

New Partners & Lawyers at WJ&L



2007 has been a particularly exciting and growth year for WJ&L. On the 1st of May, **AnnMarie Smits** joined our firm as a partner to head much of our expanded "Tax, Trusts and Estates" Department. AnnMarie's practice is concentrated in the fields of tax and estate planning and trust and estate administration.



When **AnnMarie** joined our firm, she brought with her **Pat Hopp**, a longtime paralegal in her area. With Pat's addition to our staff, we expanded our TT&E practice so that we are now able to complete Estate Tax Returns in-house. Rounding out our TT&E Department are paralegal, **Janice Thill**, and a new secretary, **Erin Larkins**. Associate, **Andrew Kohut**, and associate, **Nicole Cleenput**, also do work in this area.

Nicole Cleenput is one of two new associates who has just recently joined our firm. **Nicole** is a 2006 graduate of Seton Hall Law School, and her name will be familiar to our Paramus clients as she is the daughter of the Cleenput family that has owned and operated the Paramus Diary for several generations. **Nicole, Tom Wells, Stu Liebman** and **Marcia Geller**, make up our small but mighty stable of Paramus High School graduates (yes....**Nicole** graduated much later than the rest of us!). **Nicole** will be practicing in the Tax, Trusts and Estates and Transactional areas, and is really enjoying being back in her hometown.

We are delighted to have these reinforcements at a time when our firm continues to be busy, and as always, deeply committed to providing top service to our clients. **Connor**, on their Wyckoff Recreational Basketball teams. **Ken**'s been busy off the field as well. **Ken**, who is Chair of our Litigation Department, was pleased to recently receive a \$15 Million Dollar municipal property tax assessment reduction for a major Paramus property owner. This area of **Ken**'s practice continues to take a significant amount of his time, as does his continued work in the environmental litigation area, in particular with respect to defense of actions by dune owners along the New Jersey shore. He is scheduled to present oral argument before the New Jersey Appellate Division on December 18, 2007 on behalf of 67 Long Beach Island ocean property owners seeking to protect their constitutional right against governmental takings without just compensation.

Associate, Jill Rosenfeld, just completed a stint on the Dinner Committee for the **Paramus Chamber of Commerce Foundation Twelfth Annual Dreams Award Gala**. This benefit, which helps raise funds for the



Darrell Felsenstein, who joined WJ&L as an Associate in 1998, and **Ken Porro**, who came on board "Of Counsel" two years ago, both became Partners of WJ&L on May 1st of this year. We are proud to have both of them join the partnership ranks. **Ken** serves as the Chairman of our Litigation Department, and **Darrell** serves as the Administrative Chair of the department. We are pleased to have our Litigation Department now spearheaded with such fire power!



Paramus Public School System, this year honored among others former Mayor and former School Board President and old friend, **Charlie Reid**, who these days lives in Kennybunkport, Maine and has been under the weather. It was good to see **Charlie**, an old and good friend, in town again.

Our new partner, **AnnMarie Smits**, who is the head of our Tax, Trusts and Estates Department, was one of the seminar presenters at a recent National Business Institute Continuing Legal Education presentation for other lawyers on estate administration.

Partner, **Stuart Liebman**, at long last stepped down after five years as President of Temple Beth Sholom in Fair Lawn. We were starting to think he was going to take on the position permanently. He is still in the thick of things as Vice President of Law, and the Co-Vice President of Fund-Raising. In another one of those semi-permanent Presidencies,

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Legal Update



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Wells, Jaworski & Liebman, LLP

Winter 2007-2008

Our New TTE (Tax, Trusts and Estates) Department

As part of our long range plan for the law firm, last year we made a decision to substantially increase the sophistication and capacities of our firm in the area of tax, trusts and estates. As a result, we decided to completely reorganize and staff what used to be called our "Estate Planning and Elder Law" practice, into what is now called our "Tax, Trusts and Estates Department." This department is headed up by our new partner, **AnnMarie Smits**, and includes paralegals, **Pat Hopp** and **Janice Thill**, and the assistance of associates, **Andrew Kohut** and **Nicole Cleenput**.

The Tax, Trusts and Estates department services the needs of clients in the areas of estate planning, trust and estate administration, gift and income tax advice, elder law and Medicaid planning, conservatorships, guardianships, fiduciary litigation and dispute resolution. Our team designs estate plans to protect clients' assets, and assist in the transfer of wealth to the younger generations, with minimum

tax implication. They are trained to use both complex and simple planning techniques that address the individual needs of our clients. The department prepares Wills, revocable "living" trust agreements, irrevocable trust agreements, family limited partnerships, charitable trusts and foundations and other trusts that leverage gift tax transfers.



