

THE FPT NEWS

“. . . useful information for clients and prospective clients.”

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Attorneys at Law

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2013 YEAR IN REVIEW

Another Busy Year

For Fischer Porter & Thomas, 2013 was another busy year in the trenches of litigation warfare and transactional mayhem for our clients. Looking back, we saw two significant trends. First, we observed a shift in parties' attitudes toward taking a case to trial, which dovetailed into an increased use of mediation in contested matters. We are proud to declare that many of our clients obtained favorable results. This shows that our aggressive and concerted efforts to prepare cases for trial and our readiness to try a case work out very positively for our clients.

Second, there was a significant uptick in our real estate practice, including commercial real estate transactions in New York and New Jersey. Similarly, there was an increase in New Jersey residential transactions and re-financing matters. So long as interest rates stay at their historic lows, we expect similar activity in 2014.

Here is a sampling of the diversity and depth of the matters Fischer Porter & Thomas handled in 2013:

For a real estate developer, we recovered millions of dollars through foreclosure and chancery actions and caused the dismissal of the borrower's bankruptcy petitions. Then, we successfully defeated the borrower's numerous appeals all the way through to the U.S. Supreme Court.

Hurricane Sandy caused \$1 million in losses to our client and his insurance carrier denied coverage. Our aggressive efforts convinced the carrier to pay up and the insurance broker to contribute to the settlement, too.

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CHANGES IN LLC LAW

Time To Consider Changes

New Jersey recently enacted a new version of the law governing Limited Liability Companies. The law became effective as to newly formed LLCs in March 2013, and will become effective as to all LLCs in March 2014. The changes make it more important than ever to have a written operating agreement that addresses key issues such as decision-making and what happens when a member leaves the company.

First, where the old law provided operating agreements must be in writing to be effective, the new law allows provisions of an operating agreement to be implied by past conduct or based on oral agreements. For example, a member might claim that because certain decisions had always been made by unanimous consent of the members in the past, similar decisions must continue to be made by unanimous consent in the future, rather than by majority or two-thirds vote of the members. Similarly, a member might claim the members orally agreed that only his signature or approval was necessary to process payments to vendors and that any attempt to remove that responsibility violates the oral agreement. Therefore, to be sure that the company operates the way you want it to operate, your operating agreement should be in writing and signed by all members. Your operating agreements should spell out exactly what decisions are to be made by majority vote or by supermajorities of 60%, two thirds or more, or by unanimous consent.

Second, where the old law provided (in the absence of operating agreement provisions to the contrary) that a member could resign and require the company to buy

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2013 REVIEW (continued from page 1)

While suffering through very hard times, a client fell behind in paying his state income taxes and faced criminal prosecution. We successfully negotiated a payment plan and caused the criminal charges to be dropped.

Our client owned two apartment buildings in New York City, and he decided to retire, relocate and continue in the same business on a smaller scale in his new location. We navigated through New York City's rent control and environmental regulations to get the sales transactions closed. Moreover, we engineered a 1031 exchange saving the client hundreds of thousands of dollars in taxes.

In a hotly contested shareholder suit involving a twenty-million dollar company, our clients successfully prevailed in forcing their disruptive and divisive partner to retire and accept a payout. In so doing, we helped the clients stabilize their banking and vendor relationships that had been undermined by the former shareholder.

Our client was driving on the Palisades Interstate Parkway ("PIP") when a truck lost its load of lumber. He suffered permanent injuries and lost significant income. In addition to the driver, we went after the department store that loaded the truck and the rental agency who told the driver that he was permitted to drive a truck on the PIP. All of the defendants agreed to a substantial settlement.

A client owns a fast growing group of restaurants. Working with a team of accountants and advisors, we guided our client through a difficult period of re-organization involving issues with payroll and sales taxes, liquor license regulations, and difficult lenders. The end result is a new and stable organization implementing its plans for further growth. - ALP

For more information or to learn about Fischer Porter & Thomas, P.C., and our firm's services and experience, see our website at www.fpt-law.com or call telephone number (201) 569-5959 and ask to speak with one of our attorneys:

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LLC CHANGES (continued from page 1)

out the member's ownership interest at a "fair value," the new law says a member who resigns is not entitled by law to be bought out at all. Rather, the withdrawing member continues to hold an economic interest but no longer has the right to vote or participate in managing the company.

