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Attorneys at Law

VIEW FROM THE BAR
SPRING 2017

A Message from our Chairmen

My Co-CEO, Bill Barrett, was the driving force behind the move to our new offices two years ago and at that time Bill had remarked, "If you build it, they will come." I know the phrase was not original, but it certainly was accurate. The best and the brightest in our profession have found their way to our practice. We have added ten new lawyers in this short time. They represent a vast array of experience and come to us from the most prestigious firms in the region, ranging from large practices to renowned boutique firms, and they include former law clerks and a New Jersey Supreme Court clerk.

So, as we celebrate our 87th year, now more than 70 attorneys strong, we continue our mantra to stay forever young and innovative. We do so with what many have described as our unique culture. I looked up the definition of culture in my Webster's Dictionary. There are eight definitions, but the one that appears most appropriate is the cultivation and refinement of thoughts, manners, emotions and tastes resulting in a caring environment. We are proud of our culture and you can be assured that we will strive to maintain it as we continue to expand the talent and expertise we offer to our clients.

Very truly yours,

Barry R. Mandelbaum, Esq.
Chief Executive Officer

William S. Barrett, Esq.
Chief Operating Officer

To Litigate or Not to Litigate

By Michael A. Saffer, Esq.

Although I Co-Chair Mandelbaum Salsburg's Commercial Litigation Department and I immensely enjoy trying cases, the impact that a lawsuit has on a litigant requires the litigant to assess a number of factors prior to initiating or defending litigation. Although a wronged party should generally pursue litigation if the opposing party refuses to make the wronged party whole, a litigant should focus on whether participating in a litigation is justified in light of the cost, the business distraction, the time involved and the emotional toll that litigation can exact on that litigant.

At the outset, for you to make an informed decision on the issue of "to litigate or not", you have to be an active participant in that decision. You must: (1) not be afraid to ask your attorney questions; (2) not be afraid to ask your attorney what a reasonable expected outcome would be if you decide to litigate; and (3) get a general idea of what the litigation will likely cost you or your company. Although litigation-outcome predictability is an uncertain science at best, clients who are uninformed to any extent about the likelihood of success if they litigate and the range of the cost of the litigation will be disappointed clients.

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Impact Fees and Development Approvals: A Cautionary Tale

By Craig W. Alexander, Esq.

The land use approval process is difficult, time consuming and expensive. In New Jersey's home-rule environment, it takes more than a well-designed plan to secure an approval; affordable housing and tax abatements are now equally if not more important concerns. Municipalities also continue to pressure applicants to "support" the community by contributing towards the cost of local projects. As a recent court case demonstrates, however, there are strict limits on what off-tract impact fees a land use board can impose, and what applicants can offer, as a condition of land use approval.

In *SB Builders Associates, L.P. v. Planning Board of the Borough of Milltown*, the court invalidated a condition of approval of a development plan that required the applicant to contribute to improvements to electrical utility facilities. The contribution was based upon a redevelopment plan adopted by the Borough requiring the redeveloper to pay its pro-rata share of the off-tract improvements. The contribution was memorialized in a developer's agreement accepted by the applicant.

Even though the redevelopment ordinance authorized the condition and the applicant agreed to it, the court declared the condition ultra vires because the Municipal Land Use Law (MLUL) does not authorize contributions for off-tract improvements to electrical utilities.

In its decision, the court reiterated that a municipality is not "free to chart its own course" and may only impose impact fees that have been duly authorized by statute. In the land use arena, the MLUL is the paramount statutory authority. Under the MLUL, these contributions are limited to only water, sewer, drainage and street improvements. Under a prior version of the statute, contributions could also be required for other improvements a municipality found necessary in the public interest. This version granted a municipality broad discretion to impose impact fees for questionable off-tract improvements. However, the court explained that because this former "omnibus grant of authority" was omitted from the revised statute, municipalities are now constrained to impose impact fees only for the list of statutory improvements.

Further, if a board desires to impose an impact fee authorized by the MLUL, it must also be authorized by local ordinance, which must contain a methodology that accounts for the impact of the development. An impact fee cannot be calculated on an ad hoc basis. The ordinance must establish reasonable standards to apportion the costs of the off-tract improvements among all property owners that would benefit from it. The ordinance must also conform to the municipality's master plan. Based on the MLUL, only reasonable and necessary pro-rata costs can be imposed, and the land use board must make detailed findings to support the imposition of the fees.

It is well settled that payments for unauthorized "public benefits" are illegal and that any approvals granted because of such payments will be invalidated. Nevertheless, municipalities continue to look to the deep pockets of developers to fund municipal projects. The courts have continued to invalidate conditions of approval constituting unlawful exactions, such as the donation of off-tract land or cash contributions for the cost of a fire truck. In the *SB Builders* case, the court reiterated that municipalities cannot exceed its statutory authority by passing off the cost of infrastructure projects to developers, and clarified that electrical utilities are not an off-tract improvement authorized by the MLUL. The case confirmed that the MLUL sets forth an exclusive list that cannot be expanded by municipalities.

