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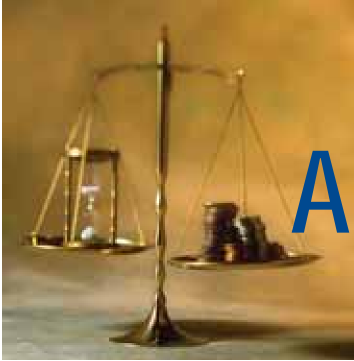
VIEW FROM THE BAR

SPRING 2006

New BANKRUPTCY AMENDMENTS help landlords



Stuart Gold

The Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005 ("BAPCPA"), made many changes to the Bankruptcy Code, primarily to bankruptcy cases that will be filed on or after October 17, 2006. While most of the changes to the Code impact consumer bankruptcies, there will be significant changes affecting the rights of commercial landlords in Chapter 11 bankruptcies filed on or after October 17, 2006. Areas of critical change include:

Assumption/Rejection of Leases

Prior to BAPCPA, a debtor tenant in possession had 60 days from the date of the filing of the petition to assume or reject a lease of nonresidential real property. However, these debtors could, and usually did, obtain numerous extensions even if the landlord objected. In many Chapter 11 cases, the time to assume or reject would be extended through confirmation of a plan. Now, under Bankruptcy Code § 365(d)(4), the debtor has 120 days from the filing of the petition to assume or reject the lease and may only have a single 90 day extension, unless the landlord consents. Thus landlords now have a stronger bargaining position with debtor tenants.

Non-Monetary Defaults

Tenants have both monetary and non-monetary obligations under a lease. The monetary obligations include payment of base rent and additional rent such as taxes and utilities, payment of common charges, and payment for maintenance and repair items. The non-monetary obligations may include using the premises only for the purposes stated in the lease, operating during certain hours or maintaining a stated volume of business.

Under the prior version of the Bankruptcy Code and under BAPCPA, it is clear that a debtor must resolve any existing payment defaults before it can assume a lease. However, under the prior version of the Bankruptcy Code there was an open issue as to whether the debtor had to resolve defaults that did not require payment of money. Courts took different positions on the debtor's obligation to cure non-monetary defaults. Now BAPCPA resolves the issue in favor of the landlord. In a new provision, BAPCPA now requires a debtor to resolve non-monetary defaults as a condition of assumption. If the non-monetary defaults are not resolved, the landlord may claim compensation for the breach. This provision is a boon to landlords, encouraging debtor tenants to abide monetary and non-monetary provisions in their leases.

Claims for Rejected Leases

A new provision, Bankruptcy Code § 503(b)(7), protects the landlord when a debtor assumes a lease during the course of the bankruptcy and then subsequently rejects it. The landlord now has an administrative claim to be paid ahead of unsecured creditors, for up to two years of rent and other monetary obligations under the lease. However, the debtor is allowed a reduction if the landlord reduces its damages by reletting the property.

Stuart Gold is a partner with over twenty years of experience in bankruptcy and complex commercial litigation.

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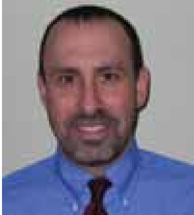
Employers must thoroughly investigate employees'

ILLEGAL COMPUTER USE

for the benefit of third parties

Mark F. Kluger



In a decision with far-reaching implications for New Jersey employers, the Superior Court of New Jersey Appellate Division recently held that an employer can be liable to third parties for failing to properly investigate and discover an employee's use of a company computer to access child pornography.

Although the court protected the identities of the parties in the caption of the case, it has been widely reported that the employer in the case is the United States Golf Association ("USGA") and the Plaintiff (Jane Doe) is the ex-wife of Joseph Herrera, a former USGA employee. Jill Doe is Jane Doe's daughter who Herrera allegedly victimized.