Our Tax, Trusts and Estates Department Partner, **AnnMarie Smits**, sitting, backed up by Associates, **Nicole Cleenput** and **Andrew Kohut** and Paralegal, **Pat Hopp**. Paralegal, **Janice Thill**, missed the picture.

Our Estate Planning attorneys and paralegals frequently work with accountants, investment advisors, trust officers, insurance professionals and other advisors, to help clients formulate asset protection planning, lifetime gift giving programs and wealth succession planning. They also assist fiduciaries in administering estates and trusts and advise executors and trustees on post mortem tax planning options. Since the creation of our new department, we also now prepare estate, inheritance and gift tax returns, value estate assets, handle tax audits and prepare accountings to settle an estate or trust, all in house. Finally, if a dispute arises with respect to any area of this practice, we are well qualified in dispute resolution and prepared to go to Court when necessary.

We are excited about our new department. Stop in and meet them.

- Tom Wells

NOTEWORTHY

The event is not scheduled until March 8, 2008, but we already want to start bragging that our own Partner, **Jim Jaworski**, will be honored at the **Distinguished Citizens Dinner** of his alma mater, Ramapo College. **Jim** graduated from Ramapo in 1981 after a tour in the Air Force, and later went on to attend New York Law School. **Jim** is being honored not as an alumnus, but for his service to the community which includes active membership in the Bergen Highlands Rotary Club (President in 1999 to 2000), service on the Ridgewood YWCA Board of Directors from 2002 to 2004, and service on the West Bergen Mental Health Board of Directors since 2004. **Jim** is an active land use and real estate attorney in our firm, specializing in development applications in the upper end of the county, particularly, Ramsey and Mahwah. **Jim** divides his time between his home in Ramsey and vacation home in Sunapee, New Hampshire. **Jim** and his wife, **Michele**, are the proud parents of 8 year old **Michael**. Congratulations **Jim**!

Congratulations also to our Partner, **Darrell Felsenstein**, on his election as a Trustee of the Bergen County Bar Association. **Darrell**, who will now serve a three year term, enjoys his connection with the Bar Association and looks forward to even greater involvement. Lest you think that Bar Association activities just proves that **Darrell** is indeed a "stuffy lawyer", please know that **Darrell** is actively coaching and now is also on the Board of the Glen Rock Baseball Association. **Darrell** takes baseball as seriously as the Bar Association and recently spent a week in sunny Florida at the New York Yankees fantasy camp. You should see the pictures....he looks like the real thing!

Darrell is not our only coach, Partner, **Ken Porro**, can also be found on the field coaching. He coaches his sons, **Kyle** and

Here is your copy of Legal Update from:



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So What Do Sub-Prime Loans Have To Do With Me? a layperson's primer

By: *Thomas M. Wells, Esq.*

Not much! At first blush, this is the clear answer to this question. That is, unless your credit is not so good and you stretched hard to get a mortgage that you really could not easily afford through a Mortgage Broker who sold your mortgage as part of a pool of mortgages. Not you, then, still....not much. However, like many things in the financial world, and in particular, the capital markets, perception may be more important than reality. So you better keep reading.

Let me start with a simplified explanation of exactly what the sub-prime crisis is about. In the old days, when most loans were made by local banks and

savings and loans, they were made with money secured from local depositors. However, in recent years as the need for mortgages outstripped the ability to fund them with deposits, many institutions (but not all, for example, Hudson City Savings Bank is an extremely successful institution that does only residential mortgages, and keeps all of the loans within the bank) "sold" their mortgage loans, that were then often "securitized" and sold in pools of say, 200 loans. Along the way, the Mortgage Broker made a fee, and the local bank that still appears to be the lender gets paid a modest fee each month for servicing the loan. The investors that buy the securities

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Voter-Verified Paper Record Systems and the Impending January 1, Deadline

By: *Nicole E. Cleenput, Esq.*

Pursuant to a New Jersey Statute passed in 2005, by January 1, 2008, every electronic voting machine in New Jersey is required to produce a paper record that will allow voters to verify that their votes were properly recorded. No vote will be recorded until the paper record is viewed and approved by the voter. In the event the voter rejects the contents of the paper record, the voter would be able to recast a ballot up to two additional times. The paper record will be preserved for later use in any manual audit and in the event

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When Does Condemnation Go Too Far?

By: Andrew S. Kohut, Esq.

