

Employment Agreements 101

Continued from page 3

work for a competitor, taking away their customers or employees, or using their confidential information and carefully developed trade secrets for the benefit of a competitor. On the other hand, employees have a legitimate right to continue to be able to make a living. Restrictive covenants prohibit the departing employee from working in a competitive business, in a specific geographic area, for a specific period of time.

Generally, in New Jersey, an employee's creation is the employer's intellectual property, if created within the scope of employment and with the employer's resources, and especially if created in the area in which the employee was hired.

Dispute Resolution. Procedures for resolution of disputes are often included in

employment agreements, including mediation (a non-binding negotiation with a third party neutral) arbitration (a binding determination, subject to specific rules), litigation (determination of a court), or some combination of the three.

Indemnification. The party required to indemnify, must hold the other party harmless from its acts that cause damage to the other party.

Other Important Provisions. The notice provision mandates just how legal notice should be delivered to be deemed effective. A waiver provision provides that a party may elect not to take action against the other breaching party, but still may enforce its rights against future breaches. If one provision of an agreement is deemed to be unenforceable, a "severability" provision protects the enforcement of the rest of the agreement. A "no oral modification" or "integration" provision

means that the four corners of the contract govern the relationship, regardless of what any party says prior to, or after execution, and anything the parties said or agreed to prior to the execution of this agreement is "integrated" or "merged" into this agreement. There are many other often called "boiler plate" or "miscellaneous" type provisions in these agreements, and each such provision must be carefully reviewed and considered.

This article is a summary of employment agreement provisions, but does not take the place of good legal advice from a skilled attorney who is well versed in employment law.

Lisa R. Aljian is "Of Counsel" at WJ&L. She works actively in our Business & Corporate department and on Transaction matters.

Ramapo College this semester. We think the students are probably learning a lot too. Partner, **Jim Jaworski**, had the same position a number of years ago, and gave up after he learned as much as he could!

Partners, **Jim Delia** and **Tom Wells**, traveled to Haiti this summer. Both were representing the Ridgewood YMCA World Service Committee, and **Tom** also represented the Wells Mountain Foundation. **Jim** spent a week coaching soccer in Camp Perin. **Jim** will be returning to Haiti next summer and is recruiting more coaches, so by all means, be in contact with him if you have an interest. **Tom** helped open the soccer program, then visited other projects in Haiti. As a result of the trip, Wells Mountain Foundation, has underwritten the opening of a new YMCA branch in Kenscoff, Haiti and is running a major book drive for lightly used "easy reading and children's books" for English libraries in all of the Haiti YMCAs. If you have any books you

would like to donate deliver them to WJ&L's office, or to the Ridgewood YMCA at 112 Oak Street. **Tom** reports that WMF will have a record 25 scholarships in place this year in Ghana, Senegal, Zimbabwe and Haiti.

Partner, **AnnMarie Smits**, recently gave a seminar for the National Business Institute on Probate and Estate Administration. Longtime client, Children's Aid and Family Services is forming a "Planned Giving Council" and has asked AnnMarie to be its Chair.

Lisa Aljian "Of Counsel" featured elsewhere in this Legal Update, recently taught a class entitled "Sale of a Small Business" for the Institute of Continuing Legal Education.

On a lighter note, both literally, and figuratively, even more slender Partner, **Stuart Liebman**, now rides his bike 150 miles per week. He recently participated in a 70 mile fund raising event for the Burlington Rotary Club and soon will be riding 50 miles for Care Plus Foundation.

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Partner, **Tom Wells**, who before moving to Vermont in 1996, for many years lived in Ridgewood, lately seems to be at the Planning Board or Board of Adjustment in his old hometown, virtually, every month, reports that his stint as the Chairman of the Planning Board in his present hometown of Bristol, Vermont, continues to be one of his most challenging jobs. **Tom's** Board is in the final stretch of re-writing the Town Master Plan. **Tom** says that in Vermont, Boards do not get so much professional help, and The Plan, which is growing from 8 pages to almost 100, is a result of a group of laymen fighting over virtually every word.

Partner, **Jim Delia**, has gone back to school, this time on the other side of the desk, as Professor. **Jim** says he is "learning a lot" as an Adjunct Professor teaching Business Law at

Legal Update



Vol. 16, No. 1

Wells, Jaworski & Liebman, LLP

Fall 2008

Lisa R. Aljian joins WJ&L's Corporate Law Department



At the beginning of May, **Lisa Aljian** joined WJ&L's corporate practice, bringing to our firm a unique background and approach to the practice of law, specifically in the corporate and commercial area, and a diverse client base. **Lisa** has experience in all types of business and corporate matters, including financing, leases,

employment matters, contracts, and the vast growing area of intellectual property law. She has had extensive experience with clients ranging from solid waste haulers to software developers. She also currently serves as attorney for the Zoning Board of Adjustment in River Edge and the Rent Leveling Board in New Milford. **Lisa** is a faculty member of the Institute for Continuing Legal Education in the area of organization and sale of a small business. She has also lectured for the New Jersey Economic Development Authority and the Association of Women Business Owners.