At various times during his employment, USGA co-workers and supervisors noticed that Herrera was viewing pornographic websites at work. Several supervisors confronted Hererra and insisted that he stop doing so. In early 2001, one supervisor went onto Herrera's computer while he was out of the office and printed out the "websites visited" list. The list included the names of several pornographic websites and one that specifically had to do with children entitled: "Teenflirts.org: The Original Non Nude Teen Index." On March 7, 2001, that supervisor and his boss spoke with Herrera and told him to stop viewing pornography at work. Herrera agreed to cease those activities.

Three months later, however, Herrera downloaded and transmitted three nude photographs of his ten year old step-daughter to a child porn site from the company computer. He was arrested a few days later and subsequently admitted to having downloaded over 1,000 pornographic images while at work.

In an unprecedented extension of the law, the court held that "an employer who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's activities and to take prompt and effective action to stop the unauthorized activity, lest it result in harm to innocent third parties." The court went on to establish a new standard, requiring employers to monitor employee internet activity not only to protect employees from a hostile work environment but also for the benefit of third parties like Jill and Jane Doe.

This new court decision underscores the need for employers that do not have policies and procedures in place to monitor employee internet activity to implement them. For those employers that already have computer use and monitoring policies in place, the USGA decision requires their effective use. Merely discovering that an employee is looking at pornography and reprimanding that employee is not enough. The court imposed an affirmative obligation to find out exactly what kind of pornography the employee is viewing and to take whatever steps are necessary to ensure that the activity stops.

The practical implications of this ruling are significant. Many pornographic websites for example are not readily apparent by their name. So, even if an employer regularly ascertains the websites being visited by its employees, that is not enough. Employers will have to actually determine the content of all unknown websites to ensure that employees are not engaging in illegal activities on the internet.

Although the long term implications of this decision are unclear, at this point, it is critical that employers that provide internet access begin to take the affirmative steps necessary to comply with its mandates. While this decision only applies to New Jersey employers, in the last two decades, New Jersey appellate courts have been at the forefront of groundbreaking employment law decisions. This ruling likely represents the new frontier of employer obligations nationwide.

Mark F. Kluger is a partner in the firm and chairs the labor and employment department and practices exclusively on behalf of employers.

Barry Mandelbaum

Barry Mandelbaum
RECEIVES DOUBLE HONORS

Managing Partner Barry Mandelbaum has been named to the Board of Directors of Horizon Blue Cross Blue Shield of New Jersey, the not-for-profit, health service corporation that provides health insurance coverage to nearly three million people throughout all of north, central, and southern New Jersey. Barry joins a 15-member Board of Directors that manages the company for its members. He was appointed to the board by the governor and approved by the New Jersey State Senate.

Barry has also been selected by his peers to be included in the 2007 edition of The Best Lawyers in America in the specialty of real estate law. Inclusion in Best Lawyers is based on an exhaustive and rigorous peer review survey based on 1.6 million confidential evaluations by the top attorneys in the United States. Inclusion in Best Lawyers is regarded by both the legal profession and the public as the highest form of professional accolade.

NEW COURT DECISIONS AFFECT Condo Management

John Dusinberre, Esq.

Ricki Anne Sokol, Esq.

Two recent New Jersey court decisions are having a major impact on what community associations can and cannot do with owners and buyers.

In Micheve, L.L.C. v. Wyndham Place at Freehold Condominium Association, a New Jersey Appellate Court ruled that condominium associations cannot collect non-refundable capital contributions from buyers of re-sales at the time of closing. The Micheve decision held that the imposition of a non-refundable working capital contribution payment on a buyer by a condominium association was illegal, in violation of N.J.S.A. 46:88-17. The section of the Condominium Act referred to by the court requires that all common expenses be shared by the unit owners proportionally according to their undivided interest. Under the court's ruling, by requiring only buyers to make this payment, a unit that is sold more than once in a fiscal year will pay more than its share of the common expenses for that fiscal year.

