to joining the McGreevey administration, Mr. Josephson—who is listed in the top tier of *PoliticsNJ.com*'s list of New Jersey's most politically influential people—was a partner at the Newark-based firm Sills Cummis Epstein & Gross, where he focused on civil litigation and administrative law. Mr. Josephson is recognized for his experience in real estate litigation, election law, government ethics, public contracting and corporate compliance issues. He has substantial experience in all facets of the gaming industry, including casinos, horseracing, lottery and internet-based enterprises.

In announcing the partnership with Mr. Josephson, **Hill Wallack** Managing Partner Robert W. Bacso said, "We are proud to have a professional of Paul's caliber join the firm. Our clients will obviously benefit from his extensive legal skills and thorough understanding of state and local government. More importantly, however, our clients will appreciate Paul's proven ability to work effectively and honestly in complex public matters in which viewpoints and interests vary greatly." Mr. Josephson's decision to join **Hill Wallack** is based on his desire to devote more time to his new family. He noted that, "Governor McGreevey recruited me from private practice to help him set up his new administration and establish greater accountability to taxpayers. Having accomplished the public service goals the Governor set out for me, it is time to address two personal goals: to spend more time with my new family and to return to private practice. My move to **Hill Wallack** was a natural fit." He said, "**Hill Wallack** has long been recognized as one of New Jersey's most progressive and savvy law firms. Their culture and strategic direction are well-suited for my skills and background. Equally important to me is **Hill Wallack's** dedication to urban redevelopment—reflected in their bold decision to relocate to downtown Trenton. **Hill Wallack** has put its money on the line with its decision to move to downtown Trenton this fall.

Born and raised in Essex County, Mr. Josephson graduated from Montclair Kimberley Academy. He earned his undergraduate degree from the University of Michigan, and his J.D. with honors from the National Law Center at George Washington University.

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NEW ASSOCIATES

Mark P. Williams has joined the firm in its **Land Use Division** which includes the firm's **Land Use Applications, Land Use Litigation** and **Environmental Applications Practice Groups.** Mr. Williams is a graduate of The Catholic University of America, Columbus School of Law and is admitted to practice in New Jersey. He previously served as law clerk to The United States Environmental Protection Agency in the Office of Site Remediation Enforcement in Washington, D.C.

Kelly Anne Hicks has joined **Hill Wallack** in its **Banking & Secured Transactions Practice Group.** Ms. Hicks 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 Widener University School of Law and earned her degree of Master of Law in Taxation (LL.M in Taxation) from Georgetown University Law Center. A resident of Deptford, New Jersey, she is admitted to practice in New Jersey and Pennsylvania.

Adam S. Picinich has joined the firm in its **Litigation Division** where he is a member of the **Trial & Insurance Practice Group.** He concentrates his practice in the representation of insurance companies in defense of diverse claims. He received his law degree from Seton Hall University School of Law. Mr. Picinich is admitted to practice in New Jersey and is a resident of Hoboken, New Jersey.

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APPOINTMENTS & RECOGNITION

Edward H. Herman, a partner with **Hill Wallack** has been reappointed Municipal Court Judge in the Borough of Spotswood in Middlesex County. Mr. Herman is a member of the firm's **Litigation Division** and partner-in-charge of the **Workers' Compensation** and the **Automotive Dealers Business & Liability Practice Groups.** His 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. He also has 30 years of experience representing automobile dealer principals.

Anne L. H. Studholme, an associate with the firm was recently appointed to the Board of Directors of the U.N.O.W. Day Nursery. The Board of Directors sets policy and handles staffing and finances for the school, which has six classes with about 85 children, ages 3 months through 5 years and 25 staff members. Established in 1970 by Princeton University and the National Organization of Woman, U.N.O.W. has provided full time day care to the children of Princeton University staff members and members of the community for over 30 years. Ms. Studholme is a member of the firm's **Land Use Division** and its **Land Use Applications Practice Group.** She also has a practice concentration on federal civil litigation, complex litigation and legal malpractice. Ms. Studholme, a graduate of Princeton University, earned her law degree from University of North Carolina, Chapel Hill, and is admitted to practice in New Jersey and North Carolina.