Senior Partner, **Tom Wells**, who heads our firm's Business and Corporate Department, said "*Lisa is a valuable addition to our business and corporate practice. She brings solid experience and an approach that is at the same time that*

of a 'tough negotiator,' but also of an attorney who conducts herself with total compassion and respect. She makes clients feel much more comfortable with very complicated transactions."

Lisa has been active in the Hudson/Bergen Inns of Court for transactional lawyers. Interestingly, before becoming a lawyer, **Lisa** was a consultant in the sports and entertainment field and managed the film archive for Major League Baseball.

Lisa is admitted to practice in both New Jersey and New York, received her Juris Doctorate from New York Law School, and her B.A. from Farleigh Dickinson University. **Lisa** is married to Sandy Moscaritolo, who is also an attorney, and they make their home in River Edge.

Managing Electronically Stored Information In A Digital World

By: Nicole E. Cleenput, Esq.

When attempting to manage an overwhelming amount of digital information, often referred to as "electronically stored information" or "ESI", an organization must decide what information it values and should therefore preserve, and what information it can destroy in the interest of maintaining an efficient operating system. Businesses should establish document retention and destruction policies to provide guidelines for managing ESI which should be created after considering the business, regulatory, tax, information management, and infrastructure needs of the organization, including the need to conserve electronic storage. For example, if a company determines that it only needs to retain

Continued on page 4

What is the Future of Estate Tax?

By: AnnMarie P. Smits, Esq.

It has been said that nothing in life is certain but death and taxes. This statement looks like it will continue to hold true; however, what is uncertain is what the estate tax will look like in the future. As many of you know, in 2001 President Bush changed the estate tax. However, his change was only temporary and will revert back in 2011 to the law that existed in 2001. In 2001, the estate tax was increased in increments until full elimination of the estate tax in 2010 and a sunset of the law in 2011 as follows:

Year of Death	Applicable Exclusion Amount
2008	\$2,000,000
2009	\$3,500,000
2010	Taxes repealed
2011	\$1,000,000

As you can see above, in 2009 the last increase in the exemption amount raises it to \$3,500,000 per individual with an estate tax rate of 45%. This permits each couple to pass \$7,000,000 free of tax to their families. However, 2011 would reduce the joint exemption to \$2,000,000. With this prospect there have been discussions and proposed bills in the House and Senate to amend the estate tax permanently.

The Presidential election has placed more focus on these proposals, as the estate tax has become a key issue for the candidates. Each candidate has taken a different position on the permanent change to the estate tax. It is important to note that the Republicans and Senator John McCain (R-Arizona) have backed away from their previous position for a permanent full repeal of the estate tax. This is most likely due to the economic condition in our

Continued on page 3

Attorneys Fees

By: Darrell M. Felsenstein, Esq.

One of the most frequently asked questions of us in the litigation department, is "if I sue, can I get the other side to pay my attorneys fees?" The possibility of fee shifting is always on everyone's mind when involved in a litigation matter. Most people know that attorneys, especially litigators, do not like to offer any guarantees, so predictably, our answer is you might be able to get your fees paid or you might not. In practice, Courts generally seek to avoid an award of fees, even if they are truly warranted, as our system is designed for litigant's to pay their own way.

The "American Rule," as opposed to the "English Rule," is that parties bear their own counsel fees except in the few situations specifically permitted by Statute or by our Supreme Court. This makes the United States different from most other democracies in that, for the most part, litigants pay their own legal fees, win or lose. However, there are many scenarios in which attorneys fees may be awarded. Some specific actions

permit some of the prevailing parties' fees to be paid. These include a family action, where a fee is allowed in both Pendente Lite or on final determinations; out of a fund in court the Court may make an allowance for fees; a probate action; a mortgage foreclosure action; the foreclosure of a tax certificate; and in an action upon a liability or indemnity policy of insurance. Also, fees could be appropriate if the parties have agreed, in a contract, that if a dispute arises and is litigated, the prevailing party is awarded fees.