Interestingly, the court also discussed whether this statutory prohibition can be circumvented by the developer voluntarily agreeing to the contribution. It is not uncommon for a developer's agreement to be the subject of intense negotiations about conditions of approval or impact fees. In the *SB Builders* case, however, the court stated that since land use boards operate under the MLUL, they lack authority to accept any contribution for off-tract improvements outside the scope of the MLUL, even if the developer does not object. This is because the contribution is not negotiable – it is established by ordinance – and a developer's agreement is a contract with a public agency, which must operate within the limits of its governing statutes.

The court also expressed concern about protecting the land use process from being corrupted and the "intolerable spectacle" of approvals appearing to be up for sale. To avoid improperly influencing municipal officials, the court declared that developers may not contribute towards the cost of off-tract improvements that are not authorized by the MLUL and local ordinance, and this prohibition cannot be circumvented by private agreements or settlements.

SB Builders is yet another cautionary tale for developers and land use boards. In order to impose impact fees, boards must adhere to the dictates of the MLUL and local ordinances and make findings to determine the developer's proportionate share of the cost of the off-tract improvements necessitated by the planned development. Land use boards cannot delegate that function to other municipal agencies or officials. Conversely, in their haste to grease the approvals process, developers should refrain from becoming a willing participant in an unlawful arrangement to pay off-tract impact fees. The result could be dire. If a court concludes the process was tainted, it could invalidate the entire approval instead of merely excising the unlawful condition. Considering the investment required to pursue an approval, it is an unwarranted risk in a process already fraught with uncertainty.

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*Reprinted from the *New Jersey Law Journal*, April 24,2107

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To Litigate or Not to Litigate

If you are going to initiate litigation, determine what your objective is in doing so.If your objective is to collect money damages, the first consideration should be whether it is cost-effective to litigate.In other words, does the relationship between the anticipated amount to be collected and the anticipated attorneys' fees and costs justify the litigation? For example, if you or your company are seeking to collect a relatively nominal sum that is owed, unless there is a clause in the contract between you and your proposed defendant that allows you to recover your attorneys' fees and costs incurred in the litigation, it is going to be very difficult to cost-effectively litigate that case.

In the same vein, in assessing the cost-effectiveness of litigation, the possibility that you will incur additional attorneys' fees and costs should you prevail in the litigation but the opposing party appeals must be a factor. In addition, the collectability of a judgment must be considered.If the company or individual you are considering suing has no assets or might be candidate for a bankruptcy if a judgment is entered against them, those factors must be considered.

A second consideration in deciding whether or not to litigate is the distraction that litigation has on a litigant. You will have to set aside time from your business and personal life to assist your counsel in answering written questions (known as interrogatories), preparing for your deposition, assisting your counsel in preparing to depose the adverse party and preparing for and participating in the trial of the action. This time commitment on your part can be very substantial.

A third consideration is the emotional toll that a litigation can exact on a party. If you are suing or being sued by your former business partner, a relative or someone you were close to in business, there can some measure of emotional involvement in the case which can sometimes be a distraction from your business focus.

If these factors do not favor litigation, you should consider non-litigation alternatives. Among the options are having a meeting among clients and counsel to see if common ground can be reached on a settlement or hiring, pre-litigation, a mediator such as a neutral former judge, to see if a settlement can be reached and costly litigation avoided.

The "take-aways" in deciding whether or not to litigate are to be an activist, educated client with your attorney. Consider what your objective is if you litigate.Take into account: (1) the costs of litigating; (2) the time you are going to have to spend away from your business to work on your case; (3) the emotional impact the litigation may have on you and (4) non-litigation alternatives.

Once again, litigation frequently remains the option for a party to pursue in order to obtain justice. But keeping these principles in mind will assist you in ultimately making the right decision "to litigate or not to litigate."

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Interview with Elder Law Chair Richard Miller on Blended Families Making Elder Law "A Complex Proposition"

Richard I. Miller, Esq.

Families, as we know, have always been complicated. But modern families can make matters even more complex – at least when it comes to practicing Elder Law, according to Mandelbaum Partner Richard Miller."How many of our grandparents were divorced?" asks Miller, who is certified as an Elder Law Attorney by the National Elder Law Foundation. Today's generation of American seniors, Miller explains, is the first in which multiple marriages or committed relationships are routine – a complication that can wreak havoc when it comes to settling the legal affairs of an aging population.

"Blended families make Elder Law a very complex proposition," says Miller, who has nearly 25 years of experience in areas ranging from Special Needs Trusts and Guardianships to Estate Planning and Probate Litigation. That experience is invaluable in tackling a caseload that more closely resembles a reality TV show than a client docket: Individuals in multiple marriages leaving assets to a second (or third) spouse rather than children from prior relationships. Families failing to identify who should make financial and medical decisions in the event of disability. Spouses overlooking economic consequences if a second marriage partner requires long-term nursing care.