In addition, the new LLC law contains its own "oppressed minority shareholder" provision. This is the legislative response to a recent appeals court decision that held that the corporate oppressed minority shareholder law does not apply to LLC's, despite the fact that trial courts had been doing so for decades. Thus, under the new law, a LLC member who believes he or she has been treated unfairly can ask the court to dissolve the company, appoint a custodian or provisional manager, or require a buyout of the member's interest, in the court's discretion and on terms to be set by the court. This will not necessarily be what the members think is fair.

How to deal with member disagreements and how to value a member's ownership interest for a buy-out are two of the most difficult questions to answer after a disagreement arises. Unless a buy-sell provision is included in an operating agreement, there is no easy exit from an LLC without proving to a court that continuing the business is impossible (not just unpleasant), or that a member is being substantially harmed by conduct of the other members. This can be difficult, time-consuming, expensive, and slow, and the business can suffer while the process runs its course. Although reaching agreement on buy-sell and valuation provisions can be difficult and contentious, it is far easier to do so while the members are on good terms than after disagreements arise.

Operating agreements can also specify procedures for buying out members who want to leave or from whom the other members want to separate. Procedures and valuations can be whatever the members agree should be done. Common valuation procedures include agreeing annually; appointing a third-party appraiser; or a process in which one member sets a value for the company and the other members have the option of buying his shares or selling him theirs based on the same value. The members are always free to negotiate another solution, but the operating agreement should provide a "default" solution.

Remember the basic principle: it is better to make a written agreement when members are getting along than to litigate over recollections of oral agreements and past practice after a disagreement arises. - AEA

THE NEW JERSEY TORT CLAIMS ACT WHEN YOU HAVE TO SUE A PUBLIC ENTITY; PART ONE

In the course of living our busy lives, we seamlessly interact with our state and local government – other than paying taxes – without too much thought or consideration. On occasion, however, our interplay with government can involve a negligent act on the part of a government employee, which can lead to you being injured such that you should be entitled to compensation. Not so quick! You can't just sue the "King," i.e., the government, as you see fit. You can sue, but you must follow certain strict rules and procedures to comply with what is commonly known as the New Jersey Torts Claims Act. *N.J.S.A. 59:1 et. seq.* The failure to comply with Tort Claim Act will result in your claim being denied.

When you need to sue a non-government entity (or person) for personal injury, your primary deadline is the two-year statute of limitations. In other words you must file suit within two years of the incident or be forever barred from filing suit. Law suits against public entities must also be filed within the statute of limitations applicable to the specific government body, but the Tort Claims Act requires you to do things almost immediately after the incident in which you were injured.

Under the Tort Claims Act, you must notify the government body that you have a claim **BEFORE** you are allowed to file a lawsuit. This is called the Notice of Claim, and it must be received by the governmental body within 90 days of your incident. You must give the Notice of Claim to the governmental body whose employee injured you. If you do not know the negligent employee's governmental employer, you need to find out. If you are not sure, you may send the Notice of Claim to several governmental bodies.

A Notice of Claim is straightforward to prepare. Under the Tort Claims Act, it is a written notice - a letter is sufficient - with your name and contact information (and that of anyone else injured); the date, place, and description of the incident; a description of the known injuries; the name of the government entity and of each of the employees involved; the amount you claim for your injuries and lost income (to the extent known) along with the computations leading to that amount; and the signature of each claimant. The Notice may be hand delivered to the government body or sent by certified mail so long as it is within the 90 days of the incident. Keep copies of everything you

send and keep the proof of the delivery or mailing.

Do **NOT** wait to the last minute to prepare and send the Notice of Claim. The reason is simple. The Tort Claim Act permits government bodies to require you to complete another form that is particular to the governmental body you seek to sue and typically requires a lot more information such as medical records, wage and income information, and the like. This additional information must also be provided, and it is best to provide it within 90 days of the incident giving rise to your claim.

Unless you comply with the 90-day Notice of Claim requirements, you can be barred forever from recovering monies to compensate you. Although there is a procedure for filing a late Notice of Claim up to one year after your incident, to succeed with a "late" Notice requires proof of "extraordinary circumstances" justifying your late notice, such as you were in coma for the 90 days after the incident. Although not required, we recommend that you seek legal counsel to assist in the preparation of the Notice of Claim to make sure you have followed the procedure and have set forth all possible legal claims.