Frivolous Litigation

The area where fees are most often discussed is when dealing with frivolous litigation. The Rules of Court and specifically, R. 1:4-8 provide, in part, that by signing and filing a pleading or motion an attorney certifies to the best of his or her knowledge that there is some basis for the matter being presented. The "Frivolous Lawsuit Statute" (N.J.S.A. 2A:15-59.1) permits an award of attorneys fees and costs if it is determined that a complaint, counterclaim, cross-claim or defense of a non-prevailing party was frivolous. However, the term frivolous needs

to be defined. The Statute does provide some guidance. In order to find a case frivolous, the case, pleading or defense must have been commenced or continued in bad faith, solely for the purpose of harassment, delay or malicious injury or the losing party should have known that their claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. The determination on what constitutes bad faith in this context is an issue that can, in and of itself, be litigated for a long time. We have successfully litigated matters seeking the assessment of fees but often a party will expend considerable additional sums seeking to obtain attorneys fees. Ultimately, you should enter the litigation assuming that you will have to pay your own fees as the matter progresses through the system.

Darrell M. Felsenstein is a Partner at WJ&L and serves as the Chairman of our Litigation Department.

Importance of Partnership Agreements

By: Jill F. Rosenfeld, Esq.

When two or more people go into business together, it is important for them to agree to and enter into a formal written agreement for a partnership or partnership agreement. A corporation's shareholders would be governed by its shareholders agreement and an LLC's members by its operating agreement.

For partnerships, in particular, it is important to have some type of written agreement, whether it is a partnership agreement or a buy-sell agreement. Partnerships are one of two business entities in New Jersey (sole proprietorship being the other), which do not require a formal filing with the secretary of state in order to exist. The law recognizes a partnership based on the activities of the partners. If two or more people are in business together and are sharing in profits, New Jersey sees this business relationship as being a partnership.

Two Types

Generally there are two types of partnerships, a general partnership and a limited partnership. A general partnership consists of two or more people who go into business together and share in the profits.

The general partners are each involved in the business operations and share liability on the business obligations. A limited partnership consists of one or more general partners and at least one limited partner. The general partners handle the business operations and share in liability. The limited partners contribute capital to the business, but do not get involved in the everyday functions and have only a limited liability. A limited partnership requires a formal filing with state.

Statutes Dictate

Where there is no formal written partnership agreement, the New Jersey statutes dictate how the partnership is run and/or dissolved. For instance, absent agreement, each partner has an equal say in the management of the partnership. As for business decisions, the statutes provide that ordinary decisions require a majority vote, whereas extraordinary business decisions require unanimous consent. On the other hand, with a written agreement, the partners can choose one or more individual partners as being authorized to handle day-to-day business affairs. Unless there is a written agreement that provides otherwise, no new partners can be added to the partnership

without the consent of all of the existing partners. More troubling is the provision that if a partner dies or becomes bankrupt and there is no written agreement, the partnership is automatically dissolved. However, if there were a written agreement which addresses these situations, the partnership could be reconstituted on the death or bankruptcy of a partner. The agreement could also provide for situations where a partner becomes disabled or voluntarily or involuntarily withdraws from the partnership. Moreover, the agreement could also determine what amount of payment a departing partner (or deceased partner's estate) receives from the partnership.

Although a written agreement is not a legal requirement, it has the advantage of allowing the partners to decide how business decisions are made, how profits and losses are shared and what happens to the partnership, should a partner become disabled, deceased, bankrupt or withdraw from the partnership.

Jill F. Rosenfeld is an Associate at WJ&L and practices in our Business, Corporate and Transactional areas.

The Ever Changing World of New Jersey's Affordable Housing Obligation

By: Andrew S. Kohut, Esq.

In *Southern Burlington County NAACP V. Twp of Mount Laurel*, 92 N.J. 158 (1983) the Supreme Court reiterated that every municipality has a constitutional obligation to provide affordable housing to its citizens earning low and moderate incomes. As a result, in 1985 the New Jersey Legislature enacted the Fair Housing Act and the Council on Affordable Housing ("COAH"). For over twenty years, COAH has established fair share obligations, which means the minimum number of affordable units which must be provided for each municipality in an attempt to help satisfy their affordable housing needs. COAH first established these fair share obligations during two rounds of regulations. Round One spanned from 1987 to 1993 followed by Round Two from 1993 to 1999.

However, COAH failed to establish Round Three regulations until December 20, 2004. Instead of simply assigning a definite obligation to each municipality, the Round Three regulations created each municipality's obligation by calculating its growth share. The growth share methodology calculated a municipality's affordable housing obligation based on the amount of development which occurred within the municipality.