"People often don't do the planning, and that can lead to emotional and passionate disputes among family members," says Miller. "Estate and Guardianship litigation, in particular, can get quite heated and expensive."

With so much at stake in such a contentious arena, experienced Elder Law attorneys like Miller will become increasingly in demand in the coming years as Baby Boomers tackle end-of-life issues and navigate what are, in many ways, uncharted waters.

"No previous generation has really experienced this before, so they are going to need a lot of guidance," says Miller. "These issues will be an endless source of litigation in years to come, particularly if individuals in blended families don't plan ahead."

Richard Miller is a member of the Firm and Chair of the Elder Law Department. He can reached at rmiller@lawfirm.ms

Privacy Policies and Disclosures – What's the Big Deal?

By Khizar A. Sheikh, Esq. and James Venezia

Dealing with privacy and cyber risks can be daunting, but it does not have to be; it's just a matter of re-framing the conversation to reflect the fact that your web site, mobile app and digital footprint are an extension of your organization's real estate. You would not consider entering into a real estate or branding transaction without the proper legal and insurance guidance, the same emphasis needs to be placed on the necessary and appropriate digital disclosures.

Why? Any organization that collects data / information through their website or mobile application (that is, every single company) should have an external facing policy that describes their privacy and security practices (which should follow the law). Too many organizations fail to do this and the negative results speak for themselves.

Start with a recent Federal Trade Commission (FTC) enforcement action brought in conjunction with the NJ Attorney General. TV maker Vizio has to pay $2.2 million for failing to disclose to users the information that the company collected. Or take membership reward service Upromise having to pay a $500,000 civil penalty to settle allegations regarding disclosures about its data collection practices.

These are not anomalies. Since December 1, 2016, it is the fifth and sixth FTC action on privacy policies and secure application practices. For the NJ Attorney General, in the past 2 years, the Vizio settlement is the fourth action that it has brought for failing to disclose data, privacy and security practices in violation of NJ's Consumer Fraud Act.

Based upon the potential cost of a violation, small and middle market businesses need to be concerned as these violations and subsequent penalties, generally, fall outside of the scope of insurance coverage.

This is so important that we have been discussing how to best express this concern. We felt this introductory post might be useful.

The easiest way to get the process of analysis and risk management started is through the examination of an organization's website and mobile application privacy policies and security practices.

For a quick understanding of whether these issues apply to your organization, contact either of us at ksheikh@lawfirm.ms or jvenezia@phxins.net, for a complementary initial consultation.

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James Venezia is an Insurance Professional with Phoenix Insurance Group, Inc.

Immigration Law Update

By Laurie J. Woog, Esq.

President Trump promised there would be many changes in the area of immigration once he took office. No sweeping legislation has been passed yet, but this article will discuss briefly two areas of uncertainty that corporations and individuals should be watching.

Travel – Corporations, universities and individual travelers often get frustrated by delays in border control processing and visa issuance. Well, they may need to call on extra reserves of patience in the coming months, and develop contingency plans due to the administration's recent directives. Even though the travel ban on immigration from six majority Muslim countries has been blocked by federal courts as of this writing, non-U.S. citizens from those nations should be extremely careful about travelling outside the U.S. and consult an attorney before doing so to make sure they will be able to return without issues. In addition, the Trump administration recently told all consulates abroad to engage in enhanced scrutiny of visa applicants. ("Trump Administration Orders Tougher Scrutiny of Visa Applicants," New York Times, 3/23/17). This enhanced consular vetting will include more detailed questioning about previous residence, travel and employment, and social media reviews. Based on the number of interviews posts are supposed to conduct, and numbers of applicants, this enhanced scrutiny, while potentially helpful in certain cases, is likely to result in greater delays in visa approvals as well as increased denials. This could have a negative impact on conference attendance, and business travel for meetings and seminars or training, and inject uncertainty into the ability of foreign employees to obtain or extend visas abroad in a timely fashion.

Marriage Equality – In *U.S. v. Windsor* (2013), the Supreme Court extended federal benefits, including green cards and visas, to legally married same sex couples. For example, a United States citizen can now petition for his same sex spouse to receive a green card. A foreign scientist or engineer on an H-1b visa can bring along her wife as a dependent. These situations were not permitted a few years ago, and some people are worried that they might not exist for much longer, despite the Supreme Court's ruling in *Obergefell v. Hodges*, which established a constitutional right to same sex marriage. New York and other states have seen a noticeable increase in the number of marriages just before and after President Trump's election; this possible "Trump bump" includes gay and foreign couples worried about their ability to remain together in the U.S. if same sex marriage rights are eroded. In reality, it seems unlikely that this will happen any time soon. First, a case would have to come before a newly configured Supreme Court, which could take a couple of years. Second, even if the new Supreme Court justice is inclined to overrule a solid precedent, if the court splits as it did in *Obergefell*, then the outcome will not be changed. Third, even if *Obergefell* were overturned, under *Windsor*, federal benefits such as immigration would still flow to a foreign spouse if the marriage was legal where it was performed, for example in a state that retains same sex marriage. Nevertheless, many couples are dismayed by a perceived rise in anti-immigrant and anti-gay marriage rhetoric. A trip to City Hall could be something to consider for committed couples who haven't yet put a ring on it.