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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 State Bar Association Government and Public Sector Lawyers Committee Panel *"Ethical Issues Facing Government & Public Sector Lawyers".* Mr. Peterson gave a presentation on the Local Government Ethics Act and related statutes in the New Jersey Penal Code. 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. He most recently was Director of Law for the City of Trenton from 1990-1998. He is active in numerous professional and community organizations.

Rocky L. Peterson was recently a featured speaker at the New Jersey Institute for Continuing Legal Education School Law Conference. Mr. Peterson gave a presentation on the topic of sexual and physical harassment and the school district's duty to investigate current and prospective employee's histories.

Ronald L. Perl, a partner with the firm and partner-in-charge of its **Community Association Law Practice Group,** recently presented a seminar entitled *"Common Interest Communities: Examining the Line Between Public and Private"* at a symposium in Washington, D.C. sponsored by the Foundation for Community Association Research. Mr. Perl also served as the chair of the symposium, which was the nation's first national symposium on Community Association governance. The symposium attracted hundreds of participants from throughout the country, including academics, attorneys, management professionals and volunteer board- and committee members from community associations. The Foundation for Community Association Research was incorporated as the Community Associations Institute Research Foundation in 1975. The organization was recently renamed the Foundation for Community Association Research in order to clarify and promote the organization's primary purpose—community research, development, and scholarship. Operating under the belief that community associations reflect a deep commitment to grass-roots democracy, the Foundation has fostered the growth of associations by providing educational and research support through CAI's chapters. The Foundation is committed to providing quality research and publications for promoting academic interest in these phenomena. Mr. Perl is nationally recognized for his work in the field of community association law. He is a member of the National College of Community Association Lawyers and an Adjunct Professor of Law at Seton Hall Law School in Newark, New Jersey.

Julie Colin, a partner at **Hill Wallack** and member of the **Litigation Division** and **Employment Law Practice Group,** recently presented a seminar entitled *"Solving and Dissolving Human Resource Problems"* at the New Jersey Association of Counties 2004 LEAD New Jersey Program. The NJAC Foundation offers the LEAD Program in collaboration with the College of New Jersey. An accredited college program, LEAD New Jersey is designed to provide county officials and employees with introductory and advanced training in areas relevant to their career in the public sector. Ms. Colin concentrates her practice in employment law, personal injury including products liability, employment discrimination and premises liability with expertise in trial work including jury trials in defense litigation, personal injury, and commercial litigation and workers' compensation. A cum laude graduate of Seton Hall University Law School, she is a member of the New Jersey State Bar Association and Mercer County Bar Association.

Michael S. Karpoff recently spoke on the topic *"How Free is Free Speech in Community Associations"* at the 25th Annual Community Association Law Seminar in Las Vegas sponsored by the Community Associations Institute (CAI). The Law Seminar was a

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An Ounce of Prevention: Automobile Dealerships and Environmental Risk Management

by Nielsen V. Lewis

By the nature of their operations, automobile dealerships experience significant environmental concerns, including potential liability for accidental discharges of hazardous substances into the environment. The risk of such discharges depends upon the nature and scope of each dealer's operations. Discharges may result from parked automobiles; the storage and use of products containing hazardous chemicals, such as solvents and lubricants; the storage and use of gasoline and other petroleum products; the on-site fueling of automobiles; automobile maintenance, service and repair operations; body shop and painting activities; and waste handling and disposal practices, to name some areas of concern.

Tough New Jersey Environmental Laws

Environmental risk is no small matter. New Jersey is home to one of the toughest sets of environmental liability laws and enforcement programs in the nation. Key environmental statutes of concern to dealerships include the Spill Compensation and Control Act (Spill Act), the Underground Storage of Hazardous Substances Act (USHS Act), the Water Pollution Control Act and the Solid Waste Management Act and related regulations. The Spill Act prohibits discharges of hazardous substances without a permit and imposes strict liability, without regard to fault, on persons "in any way responsible" for discharges for the costs of cleanup and restoration of injured natural resources. More recently, the USHS Act was enacted to prevent, control and abate groundwater contamination caused by leaking underground storage tanks (USTs). Implementing regulations impose the following requirements upon owners and operators of USTs: detailed registration; design, construction and installation; operating; release detection; release reporting and investigation; remediation; and tank closure. Many car dealerships have at least one UST posing the risk of leaks or discharges. Spill Act and USHS Act regulations require prompt reporting of unauthorized discharges of hazardous substances to the New Jersey Department of Environmental Protection (NJDEP), which is the administrative agency charged with administering and enforcing state environmental laws.