The first thing people think of when they hear words “condemnation” or “eminent domain” is the government's ability to take property with dilapidated buildings or vacant wastelands and rejuvenate the land for a public purpose. However, in 1992, New Jersey passed the Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1, causing a renaissance in the area of redevelopment. Municipalities within New Jersey have used the state's redevelopment statutes to revitalize private property, for both public and private uses, when they deemed the property “areas in need of redevelopment”. These statutes enabled numerous municipalities to improve areas which were underutilized and/or poorly planned, not just blighted. To do so, municipalities needed to meet the standards of one of the eight statutory criteria listed in N.J.S.A. 40A:12A-1. As these types of takings became more prevalent, citizens of the state began to complain that their individual property rights were being violated.

The rapid rise in these instances of eminent domain is not only occurring in New Jersey. Throughout the United States municipalities are attempting to redevelop private properties that are underutilized. And just like in New Jersey, it often adversely affects private citizen's rights. In *Kelo v. New London*, 545 U.S. 469 (2005), the Supreme Court of the United States held that the benefits a community received from the economic upgrade from the redevelopment of private property taken through condemnation is a permissible “public use” under the Takings Clause of the Fifth Amendment.

After the *Kelo* decision, New Jersey municipalities were astonished with the unanimous decision of our state's Supreme Court in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, A-51-2006. In this decision the Court held:

NJ Case

Because the New Jersey Constitution authorizes government redevelopment of only “blighted” areas, the Legislature did not intend N.J.S.A. 40a:12A-5(e)

to apply in circumstances where the sole basis for redevelopment is that the property is “not fully productive”. Rather, subsection 5(e) applies only to areas that, as a whole, are stagnant and unproductive because of issues of title, diversity of ownership, or other similar conditions.

In *Gallenthin*, the Paulsboro sought to categorize a sixty-three acre parcel of land, consisting mostly of vacant wetlands, as an “area in need of redevelopment.” Paulsboro relied on N.J.S.A. 40A:12A-5(e), one of the 8 criteria, to exercise such a power. In part, subsection (e) states redevelopment is needed when “a growing lack or total lack of proper utilization of areas caused by the condition of title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.”

Specifically, Paulsboro argued that the legislative intent of the words “other conditions” was intended to be infinite in scope. In essence, municipalities are permitted to acquire any parcel of land through condemnation for purposes of redeveloping property which is “not fully productive” or potentially useful to the public good. Gallenthin countered that Paulsboro's interpretation was beyond the parameters set forth in the New Jersey Constitution and the Local Redevelopment and Housing Law found at N.J.S.A. 40a:12A-1. Gallenthin contended “not fully productive” and “blighted” were not synonymous. Gallenthin felt that if these terms were to become interchangeable, municipalities would have the discretion to condemn any piece of land which they felt was not being used to its maximum productivity and place it into a redevelopment plan.

As previously stated, the Supreme Court ruled that Paulsboro had misinterpreted the intent of N.J.S.A. 40A:12A-5(e). The Court agreed that a windfall would occur if municipalities were allowed to take any land merely because it is “not fully productive”. In the Court's opinion, “blighted” was intended to define those properties which

have deteriorated to the point in which it has become a significant detriment to surrounding properties. Therefore, a municipality's utilization of subsection (e) could only occur when a property's lack of productivity is caused by issues with title and/or a diversity of ownership, as stated in the statute. The Court interpreted the term “other conditions” to mean conditions related to those dealing with title and ownership.

Redevelopment

It is important to note that this part of the decision only concerned subsection (e) of N.J.S.A. 40A:12A-5. The other 7 criteria remain unchanged by this interpretation. However, the Courts did emphasize in their decision that municipalities still need to provide considerable evidence on the record, no matter which criteria is employed, establishing that a subject property is in need of redevelopment. Simply having an expert recite the elements of the criteria and formulating a conclusion will be found insufficient.

Municipalities have all but abandoned redevelopment projects which are based on the property being “not fully productive”. Furthermore, the need for substantial evidence on the record has already altered how municipalities approach redevelopment. The rulings have caused municipalities to reevaluate the validity of existing and future redevelopment projects. From the municipality's standpoint, this ruling will place a significant, some even say undue, burden on the municipality's ability to provide a safer environment for its citizens. One definite is that the Courts will see a significant rise in appeals from landowners, using Gallenthin as their defense, whose property is being condemned for redevelopment. It will be interesting to see if and/or how the Courts will handle future arguments for the restriction of eminent domain for the purposes of redevelopment.

Andrew S. Kohut is an Associate at WJ&L. Andrew is active in the Land Use and Real Estate areas of our practice as well as in the Tax, Trusts and Estates Department.

A 1031 Exchange Can Save Lots of Taxes

By: James J. Delia, Esq.

