

# The Precedent

Winter 2008-09

Volume 1, Issue 1



## Enjoy Our Inaugural Issue

This is our inaugural issue of a quarterly



Tony Lamm, Esq.

newsletter for our friends and clients that will strive to keep you in-

formed of all recent decisions, current news, and interesting developments in the practice of law in the areas in which we specialize. I have the privilege of practicing law with some of the brightest and most talented attorneys I have encountered in my professional career and I think you will agree with me when you read *The Precedent*. In this issue, and in the coming

months, I hope you will find articles that are informative, interesting and fun. If there is a topic you would like to know more about, feel free to contact us and tell us. We appreciate your feedback and we hope you will enjoy reading *The Precedent* as much as we enjoy bringing it to you.

Tony

## Calendar of Events and Special Points of Interest

- Lamm Rubenstone partners Sherry Lowe, Jennifer Gould and Tony Lamm were featured speakers at the annual ELFA convention in New Orleans in October
- We welcome our newest colleague David M. Siegel, an attorney specializing in Trusts and Estates
- The second annual Lamm Rubenstone golf outing in October at Heron Glen G.C. in New Jersey was a well-attended great success.

## Trademark Law-The Big Game

### *El Juego Grande*

Stephen Levin, Esq.

*Lamm Rubenstone LLC*

On December 9, 1969 the National Football League ("NFL") was granted a trademark for SUPER BOWL® in international class 41 for entertainment services in the nature of football exhibitions (Reg. No. 882283). The applicant asserted the first use of that mark in commerce occurred on January 15, 1967. Advertisers wishing to make an association between the annual Super Bowl and some product or service

offered by the advertiser must first obtain a license for such usage from NFL Properties, naturally at considerable expense.

Not every pretzel advertiser thought that paying some exorbitant fee to the NFL for the right to suggest that we should stock up on their product when we hunker down to watch the Super Bowl was appropriate, in fact some thought it might be downright un-American. It was after all the Super Bowl, the granddaddy of all big games.

Consequently, advertisers not wishing to pay the NFL for the right to say Super Bowl in their commercials started referring to "The Big Game." Beginning every December

advertisers would start making references to "the big game" as a euphemistic reference to the Super Bowl. Commercials would incessantly hound you to buy your big screen TV for "the big game" which you could pick up with your brand new truck just in time for "the big game."

Predictably, the NFL took a dim view to the loss of revenue this posed. Not content with advertisers doing their own end around the obligation to pay the NFL for the use of the term Super Bowl, they decided to fight back. So, on January 31, 2006, NFL Properties asked the Patent and Trademark office for a trademark for THE BIG GAME.

See *Grande*, p.2

## Inside this issue:

Say "No" to Limited Tort	2
Preventative Documentation to Assist Risk Managers	3
Contact Information	6

**No Need to Share.**

**Get your own copy of *The Precedent*.**

**Just email us.**

**We're on the web.**

[www.lammrubenstone.com](http://www.lammrubenstone.com)

© Lamm Rubenstone LLC 2008  
All rights reserved.

## Grande

The Patent and Trademark office examiner concluded that he had no reason to deny the NFL a trademark for THE BIG GAME and thus cleared the way for the NFL to claim exclusive ownership to this mark. Fortunately, the Patent and Trademark office is but one hurdle an applicant must clear in order to obtain a trademark. After the Patent and Trademark office examiner gives it his/her blessing, the mark must be published for opposition in the Trademark Gazette where anyone can file time restricted opposition proceedings to the proposed grant of trademark rights. The list of large corporations opposing registration of the mark was impressive and too long to list here. As a consequence of this opposition, NFL Properties chose to abandon its effort to obtain a monopoly on the use of the mark THE BIG GAME. This was followed by a food company filing an application for the same mark which, not ironically, was opposed by NFL Properties. Fortunately, the NFL will not obtain a registration for THE BIG GAME or we would hear TV commercials promising to deliver that big screen in time for El Juego Grande.