Liability for pollution resulting from improper waste disposal practices is another area of concern for car dealerships. Regulations implementing the Solid Waste Management Act set forth detailed requirements for proper waste management and disposal, including a "cradle to grave" manifest system for tracking shipments of solid and hazardous wastes to their final resting place. Moreover, the Water Pollution Control Act and related regulations establish the rigorous New Jersey Pollution Discharge Elimination System (NJPDES) permitting program controlling discharges of treated effluent into surface and ground waters.

The legal consequences of an unauthorized discharge of a hazardous substance can be severe. Enforcement sanctions may include stiff penalties; revocation of storage tank and waste discharge permits; court action by the regulators seeking injunctive relief and damages; and even criminal action.

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"Liability for pollution resulting from improper waste disposal practices is another area of concern for car dealerships."

Auto Dealers Beware

by Andrew T. McDonald

"More times than not, the liability exposure in a consumer fraud action is exponentially greater than the conduct that gives rise to the complaint."

Dealers Beware! In the distance—beyond plain view, a predator lurks in your midst that has eyes fixed on bleeding profits from your business enterprise. The predator is likely a lawyer who seeks out consumers to file lawsuits alleging that you violated the New Jersey Consumer Fraud Statute.

Consumer Fraud

Many dealers bear witness to the fact that the New Jersey Consumer Fraud Statute serves to foster litigation that places adversaries at impossible ends, making settlement negotiations an effort in futility and litigation very costly. The Consumer Fraud Statute provides that plaintiffs need not prove that an automotive dealer intentionally deceived them in the purchase of a vehicle, only that a misrepresentation was made. If it is found that an automotive dealer made a material misrepresentation regarding the advertisement or sale of a vehicle, then the defendant-auto dealer faces liability exposure under the Consumer Fraud Statute. This liability exposure is greater than one would expect.

More times than not, the liability exposure in a consumer fraud action is exponentially greater than the conduct that gives rise to the complaint. The inflated exposure for a defendant facing consumer fraud allegations stems from the fact that a successful plaintiff in a consumer fraud action is entitled to have treble damages where the award is multiplied by three. Further, a lawyer that brings a successful consumer fraud complaint is entitled to have the automotive dealer pay his legal fees. Such fees are usually based on an hourly billing rate upwards of $300 dollars an hour. Therefore, any recovery in a consumer fraud action has the potential to be astronomical when compared to the actions that typically give rise to complaint.

For example, an action alleging false advertising where a plaintiff may struggle to demonstrate that he has sustained any articulable damage, or that the advertising was indeed misleading, could result in a nominal award to the plaintiff of $2,000. This figure must in turn be trebled to $6,000 while plaintiff's counsel may demand tens of thousands of dollars (or more) in legal fees. For example, an automotive dealer could be hit with a $36,000 judgment on a very questionable claim regarding only his advertising!

Lemon Law

Akin to expensive liability exposure associated with allegations of consumer fraud is potential liability exposure concerning an allegation of a violation of New Jersey's "lemon law" statute. Pursuant to the statute, a plaintiff has a choice of forums to bring such an action and must have placed the manufacturer on notice of a problem within the first 18,000 miles or two years from obtaining the vehicle. A successful plaintiff is entitled to an amount equal to the contract price of the vehicle, plus all collateral charges and attorney's fees. Again, such a remedy may drive the litigation and deter reasonable settlement negotiations. A close analysis of the "lemon law" statute reveals that it should be of paramount concern for a dealer or manufacturer to take advantage of the statutory right to be afforded one last opportunity to "cure" the alleged problem. Such action may serve to nip excessive expense in the bud and avoid the "lemon" label being affixed to the vehicle at issue.

Our firm is aware that automotive dealers are vulnerable to litigation. **Hill Wallack** is able to provide counsel in an effort to avoid this potential for liability exposure. In addition, the firm aggressively defends allegations of consumer fraud working to avoid potential pitfalls and inflated judgments that "fee driven" litigation tends to foster. Lastly, a clear liability analysis for allegations of consumer fraud and violation of the "lemon law" is paramount to enable an automotive dealer to make an informed decision in how to defend such action.