In turn, the municipality was allowed to place the burden, whether through construction or payments in lieu of construction, on the residential and commercial developers to create the required affordable units as part of their proposed development. Developers were obligated to create one affordable unit for every eight market-rate units created, or one affordable unit for every 8,333 square feet of office space, 25,000 square feet of retail space or 12,500 square feet of factory space constructed within a development application. If the developer could not construct the affordable units, the municipality and developer could agree on a payment in lieu of construction.

Round Three

The Round Three regulations were

immediately challenged by parties from both ends of the spectrum, that being developers and affordable housing advocates. And, in January 2007, the Appellate Division held them invalid stating that the rules were contrary to Mount Laurel in that they placed too great of a burden on the developer without providing any benefits (i.e., density bonuses). Also, the Court found that COAH inaccurately applied downward filtering in calculating New Jersey's affordable housing need. Downward filtering is when adequate housing becomes more affordable to lower income families over time. However, given the sharp increase in New Jersey property values over the last ten years, the Court believed downward filtering should not have been calculated in the manner COAH chose to apply it.

The revised Round Three regulations were enacted on June 2, 2008. These regulations make significant changes to the prior Round Three regulations, with the most important being to the growth-share ratios. COAH has revised the ratios to require one affordable unit for every four residential units constructed and one affordable unit for every 16 jobs created. The number of jobs created is based on the square footage of floor area created for a particular type of non-residential development. The reason for this drastic change in the growth share ratio is COAH's determination that New Jersey will require 115,666 affordable housing units between 1999 and 2018. Given that the ratio has diminished, and affordable units rarely generate a profit, the result will be a greater financial burden on the developer.

Other major changes are as follows:

- The average payment in lieu of constructing an affordable unit has risen to \$161,000;
- The Regional Contribution Agreement amounts have increased from \$35,000 to anywhere between \$67,000 and \$80,000;
- Development fees for new construction of residential property have increased

from 1% of equalized assessed value to 1.5% of the equalized assessed value;

- Development fees for new construction of non-residential property have increased from 2% of equalized assessed value to 3% of the equalized assessed value.

From the standpoint of the municipality, few believe that these new growth share ratios and other revisions will provide a realistic means to satisfy the need for affordable housing within the state. In actuality, many municipalities have stated that COAH's calculations are misguided and there is simply not enough vacant land within the state to effectuate these mandates. At the same time, developers argue that these same revisions will make it financially unfeasible to develop within New Jersey and halt development throughout the state.

In the past several months, COAH has received thousands of comments and complaints regarding the legitimacy of these revised Third Round Rules. Furthermore, there is pending legislation which may directly affect the revised rules. As a result, COAH has already proposed amendments to the recently revised rules which may be adopted in October 2008. Many believe that these revised rules are headed for a complete overhaul.

As you can tell by this article, COAH's affordable housing regulations are in a state of flux. The inability of the state to properly deal with their affordable housing issue has fostered great uncertainty with regard to where development in the state of New Jersey is heading. Wells, Jaworski & Liebman will continue to closely monitor the progression of these rules as they develop. Please feel free to contact our office to discuss any issues or questions which are raised by this article.

Andrew S. Kohut is an Associate at WJ&L who is active in the Land Use and Real Estate area of our practice.

E-mail Your Attorney

You can E-mail directly to your attorney's desktop computer. Address e-mail by using the first letter of the first name with the last name, followed by "wellslaw.com." Documents can be attached to your E-mail.

As an example: E-mail to Lisa Aljian should be sent to "laljian@wellslaw.com."

Managing Electronically Stored Information In A Digital World

Continued from page 1

e-mail with business record significance, that should be specifically set forth in the policy. A time frame should be established for maintaining ESI, one that is adhered to uniformly and routinely. ESI preservation should be for as long as necessary, but not infinitely.

Litigation

When an organization is involved in litigation; however, opposing parties may value the organization's information quite differently. For example, information in e-mails may appear to lack any business need for preservation, but for an opposing party trying to establish an organizational intent, such information may be critical. As organizational concerns focus on the risks of accumulating and storing too much digital information and the need to control the growth of electronic information, information potentially relevant as evidence may be at risk. Therefore, employers should be aware that a potential defendant in a lawsuit has an obligation to preserve ESI before a lawsuit is even filed, thus the policy should contain a provision for "legal holds" to preserve documents related to an anticipated litigation, investigation or audit.

