BRACH EICHLER LLC
Counsellors at Law

Litigation Quarterly Advisor

WINTER 2022

In This Issue:

The Impact of Technology, Videoconferencing, and Remote Hearings on the Lawsuit Process

The COVID-19 pandemic has necessitated operational modifications in nearly every industry, and the legal sector has been no exception. On January 7, 2021, the New Jersey Supreme Court entered an Order to implement virtual jury trials, requiring the parties' consent. Since then, virtual jury trials have been conducted routinely throughout the state.

Current and available technology has facilitated virtual jury trials, with little disruption or delay. For example, in *ResCap Liquidating Tr. Action v. Primary Residential Mortg., Inc.,* No. 0:13-cv-3451 (SRN/HB), 2020 WL 1280931, at *2 (D. Minn. Mar. 13, 2020), the court held that "given the speed and clarity of modern videoconferencing technology, where good cause and compelling circumstances are shown, such testimony satisfies the goals of live, in-person testimony and avoids the shortcomings of deposition testimony.

Attorneys and their clients should evaluate this option and determine whether a virtual trial is plausible, taking into consideration outside distractions to jurors and whether they will remain engaged. Equally important, protocols need to be set, by stipulation of the parties or by order of the court, if the parties cannot reach an agreement.

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General Counsel: Beware of the Possible Loss of Attorney/Client Privilege

On May 3, 2021, the Delaware Court of Chancery, a court that has historically handled corporate-type matters, issued a ruling in *Tornetta v. Musk*, C.A. No. 2018-0408-JRS, further questioning the attorney-client privilege for general counsel and other in-house attorneys. The ruling raises concerns regarding when internal communications between counsel and company personnel are privileged and confirms there is not a blanket protection for such communications, particularly when adverse interests exist among counsel and executives of the organization.

The Court concluded that because Musk was adverse to Tesla's in-house counsel with respect to the negotiation of his compensation package, any applicable attorney-client privilege was waived. Therefore, the plaintiff was permitted to review communications between Musk and Tesla's in-house counsel regarding the compensation package, regardless of whether legal advice was contained within those communications.

In-house counsel should be mindful of when their communications may become discoverable. Protecting confidential or sensitive communications may often require consultation with outside counsel, and prefacing that an email, for example, is a "confidential attorney-client privileged communication." The litigation attorneys at Brach Eichler can assist in-house counsel on how best to protect sensitive or confidential internal communications from disclosure.

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The "Liquidated Damages" Clause – What Is It and How It Can Reduce Litigation

Including a liquidated damages clause in your next contract can be a powerful tool to set a pre-determined damages amount in case of breach by the other party – and to avoid costly, time-consuming litigation. Using a liquidated damages clause effectively requires an understanding of what liquidated damages are to avoid a court ruling that the clause is an unenforceable penalty.

More specifically, liquidated damages are a specific, predetermined amount that contracting parties agree will be the damages paid in the event of a breach because the calculation of damages is difficult to prove. However, this amount must have some relationship to the actual damages suffered by the non-breaching party. Because liquidated damages provisions in contracts save time for courts, jurists, parties, and witnesses, and reduce the expense of litigation, New Jersey courts (and most other state and federal jurisdictions) consider liquidated damages provisions presumptively valid as long as the amount is fixed and the damages amount is reasonable in light of the harm caused by the breach. Courts will not enforce liquidated damages provisions that are so large as to result in a penalty, and such clauses are not enforceable in New Jersey (and most states).

Please note, a liquidated damages clause in your next contract could be an effective tool to not only solve the headache of a potential breach but also an ideal way to avoid the expensive and time-consuming litigation process, especially where the damage caused by a breach is hard to calculate or difficult to prove.

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Contractors Need to Take Note of the Strength of the Prompt Payment Act

In recent years, the Prompt Payment Act and its attorney's fees provisions have been scoffed at by non-paying contractors. Recently, the Trial Court, after a two-day trial, ruled against a non-paying contractor, finding that it violated the Prompt Payment Act. The Trial Court awarded the subcontractor a small portion of its attorney's fees and costs incurred in bringing a claim against the general contractor, a portion that the Court found was proportional to the claim.

However, the Appellate Division disagreed with the limitation on the amount of attorney's fees and costs awarded and found that proportionality does not apply to an award of attorney's fees under the Prompt Payment Act. The Appellate Division remanded the case so that the trial court could evaluate the full amount of legal fees and costs incurred by the subcontractor in bringing the claim.

This Appellate Division's analysis and refusal to limit the award of legal fees should give contractors pause in withholding payments, without documented justification.

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The Appellate Division Clarifies Standards Governing Final and Interlocutory Orders

On May 27, 2021, in *Lawson v. Dewar*, 2021 WL 2148885, *1 (App. Div. May 27, 2021), the Appellate Division held that courts must apply a more liberal standard when evaluating reconsideration of interlocutory orders. Specifically, Rule 4:42-2 allows courts to grant reconsideration in their "sound discretion" and in the "interests of justice" at any time during the case. Accordingly, a litigant seeking reconsideration of an interlocutory order does not need to establish something "new" occurred or that the prior ruling by the court was "arbitrary, capricious, or unreasonable" to succeed, and is not bound by the 20-day filing deadline.