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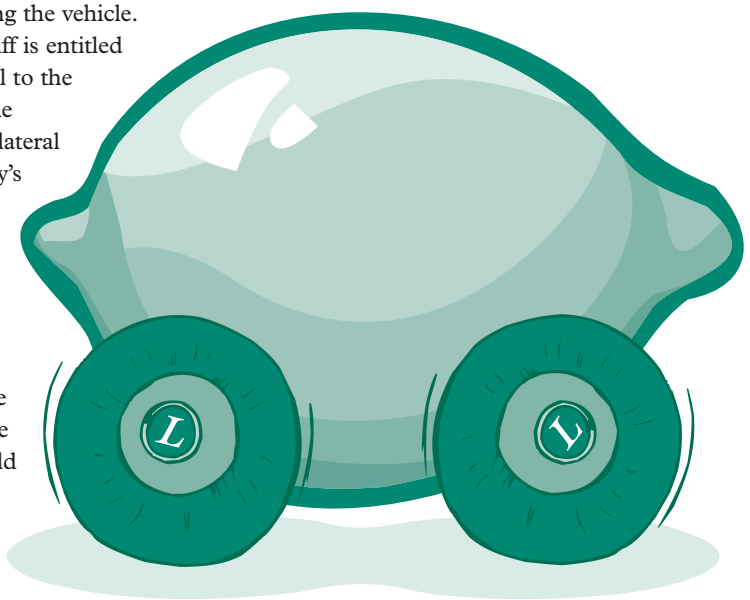

Employers Beware: ... cont. *(continued from page 5)*

of the employer to exercise due care in ensuring a harassment-free workplace for its employees. Such environment extends not only to scenarios involving co-employees, but also to customers and vendors. While the courts have recognized that the employer cannot prevent an unforeseen circumstance where an employee suffers harassment, it is possible for an employer to ensure that its policies against harassment are widely disseminated, implemented and enforced. For example, an employer may be found to be liable for failing to prevent foreseeable harassment by an outside vendor on an employee. Such a circumstance often arises when the vendor is providing a valuable service which an employer is hesitant to forego when a complaint of improper behavior is made by an employee. In this instance, it is incumbent upon the employer to risk its relationship with the vendor in order to protect its employee. Failure to do so may result in liability on the employer, even if the harassment came from an outside source.

Harassment by Customers

Similarly in the retail industry, employers often are hesitant to lose a sale to a customer who has engaged in harassment of a salesperson. Employers must demonstrate a pattern of dedication to its written policy against harassment in the face of such a dilemma. To do otherwise, and ask an employee to ignore improper behavior, or worse, to appear receptive to such behavior, clearly exposes an employer to liability based on New Jersey law. Such policy must be gender neutral. That is, a female customer making unwanted advances to a male salesperson is equally actionable as the more classic scenario. Moreover, same sex advances are equally prohibited and can result in an actionable circumstance. Employers must make it clear to their employees that behavior from any source in the workplace that is sexual in nature and unwanted, is inappropriate and must be reported. Employees must be made clear about their responsibilities in reporting such situations as often they take place with no witnesses present.

Finally, while the trend in New Jersey is to provide more and more protection to the employee with regard to claims of sexual harassment, employers have the right and obligation to conduct an investigation when claims are made. Part of the policy against harassment that is promulgated by an employer must make it clear that the employer shall investigate all claims made and that unfounded claims will be subject to disciplinary measures. While the law in New Jersey is intolerant of sexually harassing behavior, it is equally clear that employees who make unfounded accusations against co-workers, vendors or customers are subject to discipline, including termination. Employers should ensure that employees are aware of their commitment to a harassment-free workplace for all employees, and that unfounded accusations are not to be tolerated.

In order to ensure current compliance with the laws against harassment in New Jersey, it is prudent for all businesses to consult with a professional. Hill Wallack provides services to its business clients with regard to establishing a policy, providing proper mechanisms for reporting and investigation, and ensuring implementation. In order to ensure compliance, Hill Wallack will often provide training to employees and supervisors regarding both their rights and responsibilities. Such training (course), together with periodic updates to employees helps employers ensure that once faced with a claim, they are protected from liability by demonstrating full compliance with current obligations.

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Minority Auto Dealers... cont.

(continued from page 4)

cutbacks have also been utilized to lower costs. A significant influence has been the increased importance of imported vehicles. Those dealers who have added imported vehicles to their lots have noticed increased sales.