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Family Law Spotlight: Emancipation of the Drug Addicted Youth

By Lynne Strober, Esq.
and Elisabete M. Rocha, Esq.

There are many cases addressing the emancipation of young adults who take drugs and these cases are very fact sensitive. In light of the lack of predictability of the outcome in court, litigants should first try to resolve these issues out of court.

The New Jersey Courts have recognized that full-time or uninterrupted school attendance is not invariably required to forestall emancipation. For example, in *L.D. v. K.D.*, the child was 19 years old, she failed senior year of high school, and was enrolled in a residency drug rehabilitation program but was still financially "unemancipated" and in need of support while she completed the residency program and earned a general equivalency diploma.The court found that the former husband was not relieved of his child support obligation, even though the child lived in her own apartment funded by the former wife during the child's senior year to permit her to complete high school. The Court also found that the child never "moved beyond the sphere of influence and responsibility exercised by [her] parent [to obtain] independent status of...her own." The facts show that the child never reached emancipation. Her addiction, although voluntary, occurred while she was unemancipated. The use of drugs alone cannot dictate emancipation.

Courts will also look to see if the child is within the parents' sphere of influence. For example, in *Gahm v. Flay*, the plaintiff and defendant were divorced on August 19, 2003 after a sixteen-year marriage during which two children were born. The parties' Final Judgment of Divorce incorporated a Property Settlement Agreement. Article Eight of the Property Settlement Agreement addressed the payment of college expenses, and stated the parties "agree that they shall be responsible as provided by New Jersey Case Law to provide for the complete college education or secondary expenses for the minor children as per their income at the time of the event." The parties younger daughter began using drugs and entered a rehabilitation facility before graduating from high school. She eventually returned to high school and graduated in June 2012. Upon her graduation from high school, she resumed drug use, but enrolled in a number of rehabilitation facilities. Unfortunately, she was unable to successfully abstain from drug use, and enrolled in another drug program in Florida in early 2013. Upon completion of the in-patient aspect of the program, she remained in Florida and was working 32-35 hours per week. The court found that based upon these facts, there was more than a brief hiatus from the parent's sphere of influence and found that the parties daughter had moved away from her parents' sphere of influence and thus she was emancipated.

Because of the serious problems with drug use and addiction it is difficult to understand how a young adult can be deemed emancipated under such circumstances. The court is subjective in its factual analysis and incorporates the moralities of the times. Part of the analysis focuses on whether a parent should be financially obligated under these circumstances.

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Mandelbaum Salsburg Women's Initiative

The Firm's Women's Initiative hosted a networking event on January 26, 2107 and raised over $1200 for the Women Like Us Foundation. The Mandelbaum Women's Initiative hosts networking events for the firm's female attorneys, clients, and executives throughout the year with each event benefiting a designated charitable organization. The event drew a crowd of over 75 women. Speaking at the event was Linda Rendleman, CEO and Cofounder of the Women Like Us Foundation. Following the event the Firm also sponsored a "denim day," where attorneys and staff donated at least $5 to be able to wear jeans to work. The denim day raised an additional $200 for Women Like Us.

The Latest Supreme Court Decision on Copyright Protection in the Fashion and Apparel Industry

By Elizabeth Lai Featherman, Esq.

On March 22, 2017, the U.S. Supreme Court issued a ruling in a copyright infringement case involving cheerleader uniforms. This ruling, *Star Athletica LLC v. Varsity Brands Inc.*, provides guidelines to the fashion and apparel industry to have greater protections against knockoffs of apparel designs.

Under U.S. copyright law, clothing is typically outside the scope of copyright protection because clothing is considered a "useful article" with an intrinsic utilitarian function.In this ruling, the Supreme Court ruled that decorative elements of cheerleading uniforms could be protected by copyright law if these decorative elements (i) "can be perceived as a two- or three-dimensional work of art separate from the useful article;" and (ii) "would qualify as a protectable pictorial, graphic, or sculptural work either on its own or in some other medium if imagined separately from the useful article." This case had been closely watched by apparel manufacturers.

In 2010, Varsity sued its competitor, Star Athletica, for copyright infringement, after Star Athletica published a catalog of cheerleader uniform designs. Varsity alleged that Star Athletica copied multiple designs that included stripes, chevrons and other graphical elements on the uniform that Varsity had registered with the U.S. Copyright Office. The District Court ruled in favor of Star Athletica, finding that the challenged designs were not separable enough from the utilitarian function of the uniforms to provide copyright protection. The Sixth Circuit disagreed and reversed that ruling. The Sixth Circuit concluded that the graphical elements of Varsity's cheerleading uniform designs could be separately identified from and could exist independently of the utilitarian function of the uniforms. The case went before the Supreme Court, which issued a 6-2 opinion in favor of Varsity.