This decision should give trial court judges who typically seek to "move their cases" some leeway to extend discovery and other pre-trial deadlines in cases that require it, due to the COVID-19 pandemic or otherwise.

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Member Relationships Within a Limited Liability Company

A recent New Jersey case will be of interest to business owners who operate a limited liability company ("LLC").

The case *Sayegh v. Kalaba*, 2021 WL 2879128 (App. Div. 2021), involved a LLC with two equal members. The defendant, Kalaba, was alleged to have unilaterally sold LLC property without consulting his co-member, the plaintiff. Judgment for compensatory damages was awarded to the plaintiff, but since the trial court denied his claim for punitive damages, he appealed. The trial court's findings of wrongdoing clearly and convincingly demonstrated Kalaba's egregious conduct, his deceitful transfer of LLC assets to benefit only him, as being a deliberate act with knowledge of harm to his co-member. On this basis, the Appellate Division remanded the matter to the trial court for a determination of the amount of punitive damages to the plaintiff.

This case highlights the importance of keeping the assets and the property of an LLC separate from an individual member's assets. A member of an LLC has a fiduciary duty not to treat the property of the LLC as personal property. Failing to do so could subject a member not only to significant monetary damages, it may subject the member to an award of punitive damages.

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The Look Ahead to What's in Store in 2022

Medical Providers Challenge "No Surprises" Legislation

Hospitals and other healthcare providers in New Jersey will be interested in a recent lawsuit filed by the American Medical Association and American Hospital Association, among other healthcare providers (together the "Providers"), against the U.S. Department of Health and Human Services ("HHS") over its newly announced rules in connection with the "No Surprises Act." The suit was filed December 9, 2021, in Federal District Court for the District of Columbia.

The "No Surprises Act" was enacted by Congress in order to address so called "surprise billing," where patients are surprised and financially burdened by high medical bills that were not covered by insurance because the provider was "out-of-coverage." Congress chose to address the dilemma by legislating that a patient who does not consent to out-of-coverage care can only be charged the cost-sharing requirement that would have applied if the provider had been in-network. That leaves the dilemma of how much of the healthcare provider's bill will be covered by the insurer, in the absence of a negotiated rate. In order to resolve the inevitable disputes between healthcare providers and insurers, Congress set up a baseball style arbitration system. Both the insurer and healthcare provider would submit their best offer, with justification, and the arbitrator would choose between them. Congress provided a list of various considerations for the arbitrator to review in making his or her determination.

The Providers brought suit to prevent the implementation of HHS's new rules governing these arbitrations. Substantively, the Providers specifically take issue with HHS's rule that establishes that arbitrators must choose the offer closest to the qualifying payment amount ("QPA"), which is determined based on the insurer's average rates. The Providers argue that privileging the QPA puts a thumb on the scale for insurers. The Providers express concern that reliance on the QPA would result in downward pressure on rates paid to healthcare providers that could undermine the viability of healthcare providers and thereby the quality of the services that they are able to provide to the community.

The resolution of this dispute will determine the proper procedure for these arbitrations, and will have a significant effect on the prices New Jersey healthcare providers can charge for out-of-network care as part of these No Surprises Act arbitration, and may also effect negotiations for in-network rates. The Providers have requested injunctive relief, in order to prevent HHS's rules from going into effect.

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ATTORNEY SPOTLIGHT

Get to know the faces and stories of the people behind the articles in each issue. This month, we invite you to meet Member **Charles Gormally** and Associate **Autumn McCourt.**

Charles X. Gormally

Charles Gormally counsels clients with complex business matters, challenges to governmental regulation, contract disputes, and cannabis industry matters. Designated as a Certified Civil Trial Attorney for the past 25 years by the New Jersey Supreme Court, Charles regularly engages in jury and non-jury trials and arbitration proceedings in the tri-state region on behalf of both plaintiffs and defendants. Charles is admitted to the bars of New York, New Jersey, and California and a former Mayor and Councilman in Mountain Lakes.

Whenever possible Charles likes to get off the grid. Usually, this means heading to the backcountry in a national park. He has hiked extensively in the Grand Canyon and the Copper Canyon in Mexico, often in areas without encountering anyone else in the wilderness. At home, Charles is an avid gardener and finds satisfaction in growing heirloom tomatoes and other vegetables and crops from seed to harvest.

Autumn M. McCourt

Autumn McCourt represents corporate and individual clients in litigation involving both civil and criminal matters in state and federal courts. Known for her tenacity and thorough approach, Autumn has significant experience representing clients in a wide variety of matters. These include business contract disputes, consumer fraud actions, employment disputes, construction disputes, shareholder disputes, unfair competition, healthcare fraud involving Medicare and Medicaid, insurance fraud, real estate disputes, personal injury, legal malpractice, landlord/tenant disputes, DUI defense, expungements, and possession charges.