Financial Assistance

In addition to these measures, minorities seeking to own their own dealerships are receiving assistance from the industry. NAMAD has asked every manufacturer to commit to the initial goal of 15% majority ownership of the retail network by ethnic minorities. Certain manufacturers have already begun to work with NAMAD to identify opportunities for minorities to obtain dealerships. Prospective owners are urged to take advantage of programs offered by some manufacturers which help minorities complete training and dealership development.

Finally, as Dorian S. Boyland of the Boyland Auto Group, the 2003 Black Enterprise Auto Dealers of the Year, says: "you have to have a passion for this business; in which you can make or lose a lot of money. The bottom line is to make money."

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Motor Vehicle Franchise Act... cont. *(continued from page 7)*

accurately recorded. The Committee is permitted to subpoena witnesses and compel their attendance, administer oaths and require the production for examination of any documents relating to the hearing. The Committee is further permitted to subpoena and compel the attendance of witnesses requested by a party and can designate and require the production for examination of any documents relating to any matter involved in the hearing. Finally, any party can request a transcript or any other record made of or at the hearing.

Pursuant to New Jersey statute and court rules, a disappointed party is permitted to appeal the decision of either the Committee or the OAL directly to the Appellate Courts of New Jersey.

Determination of Injury to an Existing Franchise

The purpose of the hearing conducted by the Committee or the OAL set forth above is to determine whether the grant of a new or reopening of a franchise will harm existing franchisees. This determination is governed by an elaborate test set forth in the Motor Vehicle Franchise Act.

In determining whether a new franchise will harm existing franchisees, the Act recommends that the Committee consider (1) the effect that the new franchise will have on the provision of stable, adequate and reliable sales and service to purchasers in the same line in the relevant market area; (2) the effect that the new franchise or business will have on the stability of existing franchisees in the same line in the relevant market area; (3) whether the existing franchisees are providing adequate and convenient consumer service; and, if applicable, (4) the effect on a relocating dealer of a denial of its relocation into the relevant market area.

The Act sets forth circumstances under which it is presumed that the grant or reactivation of a franchise or business will injure existing franchisees or the public interest. These circumstances include situations where the proposed franchise or business is likely to cause a significant reduction in new vehicle sales or the gross income of a protestor; where the proposed franchise or business will not operate a full service franchise or business; or where an owner or operator of the proposed franchise or business has engaged in unfair or deceptive business practices with respect to a motor vehicle franchise or business.

Some cases involving the above protest have reached the New Jersey Courts. In one such case, the Supreme Court of New Jersey held that where the evidence suggested only that a new dealership would have an adverse effect on the existing dealerships, there was insufficient evidence to find that the existing dealership would be substantially injured by the establishment of a new dealership within 4.25 miles. There, the Court stressed the need for the protesting franchisee to quantify any alleged adverse effect of a competing franchise. *Monmouth Chrysler-Plymouth, Inc. v. Chrysler Corp.* In another case, a motorcycle dealer was successful in prohibiting a franchisor from establishing an authorized motorcycle dealership within a six-mile radius of existing motorcycle franchisee because the existing dealer showed that it derived 75 percent of its business from that six-mile radius. *House of Suzuki v. U.S. Suzuki.* Additionally, the Courts have determined that a franchisor's decision to locate a competing franchise in order to coerce, intimidate, or retaliate against an existing dealer is a significant factor in determining whether an existing franchisor will be injured by a new franchise within its market area.

Conclusion

In conclusion, the Motor Vehicle Franchise Act provides significant protections for existing motor vehicle franchises from the unwelcome addition of competing franchises in the same line and within the same market area. However, to avail itself of these protections, any franchisee, which is confronted with a planned opening of a competing franchise, must act quickly and decisively to protect itself through the procedures set forth in the Act. Any response must include not only a cogent legal argument based on the Act and existing case law, but also a convincing factual basis that shows how, why and to what extent the existing franchise will be harmed by the unwelcome introduction of another franchise into the market area.

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Len F. Collett *is an associate in the* ***Administrative Law/Government Procurement Practice Group.*** *He concentrates his practice in Administrative Law and Corporate Litigation including Public Procurement and Environmental Litigation with a particular emphasis on administrative, environmental and regulatory compliance.*

An Ounce of Prevention... cont. *(continued from page 10)*

Under the Spill Act, NJDEP may recover three times the State's costs of cleanup (known as a "treble damages" sanction) if a responsible party fails to obey a cleanup directive, necessitating the use of public funds to do the job.