This ruling follows the 1954 decision in *Mazer v. Stein*, in which the Supreme Court held that a statuette of a dancer that was first designed to be used as base for a fully equipped electric lamp was copyrightable, even though the lamp itself was a utilitarian mass-produced item, and that the copyright offered protection against people selling replicas of the same statuette outside the context of a lamp.However, in this decision, the Court offered little guidance on how to apply the test to other useful articles that have both functional and decorative aspects. The majority clarified that within the context of copyrightability of apparel, "the only feature of the cheerleading uniform eligible for a copyright in this case is the two-dimensional work of art."The Court further emphasized that Varsity has "no right to prohibit any person from manufacturing a cheerleading uniform of identical shape, cut and dimensions to the ones on which the decorations in this case appear." It remains to be seen how the courts will apply this test in the future.

Key Takeaways:

1. Decorative designs on apparel are worth protecting by copyright registration.While copyright law prohibits extending copyright protection to useful articles, artworks, graphical elements and sculptural works printed or affixed on the useful articles may be copyright protected separately.

2. This ruling can be extended beyond copyright protection of apparel design.Companies in other industries that involve designs of useful articles, such as furniture, stationary and kitchen appliances, should re-evaluate their intellectual property protection strategies to incorporate copyright protection into their IP portfolio so that different aspects of these products can be protected via utility patents, design patents, trademarks and copyrights.

Elizabeth Lai Featherman is a member of the Firm and practices in many areas of intellectual property law. She can be reached at efeatherman@lawfirm.ms

Sweepstakes and Contests: A Great Way to Promote Your Business

By Casey Gocel, Esq.

Hosting a giveaway, such as a sweepstakes or prize contest, is a great way to promote your brand and raise awareness for your business. Giveaways can be promoted at a business location, on a company website or on social media sites such as Facebook, Instagram and Twitter.If you plan to host a giveaway it is important to first familiarize yourself with the legal requirements to avoid unnecessary sanctions and penalties.

Lottery, Sweepstakes or Contest?

First, it is important to understand the distinction between sweepstakes, contests and lotteries. Business entities are only permitted to host sweepstakes and contests.Lotteries, on the other hand, may only be run by a government entity.A lottery must include: something of value that a participant provides for entry (i.e., consideration); a prize; and some degree of chance. In order to avoid being classified as a lottery, a business entity (known as the "Sponsor") must remove one of these three elements from its promotion.

Lottery = Consideration + Prize + Chance

Sweepstakes lack the element of consideration, so they consist solely of a prize and chance. Consideration in the form of a purchase requirement is easy to identify.However, some states take the position that consideration exists where the entrant is required to exert substantial time or effort to participate in the giveaway, such as filling out a lengthy marketing questionnaire.Therefore, participants must be able to enter the sweepstakes without exerting significant effort or giving anything of value.

Sweepstakes = Prize + Chance

Contests, on the other hand, replace the element of chance with skill, so contests involve the elements of consideration (in the form of ability or effort) and a prize.

Sweepstakes and Contests, continued

Contests = Consideration + Prize

Once you have determined whether you wish to host a sweepstakes (game of chance) or a contest (game of skill), the next step is to adopt "Official Rules", which are compliant with all legal requirements.

Legal Requirements

The biggest hurdle when hosting a giveaway is complying with the laws of each state in which you plan to promote the sweepstakes or contest.If the giveaway is only being offered at a business location, entry can be limited to individuals within the particular state where the business is located.In this case, you will only need to comply with one state's law.

Alternatively, if you wish to promote your giveaway online, you must decide if entry will be limited to residents of a select number of states or if entry will be open to all U.S. residents.Sponsors are required to comply with the state law of each state in which residents are permitted to enter the giveaway.In other words, if you wish to allow entries from all 50 states, you must comply with 50 different state laws.

Each state law regulates the kind of information that must be included in the Official Rules.Generally speaking, the Official Rules must always include the following:

- The odds of winning
- Eligibility requirements (including age and residency restrictions)
- Name and address of the Sponsor
- Entry instructions and entry period
- Prize description and total value of all prizes
- "VOID WHERE PROHIBITED BY LAW"
- "NO PURCHASE NECESSARY TO ENTER OR WIN"

In addition to drafting legally compliant Official Rules, it is also important to comply with state-specific requirements.

Bonding and Registration

Some states require the prize value be bonded if the prize value is above a defined amount.For example, both Florida and New York require that the Sponsor post a bond where the prize value is greater than $5,000.New York law further requires that this bond be posted at least 30 days prior to starting the giveaway.Rhode Island does not have a bonding requirement, but all giveaways with a total prize value in excess of $500 must be registered with the state.

Advertising

State law also governs the advertisement of giveaways.For example, some states require that a full list of all rules be included in all advertising materials, while other states only require disclosure of "material" rules.In cases where the promoter is advertising in a retail location, many states require that the Sponsor place a poster with the Official Rules inside the retail location.