After you file a Notice of Claim, you must wait six months before you can file your lawsuit. This is the "waiting period." During the waiting period, the government body notifies the employees involved and its insurance carrier, conducts its own preliminary investigation, and evaluates your claim. We use the waiting period to settle on the appropriate statute of limitations, to conduct further factual and medical investigations, and to more fully develop the legal theories of liability. In the rare event that the government body and its insurance carrier believes your claim is valid, they may reach out to you or your attorneys to discuss a settlement.

Finally, after the six-month waiting period expires, your law suit can be filed and prosecuted through the court system. Again, one must be mindful of the correct statute of limitations. For the most part, the same two-year statute of limitations for personal injury claims that applies to private entities and individuals also applies to New Jersey public entities. A significant exception is the Port Authority of New York and New Jersey, which has only a one-year statute.

In our next issue, we will discuss when public entities and their employees may be immune from suit and the exceptions to such immunities. - ALP

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In CASE you were wondering . . . Interesting or Quirky Court Decisions

The Former Spouse. You cannot sue your ex-spouse for negligent supervision when your teenage son has a party in your home while you are away and causes damage and theft to your property. *Paleski v. Cali* (App. Div. 2014).

Golf Injury. If injured while playing your favorite sport, you must prove recklessness or intent to hurt you. Thus, a jury will decide whether a golfer's failure to yell "fore" when taking a provisional shot (or mulligan) was reckless. *Corrino v. Duffy* (Essex Law Div. 2014).

Search of a Home? Just because the windows are broken, the front door is padlocked from the outside, and the electric meter is missing does not mean a home is abandoned. That's a subjective belief. A warrantless search by police requires objective proof. *State v. Brown* (App. Div. 2014).

Local Political Name-Calling: Calling a fellow resident an "enemy" of the town is not defamatory. To be defamatory, the insult must be more precise, i.e., capable of being proved true or false. *O'Boyle v. Isen* (App. Div. 2014).

Whistleblower Law: When taken together, never carrying out numerous threats to fire an employee and instead declining to renew the employee's annual employment contract, can constitute retaliatory action for the employee's reporting of safety violations to government agencies even though there may be legitimate budgetary reasons not to renew the contract. *Dukin v. Mt. Olive Board of Education* (App. Div. 2014).

Child Abuse: Leaving your 19-month-old child locked in the car with the motor running and running into a store falls within the statutory definition of abusing your child. It is a failure to

properly supervise your child such that the child is subject to a substantial risk of harm. *Department of Children and Families, Division of Child Protection and Permanency v. E.D.-O.* (App. Div. 2014).

Gun Permits: An applicant cannot be denied a gun permit because he failed to complete forms mandated by a municipality. Only the forms required by the State are permitted; the municipality cannot mandate more. *I/M/O Application of Perez*, (App. Div. 2014).

DWI Stops are Public Records: You may obtain the video recording of a DWI stop involving another citizen under the Open Public Records Act. *Monson v. Township of Mansfield*, (Law Div. 2014).

Job Hunting: An employer's commercial free speech rights are not violated by a New Jersey statute, NJSA 34:8B-1, which prohibits employers from publishing want ads stating that applicants must be currently employed for their applications to be considered. *New Jersey Department of Labor and Workforce Development v. Crest Ultrasonics* (App. Div. 2013).

No Favoritism When Going Out of Business: The New Jersey version of the Uniform Fraudulent Transfer Act, N.J.S.A. 25:2-20 to -34, prohibits company insiders from paying themselves, stiffing outsiders, and then closing the company down when they know or should know the company is insolvent. This is true even though the money paid to the insiders was for legitimate compensation and was actually past due. *Middlebrooks v. Bondar* (App. Div. 2014).

Beyond the Grave, Child Support Flows Where? The estate of the former spouse gets the arrearage payments for child support after the former spouse dies and the child (for whom the child support was ordered years before) is emancipated even though this means that under the State's intestacy laws the money is likely to go to someone other than the child. *Roder v. Roder* (App. Div. 2013) - ACT

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