To reduce the risk of environmental pollution and liability under New Jersey law, dealerships are well-advised to have in place an environmental risk management program designed to prevent, detect, control and abate unintended hazardous substance discharges in their operations. Three "best practices" risk management tools available to automobile dealers for this purpose are: (1) compliance with NJDEP pollution prevention and control regulations implementing the Spill, USHS, Solid Waste Management and Water Pollution Control Acts; (2) the use of internal environmental audits; and (3) procurement of insurance shifting the risk of environmental mishaps and liability to insurers.

NJDEP Pollution Prevention Regulations

For guidance concerning sound pollution prevention practices, one needs look no further than NJDEP's own regulations. In particular, N.J.A.C. 7:1E (Technical Requirements For Site remediation) and N.J.A.C. 7:14B (Underground Storage Tanks) provide a road map to NJDEP's concept of good hazardous substance storage, transfer and disposal practices and effective pollution prevention and control measures. Automobile dealerships can reduce their environmental liability exposure by knowing and adhering to specific standards and procedures in these regulations.

Internal Environmental Audits

Another useful risk management tool is the judicious use of internal audits of operations to assess environmental risks, the effectiveness of risk management practices, and any omissions, deficiencies or required changes. In connection with property transfer and financing transactions, environmental audits commonly are performed in two phases-Phase I ("Preliminary Assessment") and Phase II ("Site Investigation"). Normally, Phase I involves visual inspection of the property and operations accompanied by site interviews and a review of records to determine whether there are potentially contaminated areas of concern. If areas of concern are identified, a Phase II investigation, including soil and possible groundwater sampling and analysis, is performed to determine whether contaminants are actually present above "action levels" requiring cleanup. Guidelines for conducting site assessments are published by the American Society for Testing and Materials (ASTM) and in NJDEP's Technical Regulations. Such audits should be modified as appropriate to assess ongoing operations. Businesses lacking the resources to conduct environmental assessments may employ qualified outside consultants.

The use of environmental audits follows the adage "an ounce of prevention is worth a pound of cure." The purpose is to uncover and address environmental problems before they occur or get out of hand. Periodic environmental audits can play an important role in managing dealership operations to maximum pollution prevention and minimize potential liability for unintended discharges.

Liability Insurance

Even the best environmental risk management program will not always protect dealers from pollution liability. What if hazardous substance discharges occur despite the best of intentions? Liability insurance can be an integral component of an effective risk management program to deal with the "what ifs." In return for a premium payment, an insurance policy is issued shifting at least part of the environmental liability risk from the insured to the carrier. Two types of insurance may be useful here. The first is a comprehensive general liability (CGL) policy insuring against liability for environmental property damage caused by accidental discharges of pollutants; generally such coverage is limited to discharges occurring before 1986, when most policies adopted an "absolute" pollution exclusion. Importantly, these policies do not "expire" as one might expect; a tattered CGL policy issued years ago may cover pollution discovered tomorrow if its source lies in discharges occurring before 1986.

For other discharges, special environmental impairment insurance products tailored to specific sites are available to insure against future environmental accidents or discharges. Examples of such products include pollution legal liability, property transfer and cleanup stop gap policies. The availability and scope of such insurance ordinarily depends on the results of a site audit by the insurer to establish baseline environmental conditions. While these policies are more expensive than the CGL policy, they spread the risk of liability for future hazardous discharges, providing peace of mind for dealers who wish to concentrate on the business of selling automobiles.

Conclusion

Implementation of an integrated environmental risk management program can be a prudent investment in pollution prevention and reduction of environmental liability exposure. The nature and scale of the program will be shaped by the particular operations and site conditions of each dealership, in consultation with experienced consultants or professionals as needed.

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Driving Around Land Use Law...

cont. *(continued from page 6)*

surface required for vehicle display and storage. The reduction in storage/display pavement area saves on development costs and can mitigate storm water management problems.