The association in Micheve created the requirement by a resolution of its board of trustees and was not a requirement in the original by-laws or master deed. The board had simply passed a resolution requiring the payment without amending the underlying documents. Unfortunately, the court was unclear as to whether the payment would have been acceptable if the requirement had been in the original condominium documents and made no mention of the retroactivity of the decision.

Condominium associations still collecting working capital contributions where their documents provide for it should know this could be a contingent liability that may have to be refunded at a later date. Any association whose document do not permit and provide for the collection of working capital should consult legal counsel to determine how to amend their documents so that they are prepared for future court decisions.

Because the court's decision in the Micheve case was based on the Condominium Act, it should be noted the decision does not apply to homeowners associations or cooperative forms of community associations not subject to the Act. Those forms of associations may continue to collect working capital contributions without concern from this decision.

However, in the second case, Sandra Siddons v. David Cook, Wendy Cook, and County Place Condominium Association, the appellate decision applies to condominiums, homeowners associations and cooperatives. The decision requires associations to notify unit owners of known defects that may exist within a unit that have surfaced in other units, even though the subject of the defect relates only to the units and not the common elements of the condominium.

The case concerned a faulty dishwasher hose in one condominium unit that leaked, causing damage to a unit owned by a neighbor as well as portions of the common area. The hose was not in a location visible to the owner. However, the problem had previously come to the attention of the association when the hose failed in other units. The association took no action to notify all of the unit owners in the community of the potential problem which would have allowed each owner to inspect their dishwasher for problems. The owners of the leaking hose in question had periodically inspected what was visible with the dishwasher. But they, had not known about the problem and did nothing to prevent the leak from occurring. If the association had notified the owners about the defect, they could have prevented the leak. The court held that unit owners were not liable for damage to the plaintiff's unit or to the common area. However, it did find the association liable for all of the losses, finding that once it had knowledge of the defect it had a duty to pass on that knowledge to all unit owners.

The decision strongly underscores that the issue of disclosure to owners and prospective owners in community association law is changing. The questions that have been raised are not only what an association should be telling its current unit owners, but what should it be disclosing to prospective purchasers. These and other issues relating to community association law should be discussed by property managers and association boards with their legal counsel.

John R. Dusinberre, Esq. is a partner in the firm and specializes in real estate, community association, and land use matters.

Ricki Anne Sokol, Esq. is an associate in the firm and specializes in civil litigation and commercial landlord/tenant matters.

USING STANDARD CONSTRUCTION CONTRACT FORMS

Richard M. Salsburg

Cheryl H. Burstein

Can Pose Risks

It seems like a good idea. Use a standard construction contract printed and provided by a professional organization like the American Institute of Architects to speed or eliminate the pain of negotiations and expedite the "deal" .

Over the past twenty years, builders, owners, developers and contractors have become particularly conditioned to the use of the multiple standard forms printed and disseminated by the AIA and other professional groups. These forms have gone through various incarnations over the years, nearly becoming a standard in the trade. However, many who use the forms daily rarely take the time to thoroughly read the documents or analyze their impact on a particular business or goal. This, unfortunately, can be a prescription for conflict and litigation.

A recent federal appeals court decision applicable to New Jersey, centered on the use of one such standardized document--AIA document A107, "Abbreviated Form of Agreement between Owner and Contractor", 1987 Edition.

A Temple in Harrisburg, PA used this form to award a contract for the expansion and renovation of various buildings. Paragraph 17.3 of that Agreement requires the Project Owner to maintain property insurance on the entire "work" against various losses. The Temple satisfied its contractual requirement by adding builders risk coverage to an existing policy. During the course of the project, a fire caused extensive damage to the buildings. The Temple's insurance carrier reimbursed the Temple for its building loss, then sued the general contractor to recoup payment since it became subrogated to the rights of the Temple. The contractor argued that paragraph 17.6 of the AIA document barred this cause of action and provided for a mutual waiver of any claim against the Temple for loss of property insured under the terms of the agreement. The contractor argued that the waiver was binding on the Temple's insurance carrier, asserting that the carrier's rights were only as great as the Temple's and the waiver was definitive.