Record Maintenance and Other State Specific Restrictions

State law varies on how long sweepstakes and contest materials must be held by the Sponsor following the end of the promotion. Some states also require that the winners list be submitted to the state. When assessing the applicability of state law, it is also important to consider the following nuances: variations in the age of majority; restrictions on businesses that engage in the sale of tobacco, alcohol, firearms, time-shares, gas and financial services; and timing requirements for the delivery of prizes.

Penalties

The stakes for violating the giveaway laws are high.Penalties for violation of these laws vary widely but can include exposure to civil liability, civil fines and criminal penalties.Sponsors may also be subject to an injunction prohibiting the Sponsor from conducting further giveaways in each state in which a violation occurred.

Additional Considerations

The following issues should also be considered when hosting a giveaway:

- **1099s:** If the value of the prize is $600 or more, the Sponsor must send a Form 1099-MISC to the IRS and the winner.
- **Social Media Rules:** If you plan to host a giveaway on social media, you should first consult with the site's terms and conditions to determine any rules applicable to sweepstakes and contests.For example, Facebook has certain disclaimer language that must be included in the Official Rules and has banned the practice of "like-gating" (i.e., when you require a user to like a page to enter a contest).
- **Data and Privacy Laws:** Through your contest or sweepstakes, you will collect personal information from entrants. Depending on the type of information, state from which it is collected, method by which it is collected, and the intended use, certain collection and use practices may not be lawful. In most instances, a privacy policy will be required and must be linked to the Official Rules.
- **International Giveaways:** If you wish to run an international sweepstakes or contest, you will need to comply with the local laws of each jurisdiction in which the giveaway is being promoted.

If you are considering hosting a giveaway, please consult a sweepstakes law expert, so that you can enjoy the fruits of your marketing efforts without incurring unnecessary sanctions and penalties.

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The U.S. Supreme Court Recently Decides Two Landmark Cases

Court Decides What Level of Education Benefit Schools Must Deliver to Students with Educational Disabilities

By: Brian Block, Esq.

On March 22, 2017, the U.S. Supreme Court issued its highly anticipated decision in *Endrew F. v. Douglas County School District*. The case posed the following question: what is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act (IDEA)?

Under the IDEA, students with learning disabilities are entitled to a "free appropriate public education," (FAPE) but the meaning of an "appropriate" education had been elusive. In order to meet this mandate, the IDEA requires that a student receive an individual education plan (IEP). Over three decades ago the Supreme Court determined that an IEP must provide "some educational benefit" to students with learning disabilities. In the years since, Congress amended the IDEA to strengthen the IEP and quality of education students must receive. However, courts around the country had authored diverging opinions about the educational standard schools must meet to discharge their obligation to provide a FAPE through the IEP. Some courts, including the appeals court that decided *Endrew F.*, held that a school must only provide "merely more than a *de minimus* benefit." But other courts, including the Third Circuit encompassing New Jersey, adhered to a more robust standard of "significant learning and meaningful benefit."

The Supreme Court settled the issue by crafting the following standard: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstance." The Court elaborated that the "IEP must aim to enable the child to make progress," and cautioned that an IEP requires "careful consideration" of a "child's present levels of achievement, disability, and potential for growth." There is an expectation that a FAPE will include "integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." However, an "IEP need not aim for grade level advancement" if "that is not a reasonable prospect for a child." The program must be "appropriately ambitious in light of his circumstances." A school must be able to offer a "cogent and responsive explanation for their decisions" concerning the IEP.

Endrew F. was brought on behalf of Endrew, a boy with autism who attended public school through the fourth grade with an IEP, but made little progress before his parents placed him in a private school that focused on autism and in which he started to succeed academically and behaviorally. Endrew's parents sued, contending that their child was not afforded a FAPE with an IEP reasonably calculated to benefit Endrew, and were entitled to reimbursement for their private school costs. The Supreme Court vacated the appeals court's decision that used the lesser standard and remanded the case for further proceedings in light of the new standard.

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Disabled Students Can File ADA and Section 504 Discrimination Claims Without Administrative Exhaustion

By: Arla D. Cahill, Esq.

On February 22, 2017, the U.S. Supreme Court ruled unanimously in favor of a disabled student, and her family in *Fry v. Napoleon Community Schools*, by reversing and remanding the case back to the appellate court. The case upheld a disabled student's right to bring a service animal to school. The Court held that it was erroneous for a public school district to require a family to exhaust all legal remedies under the Individuals with Disabilities Education Act (IDEA) when a child's right to her service animal is fully supported under the American with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504).

Under the IDEA, when parents disagree with the school regarding any aspect of a disabled student's Individualized Education Program (IEP), the parents are required to "exhaust" their administrative remedies under the IDEA and their state's due process resolution procedures which, often times, entails lengthy and expensive litigation in multiple levels of adjudication commencing first with an informal resolution process with the school and escalating to a formal hearing by an administrative agency followed, in some instances, by appellate review in federal district court. Claims arising under the IDEA also require proof that the school denied the student a "free, appropriate public education" (FAPE). Relief available for violations under the IDEA is limited to an award of compensatory education, not compensatory or punitive damages.