Management of storm water runoff is also important to automobile dealerships because the property is normally covered with buildings and vehicle display/storage areas, leaving little open space for detention or retention ponds to handle the increased storm water runoff created by the impervious surfaces. The zoning ordinance and any applicable state storm water regulations need to be examined to determine if underground storm water storage is permitted or, indeed, even required. Such engineering measures allow for the release of rain water at a controlled rate so that the downstream pipes do not become overloaded. Variances or waivers from zoning ordinance requirements, and perhaps relief from state storm water requirements, may be necessary to permit the storm water management techniques that will allow maximum utilization of the dealership site. This could also affect the performance and maintenance bond requirements. Often times, a special storm water inlet will be required similar to that required for office parking areas, which separates oil, salt and other potential contaminants from the rain water before releasing the water to the storm water system.

Zoning for Parking and Display Areas

Zoning ordinances generally do not differentiate between a parking lot and vehicle storage/display area. The ordinance will quite routinely prohibit parking in the front of a building, meaning that no vehicles may be parked closer to the street than the front of the building. Because this would prohibit the display of vehicles in the most visible location of the dealership, a variance or waiver would be required. In addition, zoning ordinances generally specify the minimum distance that parking areas must be from property lines and streets; but such restrictions should not be mechanically applied to the storage and display of inventory. Again, the need for variances or waivers would be presented. The dealership may have to "screen" the side and rear property lines with plantings in exchange for a waiver or variance from the setback distance requirements. In one instance, the zoning ordinance required a berm to be installed along the common property lines between the dealership and abutting residential property. However, the height of the berm required by ordinance made the base so wide that it was impossible to comply without losing a significant amount of vehicle storage area. A waiver from the berm requirement was obtained in exchange for dense landscaping separating the residential property from the storage area.

A final zoning ordinance standard needing careful examination concerns lighting of the storage and display area. Many ordinances specify both a maximum and minimum brightness through the property, including the storage/display area, as well as an average. Too often these ordinances anticipate a customer parking lot, and not inventory storage or display use. Therefore, variance or waivers would have to be requested.

Zoning ordinances too often are "one-size-fits-all" and do not reflect the unique character and needs of the automobile dealer. The attorney handling auto dealership applications needs to be sensitive to the impact that zoning standards and requirements will have upon the business operation of the dealership, not only to help the engineer in the site plan layout, but also to explain to the board why a variance or waiver is justified. The pursuit of land use approvals and permits for dealerships requires a team approach in order to "drive around" the roadblocks created by typical zoning ordinances.

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SPOTLIGHT cont. *(continued from page 9)*

two-day forum attended by lawyers, community association managers and others from throughout the country, which explored trends and practices in the law of homeowner associations, condominiums, and residential cooperatives. Karpoff, a partner with **Hill Wallack,** and co-speaker J. Nussbaum, editor of the *Community Association Management Insider,* discussed the rights of common interest ownership association members to present their views within the association context and permissible limitations to such speech. In addition, they published a paper on the topic which is included in the Law Seminar book. Certified by the Supreme Court of New Jersey as a civil trial attorney, Karpoff also is a member of CAI's National College of Community Association Lawyers. He graduated from Rutgers College, holds a Master of Science degree in public relations from Boston University, and received his Juris Doctor degree from Rutgers Law School – Newark. He is admitted to practice law in New Jersey, New York and Pennsylvania as well as before the United States Supreme Court, the U.S. Court of Appeals for the Third Circuit, and the U.S. District Court for the District of New Jersey.

Terry A. Kessler, a partner of the firm, where she is a member of the firm's **Community Association Law Practice Group,** was recently a featured speaker at the Community Association's Institute Panel *"Community Association Manager Liability"*. Ms. Kessler gave a presentation on manager liability and related issues. A graduate of Albright College, Ms. Kessler received a degree in law from Seton Hall University School of Law. Ms. Kessler is actively involved in the New Jersey Chapter of Community Associations Institute (CAI) as a frequent lecturer on association law. She also previously served as chairman of the Chapter's membership committee and has served on the Special Events Committee and the Trade Show Committee. She is currently a member of the Education Committee.

Dakar R. Ross, an associate of **Hill Wallack,** where he is a member of the **Litigation Division** and **School Law** and **Municipal Law Practice Groups** recently appeared as a featured speaker during the Trenton Small Business Week at a workshop "Smart Growth-Legal Ease for Business" sponsored by the College of New Jersey Small Business Development Center. A resident of Winslow Township, 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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