Stephen Levin

*Stephen Levin, a partner in the firm, concentrates his practice on business, corporate and commercial transactional law, mergers and acquisitions and complex litigation. Mr. Levin heads the firm's intellectual property and entertainment law practice.*

## Say "No" to Limited Tort

Stephen David, Esq.  
Lamm Rubenstone LLC

When you purchase auto insurance in Pennsylvania, you have a choice of selecting full tort coverage over limited tort coverage.

Full tort coverage means that if you're injured in an auto accident through the fault of another, you can make a claim for your pain and suffering, in addition to other damages. Limited tort coverage means that you can only make a claim for your pain and suffering if your injuries are "serious." The problem is with how the law defines "serious" injuries.

According to the law, your injuries are "serious" if they fall in one of the following three categories: (1) if they kill you, (2) if they "permanently" and "seriously" disfigure you, or (3) if they result in the "serious impairment of a body function."

Now, thankfully, most auto accidents do not cause death or serious and permanent disfigurement, so the question is what injuries qualify as a "serious impairment of a body function" to allow an accident victim with limited tort to make a claim for pain and suffering.

The answer is that not many injuries meet that standard, at least according to a number of recent court decisions. Some cases where our courts have found no "serious impairment" and denied limited tort claims have included herniated discs and brain injuries.

Unfortunately, the courts are no longer focusing on the injuries themselves. Instead, they question whether the injuries can be proven objectively, and to what extent and for what duration the injuries have negatively impacted on your life. If the injuries do not disable you from working, or only have a limited impairment on your life's activities, then do not expect your limited tort claim to succeed.

Although the insurance premium for full tort coverage is higher than for limited tort, in most cases the difference, especially when spread over a year, is not significant. And we have found through experience that virtually every accident victim who contacted us with limited tort coverage was sorry not to have chosen full tort.

The fact is that limited tort coverage does not give you the protection you deserve. Making a claim for pain and suffering with limited tort coverage is always difficult, and usually impossible.



Stephen David

*"The fact is that limited tort coverage does not give you the protection you deserve. Making a claim for pain and suffering with limited tort coverage is always difficult, and usually impossible."*

## Preventative Documentation to Assist Risk Managers

**Anthony L. Lamm, Esq.**

*Lamm Rubenstone LLC*

Frequently in precarious economic times or with a marginal credit, credit managers come to their legal departments or outside counsel and pose this question, "How can I do this deal, but tie it up so that the Lessee has no way to get out of its obligation?" Many of us in the legal profession have been asked this question. To provide guidance in these circumstances, one of the most helpful ways to respond is to inquire of the credit manager, what are the particular terms of the deal and how are they expressed in the proposed Lease Contract such as:

- What is the collateral;
- What is the nature of the Lessee's business – is there any other equipment or other assets that could serve as additional collateral for the deal;
- Are there guarantors;
- Is there a purchase option; and, if so, what are its terms; is it a guaranteed purchase option at a negotiated purchase price, fair market value or nominal purchase option price; is there a program agreement or assignment between the initiating Lessor if there is one or an agreement
  - between the vendor or supplier and Lessor (that might provide for recourse in the event of the default by the Lessee);
- Is there an escalating rent payment clause for the period commencing as of the expiration date of the original lease term;
- Does the jurisdiction clause of the Lease provide for commencing a lawsuit for the repayment of the Lease or the recovery of the equipment in Lessor's local jurisdiction; and
- To the extent that the Lessor's jurisdiction permits consent to judgment or confession of judgment clause; would the Lessee agree to include this type of provision in the lease.

*"...the Lessor may learn that there is a means of recourse or remedies available to it that can be used as additional protection in a difficult economic climate or with a struggling Lessee."*

These type of questions and a discussion involving documenting in advance how to provide for a remedy in circumstances that are not anticipated is beneficial because the Lessor may learn that there is a means of recourse or remedies available to it that can be used as additional protection in a difficult economic climate or with a struggling Lessee. Common sense compels the Lessor to understand that if the Lessee is a marginal credit risk, then it is likely that other financial sources will also require additional precautionary remedies. Therefore, asking for provisions as the ones listed above should not offend or surprise a Lessee under these circumstances.