The Court held that the purpose of the AIA reciprocal waiver clause is to avoid litigation every time there is a property loss during construction. It interpreted the clause as effectively blocking any subrogation rights of the owner's carrier against the contractor.

The waiver applied to all insured property loss, including damages to areas outside the scope of the construction contract. However, some insurance policies may include an anti-waiver clause which would have barred the Temple's waiver or subjected it to the risk of declaring the insurance policy breached, preventing recovery for the loss.

Although the decision was specific to that document, the same issues or others could arise under other popular standardized documents. The use of contract forms should never be perfunctory. This case underscores the importance of reviewing all contracts with counsel and the need to negotiate changes where necessary. Anyone involved in construction should be sure that they have maximized their protection against the unintended consequences of their contracts.

Richard M. Salsburg is a partner in the firm and a senior litigator specializing in complex commercial and real estate litigation as well as public and private sector construction litigation.

Cheryl Burnstein is a partner in the firm and specializes in construction litigation.

Beware of Insurance Carriers Bearing Gifts of Low Premiums

Dennis J. Alessi

Because we live in such a regulated and litigious age, businesses have to purchase a wide variety of insurance policies to protect against what can be financially catastrophic claims of loss or injury.

Worker's compensation, general liability, employment practices liability, errors and omissions, officers and directors liability, fidelity bonds, fiduciary liability, and professional malpractice are just some of the insurance coverage businesses routinely purchase. Companies faced with shrinking profit margins will often search for the insurance carrier with the lowest premiums, neglecting to check the carrier's rating. Looking for the least expensive coverage without checking the carrier's rating from AM Best, Moody's or Standard & Poors can be dangerous.

An insurance carrier's low rating is often a reflection of its poor financial condition. When a carrier becomes insolvent, and cannot pay claims or for legal defense, the New Jersey Property-Liability Insurance Guarantee Association (PLIGA) will step-in to provide the insured with coverage. However, PLIGA only covers claims up to $300,000, regardless of the coverage levels of the insurance policy.

In a recent New Jersey Supreme Court decision, Johnson v. Braddy, the court held that if an insurance carrier becomes insolvent, and an injured party obtains a judgment against the insured company in excess of the PLIGA's $300,000.00 maximum coverage, then the insured company becomes liable for the excess amount of the judgment.

Insurance rating services are continually evaluating and rating insurance carriers, examining the financial strength, operations, management, history and financial performance of insurance companies and groups. The highest rating from AM Best, for example, is a Triple AAA rating. Businesses should be wary of purchasing insurance from a carrier that has less than a "single A" rating. Otherwise, they may face the possibility that the carrier will become insolvent and they may possibly be left with only $300,000.00 of PLIGA coverage on the carrier's policy.

Dennis J. Alessi is a partner, and the firm's lead attorney for representing clients in the health care industry.

ECONOMICS NOT ACRIMONY Dictate Alimony: High Court Rules

David Carton

The New Jersey Supreme Court recently ruled that except in very rare instances, such as where one spouse attempts to murder the other spouse or deliberately infects the other spouse with a disease, marital fault is not a factor is determining alimony or counsel fees.

In Mani v. Mani (2005), the high court made it clear that alimony determinations are based purely on economic analysis. Judge Virginia Long held that, "by (de)limiting the kinds of fault that may be taken into account in an alimony calculus, we have not only created a template for uniformity and predictability in decision-making but have relieved matrimonial litigants and their counsel from the need to act upon the nearly universal and practically irresistible urge for retribution that follows on the heels of a broken marriage.

This decision may result in more streamlined and less costly divorce litigations. Lawyers may no longer need to spend many hours drafting detailed complaints for a claim for "extreme cruelty."

As a result of Mani v. Mani, a judge will not rely on these types of allegations, no matter how specific, lengthy, carefully drafted or egregious in determining alimony. Since 97 percent of all divorce cases in New Jersey are resolved without the necessity of a final decision by a judge, the resolution of divorce cases may also become more efficient if the parties no longer dredge up the contentious activities of the marriage.