As stated above, a duty to preserve evidence exists when a party has notice that the evidence is relevant to litigation or when a party should know that the evidence may be relevant to future litigation. The intentional destruction of evidence subject to this duty to preserve is sometimes referred to as spoliation, which New Jersey has recognized as a separate cause of action. However, it should be noted that intentional misconduct in withholding e-discovery is not required for a court to make a spoliation determination; instead, poor document retention practices, or failure

to maintain such practices, may provoke sanctions from the court. Evidence of spoliation may give rise to sanctions including: dismissal of claim or granting judgment in favor of a prejudiced party; suppression of evidence; an adverse inference, referred to as the spoliation inference; fines; and attorneys' fees and costs. As a federal court in New Jersey noted, sanctions are appropriate when there is evidence that a party's spoliation of evidence threatened the integrity of the court and when the party alleging spoliation was prejudiced by the destruction of the ESI.

Safe Harbor

Due to the fact that e-mail messages, regardless of whether or not they have been deleted from an employee's inbox, are discoverable in federal court pursuant to Federal Rule 34(a), employers have a vested interest in monitoring these messages. Additionally, recent amendments to Federal Rule 26 refined the way that electronic data is discovered under the Rules. Specifically, the initial disclosure provisions in Federal Rule 26(a) were amended to require the disclosure of "electronically stored information," that the party may use to support its claims or defenses. Section (b)(2) of the Rule, which provides limitations on discovery, was also amended to provide limitations related to electronic data. It provides that a party can identify sources of electronically stored information as not reasonably accessible based on burden of cost. If the parties disagree about this designation, either party can move the court for a determination. Even if the court determines that the information is not reasonably accessible, the court may order its production for good cause shown and make a determination as to who is responsible for the costs. However, Federal Rule 37(e) provides a "safe harbor" for electronically stored

information. Specifically, Federal Rule 37(e) provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." (emphasis added). Therefore, the safe harbor is only available to those who have taken proactive measures, such as the ones detailed below, to address many of the issues surrounding ESI. The United States Supreme Court has stated that the existence of a reasonable records and information management policy, instituted and applied in good faith, should be considered in determining appropriate consequences for the destruction of evidence. The "safe harbor" provision; however, may fall short when a corporation is provided a litigation hold letter or other notice of ESI preservation and fails to suspend its document retention/destruction policy.

As noted above, employers have a legitimate business interest in monitoring and managing electronic information. At the very least, companies should implement a reasonable policy in writing, to be circulated amongst its employees and also visible in common areas, such as the kitchen or lounge, taking into considering the needs of the specific organization. In addition, potential litigants must make additional efforts to safeguard potentially relevant electronic information. This would help the company survive any allegation of "spoliation" that may arise during the course of litigation.

Nicole E. Cleenput is an Associate at WJ&L and practices in the Tax, Trusts & Estates and Transactional areas.

How about a "L3C"?

By: Thomas M. Wells, Esq.

An exciting new concept was recently born in the State of Vermont, where our firm also has an office. Vermont is the first of the 50 states to allow low profit limited liability companies to organize as a "L3C."

The basic purpose of a L3C is to signal foundations and other 501(c)(3) qualified donors that the entity formed under these provisions will conduct their activities in a

way that will qualify it for program related investments. This is important, as 501(c)(3) foundations and donors typically can only give to other 501(c)(3)s or closely related programs. A L3C is not a 501(c)(3), but an entity designated to be "low profit" and with charitable and educational goals. As the importance of solving our community's problems grow, the need for this type of social enterprise becomes all the more apparent. Utilizing a L3C device is an exciting new way to accomplish

the goal. Non-Profit organizations in New Jersey and other states should watch for this change here and encourage our legislators to enact a new L3C law.

Thomas M. Wells is the Senior Partner of WJ&L who works in both our New Jersey and Vermont offices. Among his areas of expertise is his practice in the non-profit area.

Don't Take Away My View, Access or Breeze: The Long Beach Island Dispute

By: Kenneth A. Porro, Esq.

The Department of Environmental Protection ("DEP") has recently filed a Petition to the New Jersey Supreme Court requesting New Jersey's highest Court to review the existing case law dealing with property owners' vested rights to maintain ocean views, access and breezes. This case however, could have broader implications to non-oceanfront properties throughout the State.

Oceanfront Property Owners

The current state of law is that oceanfront property owners in New Jersey who maintain oceanfront vested property rights, cannot be negatively impacted by the construction of governmental sand dune projects which take away those same view, access or breeze vested rights without paying just compensation. This controversy is not a new one. Governmental projects historically impact adjacent properties. Sometimes the impact is positive and sometimes negative.

LBI Case Study

The DEP in the Long Beach Island case is stressing the need for beach replenishment and homeowner protection against mother nature's storms. Whereas the oceanfront property owners are stressing their vested property rights associated with priceless

ocean views, access and breezes. There should be no surprise that the dispute boils down to money. The DEP feels that they do not have to pay one penny to compensate the property owner because the construction of the sand dune will "allegedly" protect them against ocean storms and its related damages. Governmental officials have candidly admitted that a wall of sand will not stop a hurricane or Nor'easter type storm, but dunes still get good press.