You have just sold an investment property which you have had for many years making a huge profit. That is the good news. The not so great news is you will be giving a significant percentage back to Uncle Sam in the form of a capital gains tax. Back to the good news. You can avoid the tax payment through a “1031 Exchange” also known as a like kind exchange. Actually, both this sentence and the headline of this article are not really accurate, you neither save nor avoid taxes, what you really do is “defer” them. What a 1031 exchange does is allow you to put off the tax day until a much later date. You must make the decisions to seek the 1031 exchange protection before you sell your property. At closing, your proceeds of sale must be held in trust by a “qualified intermediary.” The qualified intermediary acts as a buffer to make sure you cannot be deemed to have constructively or actually received any of the sales proceeds.

There are two timelines that anybody electing for a 1031 exchange must observe regarding the replacement properties to be purchased. The first of these is the “Indemnification Period.” This period is exactly 45 days from the day of selling the relinquished property. This 45 days timeline must be followed under any and all circumstances and is not extendable in any way, even if the 45th day falls on a Saturday, Sunday or legal US holiday. Usually, you are allowed to identify up to three properties, but in some instances may identify more.

The Exchange Period is the period within which a person who has sold the relinquished property must receive replacement property. It is referred to as the Exchange Period under 1031 exchange rule. This period ends 180 days after the date on which the person transfers the property relinquished or the due date for the person's tax return. Again, as with the 45 day identification period, the 180 days timeline has to be adhered to under all circumstances and is not extendable even if the 180th day falls on a Saturday, Sunday or legal holiday.

There are several types of exchanges as follows:

Simultaneous Exchange: This occurs when two properties are exchanged simultaneously. This can happen when two properties are swapped, property for property, which is called a two-party exchange. This can also happen when a property is sold and the replacement property is purchased simultaneously. As with any exchanges, to ensure 1031 protection, a Qualified Intermediary should still facilitate the exchange.

Forward Delayed Exchange: This is the most common type of exchange and occurs when a property is sold (relinquished property) and another property is purchased (replacement property) within 180 days following the sale of the relinquished property. For a 1031 forward Delayed Exchange, the sale proceeds must be held by a qualified intermediary between the sale of the relinquished property and the subsequent purchase of the replacement property.

Construction Exchange: This is otherwise known as Build-to-Suit Exchange and occurs when the taxpayer uses the funds from the sale of the relinquished property to construct improvements on the replacement property. The property on which the improvements are constructed cannot be held by the taxpayer but must be held by a third party called an exchange accommodation title holder until either the improvements are complete or until the end of the 180 day Exchange period, after which the title holder is deemed the replacement property with the improvements. This is a more complicated process than either the simultaneous exchange or forward delayed exchange.

Reverse Exchange: The replacement property is purchased before the sale of the relinquished property. The replacement property must be held by an exchange accommodation title holder until the sale of the relinquished property, which must take place within 180 days following the purchase of the replacement property. This is also a more complicated process.

The advantages of a 1031 like kind exchange are:

1) Avoid paying taxes associated with selling the property and conserve equity.

You keep 100% of your equity working for you instead of giving a portion to the IRS.

2) Move real estate investment from one geographic location to another, as in a job relocation or job transfer or retirement.

3) Increase cash flow. An exchange can be used as a way to sell a property with either no current income or a small return and replace it with one that provides better current cash flow. Property that is not providing enough income may be exchanged for a better performing property. This can be done if you own raw land and receive no income from the property. An investor may decide to sell his raw land through a tax deferred exchange and acquire income producing property that will produce cash for him each month.

4) Improve investment appreciation. You can invest in a property that has greater appreciation potential than your existing property.

5) Consolidate or diversify investments. You can sell multiple properties and exchange into one larger property to reduce the management and accounting work associated with owning multiple real estates.

6) Eliminate management hassles. Exchanging is a method that can be used when selling a time intensive property (such as a shopping center) and reinvesting in a type of property that requires less attention (such as a single tenant warehouse).

Lastly, know that a “like kind” exchange is a bit of a misnomer. You do not need to buy exactly the same type, say a restaurant for a restaurant. Rather “like kind” has a broader definition, generally one investment property for another.

Like every “silver lining” there is a little bit of a cloud with a 1031 exchange. They are not easy. They do require substantial help from a good commercial lawyer and a qualified intermediary. Multiple closings and very careful attention to tax regulations are absolutely critical in making a 1031 exchange work.

James J. Delia is a Partner at WJ&L and practices in our Land Use and Real Estate areas.

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 Ken Porro should be sent to “kporro@wellslaw.com.”

Highlands Development Still in Limbo

By: James E. Jaworski, Esq.