David Carton is a partner in the firm and practices matrimonial law and civil litigation, family law and complex commercial litigation.

Court Case, Legislative Amendment Limit Scope of New Jersey's Charitable Immunity Act

Arla D. Cahill, Esq.

The original intent of the 1958 Charitable Immunity Act was to confer civil immunity for negligent acts to non-profit entities to protect private trust funds and contributions that were intended for charitable purposes. Generally, the act has applied to non-profit entities organized exclusively for religious, charitable, non-profit educational organizations or hospital purposes.

However, recent case law and statutory developments have limited the scope of the act under certain circumstances. For example, the New Jersey Supreme Court recently decided the Act does not apply to public school boards. In Tonelli v. The Board of Education of the Township of Wyckoff, a school board's policy allowed private, non-profit clubs to use its soccer field to meet the needs of the community. Tonelli went to the public school to watch her granddaughter play for a private soccer club that was utilizing the school's soccer field. Tonelli tripped on a speed bump in the school parking lot and later died as a result of complications from her injuries. Her estate brought a negligence action against the board for failing to maintain the speed bump.

The case was dismissed by the trial court, which concluded that the Act exempted the board from liability. However, the state Appellate Division reversed the dismissal by holding that the Act was inapplicable to a public school board. The appellate court rejected the board's argument that public schools fall squarely within the protections of the Act. The board claimed that school boards are non-profit entities established for educational purposes and that nothing in the Act specifically exempts public schools from the Act's immunity. The Supreme Court affirmed the lower appellate court, reasoning that a "public school board bears none of the indicia of a private charity. It is not supported by charitable contributions, philanthropic activity or a spirit of altruism. Rather, the court noted a school board's sole source of revenue is public funds derived from taxes and government aid." Moreover, it found that because New Jersey's constitution mandates the provision of a "thorough and efficient system of free public schools," public schools do not serve to relieve the State of its obligation to provide services to the community. On the contrary, the court found that public schools are established to facilitate the State's constitutional obligation to provide a free, appropriate public education. Hence, the Court held that the Act is inapplicable to public entities supported entirely by tax dollars and providing services to which the public is entitled as a right.

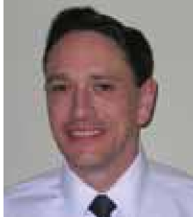
Another change to the scope of the Act's immunity is now in effect as a result of a legislative amendment barring application of the Act's immunity to negligent employment practices resulting in sexual offenses committed against minors. The amendment specifically states that the Act's immunity "shall not apply to a claim in any civil action where the negligent hiring, supervision or retention of any employee, agent or servant resulted in a sexual offense committed against a person under the age of 18 who was a beneficiary of the nonprofit organization." N.J.S.A. 2A:53A-7.4(1).

Consistent with the Legislature's other acts designed to protect children from sexual predators, the amendment to the Charitable Immunity Act was motivated by the New Jersey Supreme Court's decision in Schultz v. The Roman Catholic Archdiocese of Newark. In Schultz, the court reluctantly applied the Act's liberal immunity provisions to affirm the dismissal of a negligent hiring claim that arose from the Archdiocese employee's molestation of a child who ultimately committed suicide.

The recent amendment to the Act prevents the possible recurrence of a decision like Schultz by statutorily carving out an exception to immunity under these specific circumstances. Although the term "sexual offense" as used in the Act means any action that would constitute a crime under the criminal statutes, the amendment does not require that a person be charged with a crime for the exception to apply in a civil case. Significantly, the exception also applies retroactively to actions for which the statute of limitations has not expired and to pending actions that have not been dismissed or decided as of Jan. 5, 2006, the effective date of the amendment.

Arla D. Cahill, Esq. is a senior associate in the firm's business litigation & dispute resolution department.