In her spare time, Autumn enjoys spending time with her family, serving as Treasurer and Counselor of the Worrall Mountain Inn of Court, and serving on the New Jersey Board of Court Reporters.

WINS AND SIGNIFICANT BRACH EICHLER LITIGATION DEVELOPMENTS

Joseph M. Gorrell won an injunction against Raritan Bay Medical Center (the "Hospital") for Wageeh W. Azer, M.D., requiring the Hospital to reinstate Dr. Azer's Medical Staff Privileges. Dr. Azer had been subjected to a summary suspension of his privileges in May 2021, but a series of committees within the Hospital determined that his privileges should be reinstated. Finding that Dr. Azer's rights under the Medical Staff Bylaws had been denied, and finding that Dr. Azer would suffer irreparable harm, Judge Vincent LeBlon (Superior Court of New Jersey, Middlesex, County) ordered the Hospital to reinstate Dr. Azer.

On behalf of Novel Drug Solutions, LLC and Eye Care Northwest, PA (NDS-ECNW), **Charles X. Gormally** and **Thomas Kamvosoulis** won a $2.75 million jury verdict on November 5, 2021, against Harrow Health (HROW), a publicly-traded company, in the United States District Court for the District of Delaware. The jury determined that NDS-ECNW conveyed assets and technology in connection with both their injectable formulation and topical formulation (i.e. eye drops). The jury also concluded that Harrow Health had breached the APA by continuing to manufacture and sell products that utilized their proprietary technology—a method for combining drugs that ordinarily do not mix into a stable solution utilizing a chemical known as poloxamer. NDS-ECNW contended that they were entitled to restitution damages for the period of their continued sale after the date of termination. Shortly after the verdict, the parties entered into a confidential settlement resolving all claims between them.

Keith Roberts and **Anthony Juliano** secured a $1,492,593.84 personal injury settlement for a client who was involved in an automobile accident. The client was on her way to work when the defendant made an unsafe left turn, causing a collision with the client's vehicle. The client sustained cervical and lumbar disc herniations; knee ligament damage; and foot and ankle fractures. The client underwent surgeries on her spine and knee, including an anterior lumbar interbody fusion. Mr. Roberts and Mr. Juliano were able to settle the lawsuit for the defendant's full remaining insurance policy limit without the necessity of a trial.

Rose Suriano, Stuart Polkowitz, and **Robyn Lym** successfully represented a global company in a declaratory judgment action against its insurer, resulting in a favorable settlement for the client. Brach Eichler's client sought payment for an insurance claim arising from an underlying lawsuit in which the client was sued as a defendant. The client's insurer initially agreed to furnish a defense under a reservation of rights, but shortly thereafter ceased reimbursements and payments of newly incurred defense fees and costs. The dispute involved whether certain policy exclusions and conditions precluded coverage based on the facts and circumstances of the underlying claim and the client's renewal application. Following several years of litigation, and the exchange of voluminous discovery and depositions, a favorable settlement was reached for the client.

Rose Suriano and **Robyn Lym** successfully represented a subcontractor that was sued by the general contractor retained to perform construction work by the owner. The general contractor sued the subcontractor claiming the subcontractor overcharged for the work performed at the property. The subcontractor filed counterclaims against the general contractor because it was not paid for its work on the project. After addressing pre-trial motions, the matter was successfully settled resulting in the general contractor paying the subcontractor for its work on the project.

We are pleased to welcome **Ryan Kotler**, Associate and **Joanna Zwosta**, Associate to our Litigation Practice.

Brach Eichler *In The News*

Brach Eichler has been named a **2022 Best Law Firm in New Jersey by Best Lawyers and U.S. News & World Report!** The Firm ranked in Metropolitan Tier 1 for the following practices: Commercial Litigation, Corporate Law, Family Law, Healthcare Law, Litigation - Real Estate, Personal Injury Litigation - Plaintiffs, Real Estate Law, and Trusts and Estates Law.

On January 12, **John D. Fanburg, Isabelle Bibet-Kalinyak, Carol Grelecki,** and **Keith J. Roberts** hosted a webinar, "The No Surprises Act: What Providers Need to Know." Watch the on-demand webinar.

On December 16, **Charles Gormally** was quoted in *Montclair Patch* discussing Montclair's Rent Control Law and the NJ Court's recent opinion.

On November 29, **Rose Suriano** and **Mark Critchley** issued a client alert, "Recent New Jersey Appellate Division Opinion Provides Guidance for the Enforceability of Online Contracts."

On November 23, *Law360* discussed **Bob Kasolas'** recent case where his surf apparel client filed suit against a cannabis company alleging it infringed 'Jetty' IP.

A special thanks to Eric Alvarez and Rebecca Kinburn as the Winter Litigation Quarterly Advisor editors.

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