Neighbor War

To make matters worse, the dune project in Long Beach Island has caused an oceanfront versus non-oceanfront property owner battle. The non-oceanfront property owners believe that the oceanfront property owners are being selfish in not permitting the construction of the wall of sand dunes which comes with it, municipal bathrooms, municipal parking, municipal budget cost savings and better public access. The oceanfront property owners cry foul that their vested ocean views, access and breezes are being taken away without payment of "just compensation" mandated by our New Jersey State Constitution. Moreover, in the Long Beach case, the governmental agencies have set aside no dollars for property "taking" with regard to the project budgeting. This poor budgeting approach has doomed the project from the beginning.

Litigation History

To date, the LBI dune project has been reviewed by the Ocean County Superior Court and the New Jersey Superior Court Appellate Division. Both Courts have upheld the oceanfront property owners' rights to be compensated for their lost views, access and breezes. The DEP, unfortunately, is not satisfied with those results and has now in August 2008 filed a Petition to the New Jersey Supreme Court to once and for all determine what the law of the State of New Jersey should be. The New Jersey Superior Court is the end of the road.

Despite the conflicting positions of the parties, this writer is confident that the New Jersey State Constitution and the related New Jersey laws of Eminent Domain will continue to be upheld and recognized in the State of New Jersey. More specifically, we believe that government cannot take private property without paying just compensation whether it be oceanfront property; a highway improvement roadway; or any other public health, safety & welfare project.

Kenneth A. Porro is a Partner at WJ&L and the Senior Litigator of our Litigation Department. He has been active in environmental law and the attorney on several major dunes litigation cases.

Permit Extension Act of 2008

By: James E. Jaworski, Esq.

One need not be formally trained in economics to recognize the signs of a significant downturn in the health of the American economy. Sub-prime mortgages have precipitated a "correction" of fairly major proportions in the real estate market. Significant negative economic factors are challenging the banking, real estate and construction sectors throughout New Jersey. Believing that "...the construction industry and related trades are sustaining severe economic losses, and the lapse of government development approvals would... exacerbate those losses", the New Jersey legislature attempted to offer some relief through the passage of the Permit Extension Act of 2008. The bill was executed by Governor Corzine on September 6, 2008. The obvious thrust of this new legislation is to break the downward

cycle by preventing the abandonment of approvals.

Environmental groups, including the NJDEP, have been vocal in their protests over the passage of this legislation. They cite dire consequences for the environment by allowing expired approvals to be brought back to life, a provision of the Act environmental groups have dubbed the "Dracula" clause. Noting that conditions surrounding zoning and environmental regulations are constantly changing, environmentalists articulate the ability to control such conditions will be severely compromised by the passage of this legislation. It is anticipated that legal action will be filed by one or more environmental organizations to attempt to set aside this legislation.

The permit extension period will run

from January 1, 2007 through July 1, 2010. Expiration dates will be "suspended." All such suspended permits cannot be extended later than January 1, 2011.

Not surprisingly, there are limitations. Specifically, the Act excludes permits issued by a federal agency or any permit issued in an environmentally sensitive area as well as permits issued under the Flood Area Hazard Control Act. Additionally, certain permits issued by the NJDOT and the NJDEP under the Coastal Area Facility Review Act will also be excluded. But overall, this is a welcome bit of relief in an otherwise trying time.

James E. Jaworski is a Senior Partner of WJ&L. He also heads up our Real Estate Department and actively practices in the Land Use and Development areas.

Online Identity Theft

By: Celestino A. Labombarda, Esq.

As technology becomes more advanced and peoples schedules more hectic, there has been an increasing reliance on the Internet for conducting business and carrying out daily affairs. Although many have grown accustomed to the convenience of use and broad access to information, this free flow of data has created a haven for a new breed of criminal called *the identity thief*.

Unfortunately, the high incidence rate and the great distances between the offender and victim have thwarted the detection and prosecution of these crimes. Another problem in combating identity theft is the lack of any formal, centralized identification system. To no surprise, law enforcement officials have met with significant obstacles given that the Internet has fostered the manufacture and sale of counterfeit and black-market identification documents and enabled these criminals to duplicate and bypass security measures that have been implemented by various banking and financial institutions.