In August 2004, only days before announcing he was leaving office early, then Governor Jim Mc Greevey signed into law the Highlands Water Protection and Planning Act (the "Highlands Act"). Although a clearly well-intentioned attempt to positively impact the quality of drinking water for many New Jersey residents, the Highlands Act immediately created havoc for the 88 municipalities affected. Worse still, with almost 900,000 acres included in this new "region", countless private property owners were left to find their way through a new and uncharted regulatory morass. In an article on the Highlands Act, the *New York Times* estimated that "hundreds of thousands of New Jersey residents [were] caught in this collision between water, money and politics...." *New York Times*, January 15, 2007.

The Highlands Act created two distinct areas within the new Highlands region. Within the "Preservation Area", development

is strictly regulated. In the somewhat less scrutinized "Planning Area", development consistent with the Act's intentions is arguably encouraged. Suddenly, countless private properties that previously were subject only to the limits of municipal zoning were now burdened in a manner that might completely preclude development. However, to date, the Highlands Council has yet to finalize the Regional Master Plan governing exactly which properties are in the Preservation and Planning Areas. Six well attended public hearings have been conducted by the Council at locations throughout the region. Former NJDEP Commissioner John Weingart, now head of the Highlands Council, indicated the Council is now trying to complete the Master Plan by November. Until it does, the status of a land mass roughly equivalent to the entire State of Rhode Island remains in limbo.

Despite a clear potential for regulatory confiscation of property rights, no

compensation mechanisms for funding such takings were considered as part of the Act. While some federal monies have come to the table, financial resources to fund these potentially massive property confiscations are woefully inadequate. Added to this lack of funding is the continued inability to put forth a Regional Master Plan. In essence, takings have occurred but landowners could be effectively precluded from filing claims because administrative remedies cannot be exhausted. This veritable Catch-22 continues to plague many affected property owners. We understand that several cases are working through the New Jersey court system as we go to press. We will keep you apprised of any legal precedents of importance in this area.

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

Voter-Verified Paper Record Systems And The Impending January 1, Deadline

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of a recount, the voter-verified records will be the official count for the election. In order to comply with this statute, the state will be required to purchase and install over 10,000 voting machine printers.

During the Summer of 2007, delegates from the New Jersey Institute of Technology tested three of the printers submitted for consideration to meet the state's requirements. Reports were issued in July 2007 which highlighted areas of concern. First and foremost, the state requires the system to stop recording records if the paper malfunctions, jams, or the connection between the recording system and printer is lost. When this occurs, the voter will be allowed to vote on a different system or on an emergency paper ballot. However, while the voter may be notified that there is a problem by an error message or otherwise, in most instances

they will be able to continue voting. If this occurs, the voter will not have had the opportunity to view a paper record, nor will there even be a paper record to be stored for future use in the event of a manual recount. In addition, unless the voter notifies a poll-worker, no warning signals are sent to notify them. Therefore, it is critical to include a safeguard mechanism which will notify poll workers about problems with the printer, or in the alternative, a locking mechanism to render the machine unusable.

Additionally, a problem common to most of the machines used in New Jersey is that while voters have three opportunities to correct their ballot, on the third opportunity the voter does not have the opportunity to verify the paper record as it prints and then quickly drops into a locked receptacle. Since this is the record which would be used in the event of a manual recount, the

inability to view and thus confirm the accuracy of one's vote is cause for concern.

What remains to be seen is whether the systems can be approved and functional by the January 1, 2008 deadline. The New Jersey Voting Machine Committee had rejected immediate certification of the systems as of August 2007, and had made recommendations to further compliance. Undoubtedly, the voters in New Jersey deserve to have confidence in their voting system and presently voting machines and printers that are dependable, accurate and secure are at the forefront of ensuring confidence.

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

GENERAL EQUITY/Chancery Practice

By: Darrell M. Felsenstein, Esq.

Although often our Litigation Department handles cases involving exclusively money damages, there are an ever increasing amount of litigation matters, which are filed in Superior Court, that do not involve statements where a person is suing another for money damages. Rather what is sought is an equitable remedy or, in other words, the achievement of a fair and just outcome whereby a Court Order is sought to compel that someone do something or that something occur or not occur. These often complex cases can involve the enforcement of rights. Often these involve securing injunctive relief via an Order to Show Cause, which seeks immediate court intervention. Such "general equity" action includes matters involving property rights, such as the enforcement of easements, adverse possession, partition actions, quiet title actions, the cancellation of mortgages and matters where

contract rescission is sought.