## Preventative Documentation

Some perspective in providing for additional credit protection must be given to the business deal itself since if the term of the Lease or the structure of the residual does not meet accounting principals and guidelines, your Lessee may determine that the lease structure while attractive, does not meet its business purposes. One of the methods, therefore, to introduce credit support in a deal without altering or making the business terms too restrictive is to include additional protections through the language of the lease or loan document and expanding the default section of the contract.

*“One of the methods, therefore, to introduce credit support in a deal without altering or making the business terms too restrictive is to include additional protections through the language of the lease or loan document and expanding the default section of the contract.”*

There are numerous occasions that I can recount providing counsel to credit managers and collection professionals who were experiencing “forty-five day remorse” where a Lessee, whose credit caused the manager or other professional serious concern at the outset, defaulted on the first payment or leaked some piece of information that suggested serious trouble. When faced with a problem like this, I first ask the credit manager or credit professional to see the default provisions of their lease. Sometimes it is possible to declare a default under the lease if a particular event has occurred that was addressed in this section of the lease. A strong argument in court can always be made that specific events of default (rather than broad and general language) were subject to negotiation by their particular nature and, therefore, are enforceable. Some of the provisions I like to use, include, a provision making it a breach of the lease if the ownership of a company changes in whole or in part; a provision that makes it an event of default where a breach of any other agreement between the Lessee and Lessor has occurred; a provision, that any representation, warranty or signature to the lease made by any guarantor of Lessee’s obligation or given in any document or delivered to Lessor in connection with the lease which turns out to be false or misleading in any material respect when made; a provision that any breach by or the insolvency of any guarantor to the lease constitutes an event of default; and, a provision making it an event of default if the Lessee suffers a material adverse change in its financial condition, business, operations or assets and, as a result, Lessor deems itself or any of its equipment to be insecure. These are just examples of literally dozens of specific events of default that become useful when the credit manager or other risk professional arrives at your office and requests your advice how to terminate a lease with one of his or her customers and pursue the recovery of the debt and/or equipment.

Many times I counsel clients to include terms and conditions for the lease documentation that require the Lessee to provide specific financial information applicable to the Lessee's type of business or industry, in addition to, financial statements, balance sheets, income and cash flow statements and tax returns. It is usually recommended that a specific date for when this information should be provided be required in the lease. Moreover, the use of specific financial covenants that allow the Lessor an opportunity to periodically evaluate the performance of a Lessee in determining whether Lessee (in Lessor's opinion) is capable of maintaining payments for the equipment is a very effective means of providing an escape clause so long as the covenants are reasonable and consistent with Lessee's credit application and other financial information provided to Lessor.

There are many other customer specific covenants and representations that can be



## Preventative Documentation

included in the actual lease document or a rider that can benefit the Lessor when leverage is required to compel a Lessee's performance with the terms and conditions of the agreement. The risk manager or credit professional must spend time with the company lawyer or outside counsel to describe in detail the nature of Lessee's business in order to draft such custom covenants. For example, in learning that the Lessee is in the business of re-letting leased equipment to Sub-Lessee (if this kind of business arrangement is permitted by Lessor), a covenant can be prepared which would grant to the Lessor the right to collect all of the Lessee's payments from its Sub-Lessees (and requiring the Lessee to provide Lessor with its customer locations, telephone numbers and contacts).

Another example of a specific provision that can add leverage for equipment recovery is a clause known as Judgment for Possession. This particular provision is similar to a Confession of Judgment for lease payments, but as its title suggests, entitles the Lessor upon a default by the Lessee to enter an uncontested judgment for possession of the leased equipment. Even though there may be some practical issues that can arise in implementing this kind of judgment in different jurisdictions, a provision such as this that provides for a consensual seizure of equipment gives the Lessor a stranglehold on the Lessee.