Congressional Response in 1998

The initial response by Congress was the passage of the Identity Theft and Assumption Deterrence Act in 1998, which imposed a maximum term of 15 years imprisonment, fines, and criminal forfeiture of any personal property used or intended to be used to commit these offenses. At the state level, New Jersey has enacted the Identity Theft Protection Act, which affords consumers with the right to engage a security freeze that prevents identity thieves from opening new accounts. Under the Act, companies are also required to inform a consumer whenever their identity has been placed in jeopardy due to an attempt at unauthorized access or breach of their personal information.

It's the Economy....Stupid!

By: Thomas M. Wells, Esq.

Actually, it turns out what is stupid is to try and write an article about the economy right now. As I prepared for our periodic Legal Update about a month ago, I wrote an article to follow up on my article last year, providing a primer on sub-prime mortgages and the affect that they have had on our economy. Fast moving events made my article almost immediately out of date. With the bankruptcy of Lehman Brothers and the bail out of AIG, I re-wrote the article, then the Secretary of Treasury, Hank Paulson, suggested a bailout of all institutions with

Department of Justice

In view of these problems, the Department of Justice has taken necessary steps and measures in expanding national coordination and cooperation from law enforcement nationwide. Through the development and implementation of the Internet Fraud Initiative and the Internet Fraud Complaint Center, government has now begun to work in a collaborative effort with members of the public in addressing this mounting problem. The Internet Fraud Initiative not only provides for coordination with the Federal Trade Commission in gathering data on prevalence and incidence of these crimes, but also offers basic and advanced training for prosecutors and agents. The Initiative also supports a joint-FBI-National White Collar Crime Center and Internet Fraud Complaint Center which promotes coordination among federal prosecutors together with foreign, state, and local law enforcement agencies. Additionally, this program serves to educate the public as to detection and prevention methods. In a similar vein, the Internet Fraud Complaint Center is assigned to handle and process online consumer complaints. This includes the duty to gather and analyze data and advise law enforcement personnel as to potential schemes and breaches of security.

The Department of Justice continues to take a strong stance in improving its focus and capacity towards handling these types of crimes. These developments have served as a catalyst in increasing the prosecution of these types of cases. With the implementation of the Department's Fraud Section, federal prosecutors may obtain continuous advice and access to intelligence as well as legal support in the prosecution and litigation of these crimes. There have also been expansions to a national database through which prosecutors can obtain vital information

with respect to potential Internet fraud, criminal schemes and activity, and potential leads and witness information. Moreover, the sentencing guidelines have been modified to enable prosecutors to seek higher sentences in proportion to the gravity of certain types of offenses.

What to do as a Business

In the event of an unauthorized breach of security or incident involving alleged fraud, a company that operates or conducts business within the state must promptly contact the State Police. The law also mandates that a company or institution has the obligation of revealing any and all actual or potential breaches to the customer.

Consumer Response

A consumer who becomes suspicious of any potential breaches of their personal or financial information should contact local authorities. A criminal complaint may be filed in accordance with N.J.S.A. 2C:20-25, which encompasses computer theft and related criminal activities and assesses fines and penalties based upon the magnitude and severity of the offense. As an additional safeguard, a security freeze may be placed on credit reports in order to ensure limited and/or restricted access to his or her credit information from a specific source or agency.

Although there have been some positive steps in the right direction, Internet fraud and identity theft will continue to require a continuous effort on behalf of the government and the members of the public in order to prevent these crimes from reaching epidemic proportions

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troubled mortgages, and Congress began to consider the same. This time I threw away the article and gave up.

I decided that writing about such timely events in a newsletter that will sit around for six months, was, in a word....stupid. By the time this is published, Congress will have undoubtedly taken some action to help not only troubled institutions with questionable loans on their books, but also the individual borrowers with these mortgages. The bottom line, like so many things in life, is.....moderation. The free market does work, but not to the exclusion of

all regulation. Going forward, we need appropriate government regulation to watch our financial institutions, and most importantly, to make sure that any institution that is dealing with the public's money is fully and appropriately capitalized.

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What is the Future of Estate Tax?

Continued from page 1

country, including the war in Iraq, the stock market, the price of gas and the rising cost of food and other commodities. Before running for President in 2008, Senator McCain supported a proposal by Senator Jon Kyl (R-Arizona) that the exemption be raised to \$5,000,000 and that the estate tax rate be reduced to 35%. Now that he is vying for the White House, Senator McCain is looking to increase the exemption to \$5,000,000 per individual with a 15% to 20% estate tax rate. He would index the exemption for inflation over time.

Senator Barack Obama (D-Illinois) has not focused on the estate tax as much as Senator McCain. However, he has said that he supports an exemption of \$3,500,000 and an estate tax rate of 45%. In essence, he would freeze the current estate tax law for 2009. He would index the \$3,500,000 exemption for inflation.