General equity cases are handled in the Chancery Division of the Superior Court. Generally, these types of cases are case managed by the Court very closely in a more streamlined and efficient approach. The commencement of the litigation is through the filing of a complaint just as in the Law Division. However, there are no juries in this section of the Court. The case is tried solely by a judge and by "case managing" each matter closely, the Court becomes more familiar with the facts and is in a better position, earlier in the case, to narrow the issues and focus the parties on their particular strengths and weaknesses. This can often lead to a settlement earlier having the effect of causing expenses and costs to be lower. Typically, from the filing of a Complaint to the possible final hearing, which may or may not be necessary, the entire process will generally be completed in a year or less,

much quicker than in the Law Division. The basics of litigating in General Equity are the same as the Law Division. Discovery, including interrogatories, document production and depositions are used.

Very common is the situation where a party has multiple causes of action and may be seeking equitable relief in one count and money damages in another. The test for where an action is properly filed "Law" or "Equity" is which cause of action constitutes the principal or primary relief sought. There are exceptions to this rule. Matters involving probate, Will contests and the like, and Family Part actions, can often be about money but are considered cases that are to be heard in the Chancery Division.

Darrell M. Felsenstein is a Partner at WJ&L and practices in our Litigation Department where he also serves as Administrative Chair.

"FENCES MAKE GOOD NEIGHBORS"

By: Kenneth A. Porro, Esq.

".....but that has been my property for over thirty (30) years!" Does that statement sound familiar? The State of New Jersey has long recognized property rights to those who "take" control over property owned by others. This phenomenon is commonly known as claims for Adverse Possession or Prescriptive Easement. Unhappily, these situations are not all that uncommon when dealing with driveway access or building encroachments.

30 Years

Driveway access cases stem around the argument that for thirty (30) plus years the claiming party has utilized the disputed property for ingress and egress. For example, in days of old, driveways were constructed with narrower access lengths. Today with increased vehicle sizes, the current driveways are constructed to some 13 plus feet in width. Thereby, the driveways of old have grown by necessity. The old saying that "fences make good neighbors", can be a harsh reality for property owners whose property access is now reduced or eliminated by the construction of a fence along the prior utilized open lands.

Our advice is, strike first. If you believe you have the required thirty year usage of existing buildings encroaching upon a neighbor's property or a driveway which has been extended over time, move to

preserve those rights. This is accomplished by filing a Complaint in the New Jersey Chancery Division which seeks to quiet title by way of an Adverse Possession or an Easement claim. Easement rights can be found by way of Prescriptive Easements, Easements by Necessity, Implied Easements and other recognized easement rights.

The likelihood of success of an Easement case is actually greater than that of an Adverse Possession case. In Easement cases, the underlying title ownership remains with your adversary. In an Adverse Possession case, the adverse party loses their property title rights completely as a result of their failure to object to the offending party's actions for the period of thirty years. The thirty (30) year time line is also required in Prescriptive Easement cases. This thirty (30) year requirement does not apply to actions with landlocked property. In those cases, the argument is the absolute need for access and the necessity for same is immediate. Also be aware that Adverse Possession in 99% of the time will not work against any governmental entity!

Tacking

One may question, how can I establish thirty (30) years of use, if I have not owned the property that long? A legal doctrine called "tacking" can be used. In tacking, the moving party can use historic data from the prior owner to prove that the thirty (30) year property possession has been actual,

exclusive, adverse, visible, notorious and continual through the property's prior owner's dominion and control. Beware, however, because an educated property owner can seek to defeat one's quest for Adverse Possession or Prescriptive Easements by granting "permission" to use the disputed property or grant some type of license which can be revoked at will.

Got Fence?

What if you are on the other side and want to stop an Adverse Possession or Prescriptive Easement claim against your property? First, you need a copy of your deed and a valid survey. You should then immediately obtain a municipal fence permit and put up a fence before your neighbor files the aforementioned Verified Complaint to memorialize his or her thirty years of continuous property usage. Either way, "fences make good neighbors."

In closing, this article has reviewed the basic arguments related to historic land usage and possible resulting property rights. These cases are fact specific and even an educated property owner can get caught in the maze of do's and don'ts. Seek legal counsel before you are outwitted by your neighbor.

Kenneth A. Porro is a Partner at WJ&L and serves as the Chairman of our Litigation Department.

Asset Protection Planning Is An Integral Part Of Your Estate Planning

By: AnnMarie P. Smits, Esq.

Asset protection planning is defined as the adoption of advanced planning techniques which will place assets beyond the reach of future potential creditors. It is not hiding assets, committing fraud or perjury, or engaging in fraudulent transfers. Today, asset protection planning is a concern for everyone. Many consider today's social and economic environment both more litigious and more hazardous to the preservation of wealth than in years past. Over the past few years, we can see a rise in the areas of liability, in jury awards, and the high incidents of divorce. You work hard for your assets; now you need to protect them!