By contrast, the ADA and Section 504 prohibit discriminatory policies, practices and physical barriers that prevent disabled individuals from accessing places of public accommodation on the basis of their disability—significantly, there is no requirement to show that FAPE has been denied under these statutes, no requirement to engage in the lengthy process to exhaust administrative remedies, and compensatory or punitive damages are available in such cases. Thus, the Court held that students with disabilities who are receiving FAPE under the IDEA can still pursue their ADA and Section 504 discrimination claims that do not involve the right to receive FAPE. This ruling is significant in that it resolves a long-held misconception among courts nationwide that students alleging discrimination under the ADA and Section 504 that does not involve FAPE violations must demonstrate compliance with the IDEA's exhaustion requirement.

Arla D. Cahill is a member of the Firm's Corporate Litigation group and Co-chair of the Special Needs Practice Group. She can be reached at acahill@lawfirm.ms

Mandelbaum Salsburg Plays Matchmaker in Investment Deal for Large Mixed-Use Redevelopment Project

Mandelbaum Salsburg, recently joined two of its existing clients together into a joint venture to be developers of Washington Square Town Center. Washington Town Center is an exciting mixed-use redevelopment project which has received approvals for 260 luxury rental apartments, 100 town homes, a 40,000 square foot medical office building, 30,000 square feet of retail, 110-unit assisted living facility and 70 affordable rental apartments in Washington Township, Gloucester County. Over the last eight years, Atkins Companies and Woodmont Properties, joint venture partners, obtained approvals in connection with the development of this new town center, including successfully negotiating a 25-year PILOT tax abatement with the Municipality. The partners closed title to the project in April 2017.

The apartment community will also include an expansive clubhouse, including a fully staffed leasing and management office, state of the art fitness center, pool and sundeck among other amenities. The Medical office building component is a class A building, being joint ventured with Rothman Institute, the largest and most experiences orthopedic practice in Philadelphia and South Jersey with over 100 doctors and 20 locations. The building will be a 40,000 square foot class A medical office building and serve as the flagship location for the Rothman Institute in South Jersey. Rothman has already signed a lease to occupy the entire 20,000 square foot second floor of the building for an initial lease term of 20 years. The retail component of the project will consist of 30,000 square feet captured in three 10,000 square foot buildings adjacent to the medical office building and is envisioned as service-oriented users to synergistically interact with the balance of the mixed-use development. In addition, Atkins Companies and Woodmont Properties closed title with an assisted-living developer to construct a 110-unit facility.

This joint venture represents an extremely experienced New Jersey-based ownership team. Atkins has been developing and operating commercial space in Northern NJ for over five decades.

In addition to significant residential and retail experience, Atkins has owned and developed well over one million square feet of office/medical office space, and currently has an existing office/medical portfolio of approximately 850,000 square feet. Woodmont Properties is a regional real estate company known for developing luxury multifamily, mixed-use neighborhood communities and commercial properties throughout New Jersey and Pennsylvania for over 50 years. Each community is carefully constructed from a distinctive blend of desirable locations superior architectural designs and the very best community amenities to ensure the highest quality living experience.

Previously, Mandelbaum Salsburg introduced Woodmont Properties to a 300 unit multi-family project in Mount Arlington, New Jersey which is nearing completion. Atkins Companies had owned and secured the approvals for the project and joint ventured it with Woodmont.

Mandelbaum Salsburg in the Community

Speaking Engagements & Events

Khizar A. Sheikh, Chair of the Firm's Privacy and Cybersecurity Practice Group, spoke as part of a panel on Cybersecurity for the Morris/Sussex chapter of the NJCPA Society. The event, took place Friday, January 20th in Rockaway, NJ and helped attendees navigate the evolving cyber security landscape from legal, financial, technical, in-house corporate and former law enforcement perspectives.

Khizar A. Sheikh also spoke at the Open Web Application Security Project (OWASP) NYC/NJ Cybersecurity meetup at Microsoft on February 8th. He presented on "Legal Issues Tied to Software Security and your Business."

Lauren X. Topelsohn, a Member in the Firm's Privacy and Cybersecurity, Commercial Litigation, and Labor and Employment Practice Groups spoke as a panelist at the renowned RSA Conference in San Francisco on February 17th. The panel, entitled "The Shell Game of Electronically Stored Information (ESI)," discussed case studies regarding successful and high-risk environments.

Elizabeth Lai Featherman, a Partner in the Firm's Intellectual Property Practice Group, presented to the Kenilworth Chamber of Commerce on Wednesday, March 8th about trademark and other intellectual property topics for businesses of all sizes.

Arla D. Cahill, a Member in the Commercial and Corporate Litigation Group and Co-Chair of the Firm's Special Needs Practice Group, presented a NJICLE Program on "Measuring & Proving Damages in Commercial Litigation Cases: How Much is My Case Worth?" for the NJ State Bar Association on March 24, 2017.