The issue of the estate tax has not played a large role in the presidential debates. However, both the Democrats and the Republicans know that they must act to eliminate the repeal and then the sunset of the estate tax. The consensus between the parties is that legislation will emerge from Congress subsequent to the presidential election and will be sent to the new president for his signature. The legislation will be driven by the politics of both houses of Congress and the estimates of how much

revenue will be lost as a result of the reform. The estimates and how they are characterized will depend, in part, on which party controls the House and the Senate in 2009.

Estate Tax Will Survive

We do not know which candidate will win the presidential election and whether such candidate will be successful in implementing his preferred plan for the estate tax. We do know one thing for sure, the estate tax will be an issue to address in your estate planning for some time to come. Most are pleased that it looks like the exemption amount will be increased regardless of who gets into office, and will thus provide much needed relief to many. However, there is still a need to address the estate tax in your lifetime planning and in the documents which take effect at death. Due to the depressed state of our economy and the low interest rates set by the government, currently there is a very effective lifetime planning tool that we recommend and use for our clients. This tool is called a Grantor Retained Annuity Trust (GRAT), a gift of a remainder interest in a trust. In other words, the gift is of the right of one or more remaindermen (either individuals or one or more trusts) to receive the GRAT assets at the end of a trust term. The grantor (the person who makes the gift to the GRAT) retains an interest in the GRAT in the form of an annuity for a term of years (e.g., ten years). Typically, the annuity is equal to a fixed percentage of the value of

the assets transferred to the GRAT, but a GRAT can be designed with increasing annuity payments. The annuity must be paid, at least annually, during the GRAT term. The value of the annuity is determined by reference to an IRS interest rate (the "7520 rate") which is set each month. The rate for the month in which the transfer to the GRAT is made is utilized. The 7520 rate for September is 4.2%. The value of the annuity is subtracted from the value of the property placed in the GRAT and the difference is the taxable gift.

All of the GRAT income, including income accumulated in the GRAT because it is not needed to pay the annuity to the grantor, is taxable to the grantor. This typically also applies to gains. Payment of tax on the accumulated income and gains of the GRAT by the grantor enables the GRAT assets to appreciate tax-free and is an added estate planning benefit of the GRAT. If the assets produce income and grow at a rate above the 7520 rate (4.2%) the GRAT could be very successful in transferring wealth to the remainderman at a minimal or no gift tax cost.

The future of our economy is clearly uncertain. However, it does seem that nothing in life is certain but death and taxes.

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Employment Agreements 101

By: Lisa R. Aljian, Esq.

Employment agreements, in the most traditional sense, are contracts that require that the parties stay in the relationship for the specified term.

Unless you have signed an agreement with a definite beginning and end date, you are an "at will" employee, which means you, or your employer, can terminate the relationship at any time, without liability, for any reason, or for no reason at all.

Salient Provisions in the Employment Agreement. The salient provisions of any employment agreement are: (1) term and renewal terms; (2) early termination; (3) services; (4) exclusivity; (5) compensation; (6) expenses; (7) paid time off; (8) confidential information and trade secrets; (9) restrictive covenants; (10) other general contract provisions, including dispute resolution, governing law, and jurisdiction, indemnification, notice, waiver, severability, and oral modification.

Term and Renewal Terms. The "term" of an employment agreement documents the duration of the relationship. The "commencement date" or the "effective date" is the first day, and the "expiration date" is the last day. Renewal provisions renew the contract on the same terms, so modifications to compensation or other benefits during renewal terms should be outlined in the agreement.

Early Termination and the Effect of Early Termination. Your employer may terminate the agreement before it expires, either with cause or without cause. "Cause" means bad conduct by the employee.

Services to Be Rendered. The employee's specific job duties; the employer's expectations, and other terms are set forth in this provision.

Exclusivity. These provisions mandate that the employee not work for any competitive business during the term.

The Compensation Package. Salary, commissions, financial incentives, stock

options (if any), health insurance, life and disability insurance, and the manner of payment or delivery of same, together with other employee benefits, are set forth in this provision.

Expenses. The employer's policies regarding expenses incurred by the employee is set forth in this provision.

Paid Time Off. Paid time off includes vacation time, sick time, bereavement time, family leave, and whatever other time off to which the employee is entitled with pay.

Confidential Information and Trade Secrets; Intellectual Property. These provisions contain specific restrictions on the employee's unauthorized use, disclosure or dissemination of an employer's confidential information and trade secrets.

Restrictive Covenants; Intellectual Property. Employers have the right to protect their business from employees leaving to

Continued on page 8