The management, preservation and distribution of wealth are primary goals of estate planning. In the past, estate planners focused more on minimizing estate taxes. Today, the estate planner must consider asset protection planning with equal weight.

In basic estate planning documents, the estate planner will take advantage of the maximum tax credits afforded to individuals for estate (unified credit) and generation-skipping transfer tax planning (GST exemption). Using these credits minimizes the amount of tax that must be paid to the Internal Revenue Service, or state taxing authorities, at death. Thus, the maximum amount of assets will pass to your heirs. This type of planning can also be completed during an individual's lifetime. Through carefully drafted estate planning documents, assets can be transitioned during life or at death to your heirs with the minimum imposition of estate, gift and generation-skipping transfer taxes.

The unified credit shields property from tax, regardless of to whom such property passes. The amount shielded by the unified credit is known as the "applicable exclusion

amount." For 2007, the applicable exclusion amount is \$2,000,000. This amount increases until 2010, when the estate tax is repealed, as follows:

Year of Death	Applicable Exclusion Amount
2005	\$1,500,000
2006, 2007 and 2008	2,000,000
2009	3,500,000
2010	Taxes repealed

It is advantageous for property to pass tax free as part of the applicable exclusion because the applicable exclusion escapes tax at death. The GST exemption is currently \$2,000,000 and permits property to pass generation to generation tax free.

A Trust

In estate planning documents, assets can be transferred to heirs outright or in trust. The best asset protection is to pass the assets to your heirs in lifetime trusts. A trust can hold the assets for the benefit of a beneficiary and allow the beneficiary to have the full benefits of the assets. If the trust provisions are drafted properly, a creditor cannot reach the assets and the assets are protected from the creditor. With proper drafting, the beneficiary can also be their own trustee.

With our aging society, one of the most important types of asset protection planning is planning for future disability. Any individual requiring assisted living or nursing home care will incur substantial costs for such care. Individual medical insurance plans do not cover these costs. You must purchase a long term care policy. These policies are expensive, even with moderate coverage elected. The younger an individual is, the lower the premium will be. Unfortunately, most individuals do not consider this type of coverage until they are

ill or elderly. At that point, the premium for this type of coverage will be cost prohibitive.

In order to qualify for Medicaid benefits and protect a client's assets, estate planners are able to guide their clients through Medicaid planning. If done early enough, the planner can effectuate the transfer of most, if not all, of the client's assets into an irrevocable trust. After a five year period has elapsed from the date that the assets were transferred into the trust, the assets are exempt from Medicaid eligibility. This planning process will qualify the client for Medicaid benefits, preserve the client's assets in trust for the client's benefit and allows the trustee to supplement the client's care. This type of planning can be very successful if attended to timely.

Limited Liability

Other lifetime planning can be used to protect your assets. Any business or investment property owned by a client should be placed into an LLC, S-Corp or limited liability partnership. These entities provide the client with limited liability and afford the client with the advantageous pass-through tax benefits. Therefore, if the client's rental property is owned in an LLC, and someone is injured on the property, sues and obtains a judgment, the judgment can only attach to the assets held in the LLC. The judgment will not be enforced against the client's individual assets. It is recommended that multiple investment assets be held in separate entities. This structure will prevent cross-liability against the other investment assets.

AnnMarie P. Smits is a Partner at WJ&L and serves as the Chairperson of the Tax, Trusts and Estates Department.

NOTEWORTHY

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Stuart remains the President of the Board of Directors of **ARTSPOWER**, one of our favorite non-profits, and recently attended the Lillian Pitkin Foundation Awards Program in that capacity, happily receiving a Foundation Grant on behalf of ARTSPOWER. Stuart has also served his third straight year as Chairperson of the Bergen County Bar Association Land Use Committee.

Partner, **Tom Wells**, continues to be a moving target. After a summer of sailing on Lake Champlain with his wife, Carol (not all summer!), they are headed off to sail a

bareboat charter in New Zealand this January. Tom continues to bounce back-and-forth between our Bristol, Vermont and Paramus, New Jersey offices, with frequent trips to Bend, Oregon, where he serves on the Bank of the Cascades Board of Directors. Through his connection with this Board, Tom has become active in the National Association of Corporate Directors and recently received his Certificate in Director Education. Tom continues to demonstrate a high degree of interest in "international" community service serving as the Chairman of the World Service Committee of the Ridgewood

YMCA, and President of Wells Mountain Foundation. The latter has now expanded to support education programs in Haiti, Ghana and Senegal, and literacy programs here in the United States. Tom recently represented the Ridgewood YMCA World Service Committee at a meeting held in Mexico City of World Service participants from the Canadian, US and Mexican YMCAs.