Also, a Maintenance Rider to a lease, which requires a Lessee to permit interim inspection and establishes maintenance criteria for parts and structure of the equipment is a useful provision. Much information can be learned about the Lessee's general business situation from an interim inspection and like most of the other terms and conditions that I have suggested, impart at the inception of the lease that, as the Lessor you are going to be monitoring the Lessee's performance which ultimately can result in the Lessee deciding to pay you before someone else.

*Anthony Lamm is the managing partner of Lamm Rubenstone LLC. A nationally renowned expert on equipment leasing law he has written scores of articles on topics related to leasing law and commercial transactions. He has been a frequent lecturer at leasing industry events for the Equipment Lease and Finance Association, the United Association of Equipment Lessors, the Eastern Association of Equipment Lessors and others. Mr. Lamm has been named a Pennsylvania Super Lawyer in the area of creditors' rights and bankruptcy.*

## Say "No"

You owe it to yourself, and to your family members living with you, to provide full tort coverage, so if you are ever injured in an auto accident through the fault of another, you can make a monetary claim for your pain and suffering.

*Stephen David, a partner in the firm, concentrates his practice in personal injury law and heads the firm's personal injury department. Mr. David graduated magna cum laude with departmental honors in Philosophy from Temple University. He was also awarded a Master's degree for his graduate studies in Philosophy at Temple University and the Hebrew University in Jerusalem. He received his J.D. degree from the Temple University School of Law.*

*“a provision such as this that provides for a consensual seizure of equipment gives the Lessor a stranglehold on the Lessee.”*

Our Practice Areas:

Banking Law  
Creditors' Rights  
Complex Litigation  
Equipment Leasing Law  
Bankruptcy  
Commercial Litigation  
Mergers & Acquisitions  
Corporate Law  
Business Organizations  
Intellectual Property  
Employment Law  
Trusts & Estates  
Transactional Law  
Personal Injury

**Contact Information**

Stephen David	215-244-2449	sdavid@lammrubenstone.com
David DeFlece	215-244-2450	ddeflece@lammrubenstone.com
George T. Faris, IV	215-244-2448	gfaris@lammrubenstone.com
Alan Gershenson	215-244-2467	agershenson@lammrubenstone.com
Jennifer D. Gould	215-244-2443	jgould@lammrubenstone.com
Mark S. Haltzman	215-244-2444	mhaltzman@lammrubenstone.com
Debra Klebanoff	215-638-9330	dklebanoff@lammrubenstone.com
Anthony L. Lamm	215-244-2464	alamm@lammrubenstone.com
Stephen Levin	215-244-2441	slevin@lammrubenstone.com
Sherry D. Lowe	215-244-2454	sdlowe@lammrubenstone.com
Alan M. Rosen	215-244-2452	arosen@lammrubenstone.com
Edward H. Rubenstone	215-244-2455	erubenstone@lammrubenstone.com
David M. Siegel	215-244-2458	dsiegel@lammrubenstone.com
Frank Schwartz	215-244-2468	fschwartz@lammrubenstone.com
Brian Smith	215-244-2469	bsmith@lammrubenstone.com

---

**We're on the web**

[www.lammrubenstone.com](http://www.lammrubenstone.com)

---

*Long Relationships,  
Total Dedication.*  
[www.lrtd.com](http://www.lrtd.com)

Lamm Rubenstone LLC  
3600 Horizon Blvd.  
Suite 200  
Trevose, PA 19053  
215.638.9330 voice  
215.638.2867 fax

Article suggestions?  
Stephen Levin, Esq.  
Publisher

215.244.2441 direct dial  
[slevin@lammrubenstone.com](mailto:slevin@lammrubenstone.com)

This newsletter is intended to be interesting and informative only. It is not intended to, and should not be relied upon, as legal advice. Please consult with one of our attorneys if you would like to engage our firm for specific legal advice for a particular matter.

BULK RATE

U.S. Postage

PAID

Langhorne, PA

Permit No. 85

Change Service Requested