Serious lifestyle change is no longer criteria to sue for Auto Insurance



Samuel J. Vacchiano

Victims of serious automobile accidents must no longer demonstrate a serious impact on their lifestyle to sue on their automobile insurance policies.

The New Jersey Supreme Court has resolved this issue in DiProspero v. Penn (2005), determining that the additional significant impact is no longer required.

The injured individual must still satisfy at least one of six categories including bodily injury which results in death, dismemberment, significant disfigurement or significant scarring, displaced fracture, loss of a fetus or permanent injury.

The decision of the New Jersey Supreme Court strikes a fair balance in these types of lawsuits. Injuries which do not satisfy one of the six categories, particularly injuries that are of a transient nature and resolve, may not be pursued. However, an injured person is no longer required to satisfy the amorphous concept of a significant impact.

Since 1989, individuals who elected the restricted right to sue on their automobile insurance policies, commonly known as the Verbal Threshold or Lawsuit Limitation, were required to satisfy one of the six categories listed in N.J.S.A. 39:6A-8 to pursue a lawsuit for injuries sustained in an accident.

Originally, the categories required to be satisfied in order to pursue a lawsuit included death, dismemberment, disfigurement, fractures, loss of fetus, non-permanent injury which resulted in a significant limitation, and permanent injury or a non-permanent injury which resulted in an inability to perform substantially all usual activities for 90 of the first 180 days following the onset of injury.

In addition, the courts interpreted the statute to require that individuals asserting a claim under the significant or permanent injury categories must also demonstrate a serious impact on their lifestyle. This vague requirement led to inconsistent court decisions which could not be reconciled and were frequently the result of the subjective interpretation of the judge hearing the case.

However, in 1999, the categories necessary to pursue a lawsuit against the owner or driver of an automobile were modified to the current requirement. However, following these changes, there became substantial disagreement among the courts as to whether a significant impact on the individual's lifestyle was still required.

If you are unsure of your election on your policy, keep in mind that the limitation on your right to sue for injuries has been given to you by your automobile insurance carrier unless you specifically elected no limitation and pay a higher premium.

Individuals with questions regarding the limitations of their policies can contact the Personal Injury Department.

Samuel Vacchiano is an associate in the personal injury department.

FIRM NEWS

VIEW FROM THE BAR

Joseph A. Vena, of the Real Estate and Land Use Department, was special lecturer recently at the New York University School of Management, speaking to candidates in the Real Estate Masters Program on practical and legal issues related to land use development and governmental approvals.

Craig W. Alexander and **Robin F. Lewis**, partners in the Real Estate Department, successfully handled the multi-million dollar acquisition of a 21,000 square foot retail shopping center in Morris County, New Jersey. The acquisition was financed by a life insurance company, and the buyer acquired the property as part of a reverse Section 1031 exchange. In addition to handling customary due diligence and title closing issues, Craig and Robin coordinated unique issues presented by the reverse exchange with the lender and qualified intermediary. They also created an organizational structure for the buyer that satisfied the lender's single purpose requirements while complying with IRS regulations governing the tax deferred exchange.

Amy D. Criscuolo has been appointed by the board of directors of "Metropolitan Who's Who" to represent West Orange this year in the upcoming edition of the "Metropolitan Who's Who" Registry. She is an associate in the New Brunswick office, specializing in criminal defense, municipal practice, and general litigation.

Cheryl H. Burstein, Stuart Gold and Robin F. Lewis have become shareholders with the firm; **David Carton, Thomas Ackermann and Sharon T. Jacobson** have become officers and directors.

Peter H. Tanella of Cedar Grove has joined the firm as an associate with the corporate group. **Chad Simon** of Hoboken has joined the firm as an associate with the construction litigation group; **Samuel J. Vacchiano** of Wayside has joined the firm as an associate with the personal injury group; and **Ronald J. Gregorio** of Randolph has joined the firm as an associate with the commercial litigation group.

The Firm mourns the passing of our dear client, **Maurice Opperman**, age 97, on January 31, 2006

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