On April 2, 2017, Mandelbaum Salsburg attorneys, **Arla D. Cahill** and **Richard I. Miller** participated in the Access-ABILITY Resource Fair at Morris Museum. The Museum's Access-ABILITY Committee has partnered with the NJ Regional Family Support Planning Council to reach out to special needs families to provide them with information from disability service providers.

Dennis J. Alessi, Co-Chair of Mandelbaum Salsburg's Healthcare Practice will be speaking in June and August at the Dental Studies Institute of New Jersey's Ethics & Record-Keeping seminar. Mr. Alessi will speak about healthcare professional ethics, principals of ethical decision making, basic healthcare laws and regulations today and the legal and ethical benefits of good record-keeping.

Khizar A. Sheikh, presented on a panel for the Morris County Economic Development Corporation on Thursday, April 6th on "Secure Your Business: Protect Yourself and Your Employees – Learn Cyber Security Best Practices!"

William S. Barrett, the Firm's Co-CEO and Chair of the Professional Practice Transitions Group presented a Firm-sponsored seminar on "Exit Strategies for Business Owners" on May 10, 2017 at IlTulipano. The event featured a panel discussion with Mr. Barrett as well as Stephen Goldberg of Sun Business Valuations and Sun Mergers & Acquisitions as well as former business owners Jim Barry and Todd Sawyer. It will be moderated by Mandelbaum Salsburg Member **Peter A. Levy**. For more information, email llynch@lawfirm.ms

Mandelbaum Salsburg in the Community, continued

Casey Gocel, a Member of the Firm's Trusts and Estates and Corporate Litigation Groups presented to the Financial Planning Association of New Jersey on May 4th on New Jersey's Estate Tax and Planning Opportunities.

Michael A. Saffer, Co-Chair of the Firm's Banking Litigation and Consumer Finance Defense and Commercial and Corporate Litigation Departments, will present at the NJICLE Business Litigation Roundtable on June 2, 2017.

Charitable Endeavors

For the fourth year, **Arla D. Cahill** will participate as a charity bike rider in the 17th Annual Ride for Autism on June 10, 2017 in Lincroft, NJ.

On May 7, 2017, Mandelbaum Salsburg attorneys, **Casey Gocel, Arla D. Cahill** and **Richard I. Miller** participated in the 2017 Walk for a Lifetime in Verona, NJ, which supports the programs and services of Spectrum360 and allows them to provide vocational, social and life skills training to individuals with autism spectrum disorder and related disabilities.

Firm Accomplishments

We are excited to announce that twelve of our attorneys have been selected by their peers as New Jersey Super Lawyers for 2017 and two were named to the Rising Stars list for 2017! Congratulations to **Steven Adler, Joseph Discenza, Stuart Gold, Arthur Grossman, Robin Lewis, Charles Lorber, Barry Mandelbaum, Richard Miller, Mohamed Nabulsi, Joseph Peters, Michael Saffer, Lynne Strober** and our Rising Stars **Mara Codey and Casey Gocel.**

Michael A. Saffer was named to the Board of Trustees of the Kessler Foundation which is one of the largest not-for-profits in the world researching spinal cord injuries, MS and other physical challenges.

Congratulations to **Arla D. Cahill**, who was elected to the Board of Trustees for Employment Horizons. Employment Horizons has provided job skills training, placement and support to disabled and disadvantaged adults for 60 years.

Lynne Strober, Chair of the Firm's Family Law Department was named President of the Barry Croland Family Law Inn of Court through June 2017. She will be presenting seminars to the Inn members who are comprised of Family Part Judges, retired judges and attorneys who practice family law in March – June of this year.

Joseph J. Peters, Chair of the Firm's Personal Injury & Workers' Compensation group has been selected to serve as a Panelist by the presiding Judge of Middlesex County, Judge Happas, for the Middlesex County Bar Panelist Committee. The panel will review, conference, and counsel Plaintiff and Defense Counsels on personal injury cases set for Jury Trials in Middlesex County.

Publications

Mohamed H. Nabulsi, Co-Chair of the Firm's Healthcare Group and a Member of its Life Sciences Group participated in a Q&A for Becker's ASC Review on "Preventing & Combating Healthcare Fraud: An Ongoing Process for ASCs."

Lauren X. Topelsohn, recently authored helpful hints for employers trying to protect company information for a NJ Biz Triple Play feature.

On February 15, 2017, **Richard I. Miller,** was quoted in a *U.S. New & World Report* article entitled, "8 Tax Tips for People with Disabilities (And Their Caregivers).

Khizar A. Sheikh, recently published an article in the Primerus newsletter entitled "As VC money pulls back, enterprise blockchain may be taking off – solutions for the IoT data problem?"

Lynne Strober, recently authored an article in *The Matrimonial Strategist* on some of the unique family law issues facing both professional athletes and those married to professional athletes.

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