Partner, **Jim Delia**, is also on the Ridgewood YMCA World Service Committee and has just signed on to coach soccer for a week this summer in Haiti at a "camp" for some very needy kids.

So What Do Sub-Prime Loans Have To Do With Me? a layperson's primer

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(made up of the pooled loans) are paid from the interest that is paid on the mortgages each month. Everything works well, unless, of course, the mortgages start to default. If they do, there are plenty of people that get hurt.most particularly, the "investors," and in many cases, the banks or Mortgage Brokers that made the loans, and of course, the borrower, if there is a foreclosure.

Historically, poor credit borrowers have had to pay a higher interest rate. These additional monies were used as a "hedge" against the defaults. In recent years, spurred by lots of competitive loans, loans made to "sub-prime" and "alt-A" borrowers (those with credit problems or low income relative to the amount they wish to borrow) at fairly low interest rates. Some would say that the risk of taking credit challenged mortgages was not properly priced into the securities in which they were pooled. The policy has now changed radically. A problem creditor with a low credit score today will be offered an approximately 12% adjustable mortgage on a loan to equity rate not to exceed 55%. Let me stay "technical" for just one more moment. In addition to home mortgages, other types of loans are also "securitized" in loan pooling devices called structured investment vehicles or SIVs.

Fear Is The Problem

The real question then becomes, what do the defaults on a very small percentage of all mortgages, those made to borrowers who had questionable credit or in these complex SIVs, have to do with all of the rest of us. Likewise, why is the Federal Reserve lowering the discount rate and large banks putting together pools to buy up these questionable investments. The answer is mostly the psychological side of the whole thing. Remember when FDR tried to help Americans get out of the depression by saying "The only thing we have to fear. . . .is fear itself"? It is fear that the risk factor of questionable credit may not have been properly factored into securitized loans, that has now spread into other capital markets.

Capitalism, our economic system, works best with large amounts of capital. The capital comes mostly from all us little guys. . . .savings and stock ownership (which has become much more prevalent in the United States, with almost fifty percent

of Americans now owning stock, usually frequently in 401Ks, mutual funds, pension plans, etc.). Lots and lots of little guys put their money into capital markets. A good chunk of that capital has found its way into securitized debt instruments like those groups of 200 sub-prime loans, but also many other debt instruments which are far more secure. When the sub-prime loans started to go bad, it created a level of panic throughout the capital markets and this is what has now become the concern. Just like World War I which started from one Austrian diplomat being shot, troublesome economic news can sometimes have a snowball effect. The goal of the Fed, and now the Treasury Department, and certainly the large banks, is to keep this particular snowball up at the top of the hill and not let it create an avalanche that could create problems for all of us.

Who Is the Victim

The crisis does raise a perplexing fairness issue. Let us start by looking at who the victims are. There are three types of victims directly being hurt in the root cause of this crisis, bad sub-prime loans. The first of these are folks who probably should not have been purchasing a home with very little money down and no real prospects to be able to pay a mortgage, especially if they took a "teaser" rate where their payments were inevitably going up. Should the government, or the rest of us, be bailing them out? Keep in mind that many of these folks were not very sophisticated, and may have been enticed into these mortgages by businesses who were trying to make quick fees, and pass the mortgages on to investors.

How about those Mortgage Brokers? These folks are going out of business left and right. Should we be bailing them out?

Last, how about the investors. . . .in most cases very sophisticated folks or very large institutions like Merrill Lynch and Citibank, who were buying and selling the debt instruments, looking to get a good return for what they thought, would be very little risk. Are they worthy of a bail out?

Whether you have sympathy for any of these three categories of victims, action by both the government and others concerned about the problem, does seem appropriate. If not sympathy for any of direct victims, then to try to keep this snowball from

rolling down hill and creating a problem throughout our economy.

What Now

There are pundits announcing that there is no real problem here and never has been; that there was a problem and now it has been resolved; that there is a problem and it needs continuing government action to fix it; that there is a problem, but the government should stay out of it and the private market should fix it; and finally, that the market should just do what it must to punish those who have made risky loans or risky investments.

The answer, as almost always, probably lies somewhere in the middle. Some degree of reasonable regulation to impose the same kind of lending standards on that largely unregulated mortgage brokerage industry, as is typically in place for our banks, seems in order. Also, reasonable efforts by the government, or at the government's prodding of large institutions to try to protect the overall capital markets, also seems like a good idea. If we are very lucky, this "crisis" will pass without causing a recession and this article will have told you much more than you ever wanted to know about sub-prime lending and its effect on the capital markets.

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