

A Property Rights Victory for Our Client Against the Railroad

Iur client, the MacDade Boulevard Mall took on its neighbor, CSX Transportation, Inc., in a dispute over CSX's failure to control its storm water runoff. The dispute ended up before the Third Circuit Court of Appeals, which in a precedential two-to-one decision ruled in the Mall's favor.

For over thirty years, a berm separating the Mall's property from the railroad track kept CSX's storm water from spilling over and flooding the Mall property. For the past several years, however, CSX's storm water began to pool along the railroad track, and eventually cut a hole in the berm. CSX's storm water then channeled through the hole, causing erosion and flooding damage to the Mall.

Since state law prohibits landowners from collecting storm water and point discharging it onto an adjoining property, the Mall demanded that CSX resolve the problem at its end. CSX's response was nothing short of brazen. It decided to install a concrete spillway -- on the Mall's property -- to better channel its storm water into the Mall's private drainage system. The Mall quickly called a halt to CSX's plan and demanded that CSX put forth an engineered solution. CSX refused, and the Mall brought suit in

federal court, asserting claims of negligence and trespass against the railroad.

Before the trial court, CSX argued that it was absolutely immune from liability under the Federal Railway Safety Act, 49 U.S.C. § 20106. The Act provides that state laws relating to railroad safety continue in force until the Secretary of Transportation prescribes a regulation "covering" the subject matter of the State requirement. The Secretary prescribed a regulation requiring railroads to maintain their drainage facilities and keep them free from obstruction "to accommodate expected water flow for the area concerned." 49 C.F.R. § 213.33. CSX argued that this regulation covered the subject matter of the Mall's claim and therefore the Mall's state law claims were preempted. The trial court agreed. The Mall appealed.

In a ground breaking decision, the Third Circuit Court of Appeals reversed the trial court, holding that the Mall's claims were not preempted. The Third Circuit explained that the federal regulation, Section 213.33, merely touches upon and does not subsume the Mall's state law claims. The Third Circuit held that the federal regulation did not authorize CSX to



Marc B. Kaplin

Marc B. Kaplin is chair of the Land Use, Zoning & Development group. He concentrates his real estate practice in land use and development, zoning and planning, environmental permitting and land use litigation, representing homebuilders and developers of shopping centers, offices and apartments. Mr. Kaplin can be reached at 610.941.2666 or by email to mkaplin@kaplaw.com.

{Marc Kaplin argued the case before the Third Circuit and Pamela Tobin briefed the issues.}



Pamela M. Tobin

Pamela M. Tobin is a member of the Business & Commercial Litigation group. She handles complex commercial litigation cases involving real estate disputes, land development disputes, constitutional property rights claims and claims against municipal authorities and agencies. Ms. Tobin can be reached at 610.941.2543 or by email to ptobin@kaplaw.com.

discharge its storm water directly onto the Mall's property. If it did, it would lead to absurd results, such as allowing a railroad to install pipes along its tracks to discharge its storm water directly onto neighboring properties. The Court concluded that the regulation was never intended to give the railroad the authority to disregard state property rights.

With storm events like last year's Hurricane Sandy predicted to continue to batter the east coast, disputes over who is responsible for controlling storm water are on the rise. Landowners should be vigilant about detecting storm water problems before they escalate into major trouble spots. The Third Circuit's decision is a vindication of state rights and a potent reminder that landowners have a cause of action against adjoining property owners who do not properly control their storm water.

KS News

New Faces at Kaplin Stewart

three attorneys and a paralegal have recently joined the firm.



Michael P. Hogan is an Associate in the Commercial Litigation group. He previously was an Associate with Lavin, O'Neil, Ricci, Cedrone & DiSipio. Mr. Hogan represents businesses and individuals in real estate and business disputes, as well as defending employers in all types of employment litigation.

Michael P. Hogan

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Joshua A. Steinberg is an Associate in the Real Estate Transactions and Corporate Law & Business Planning groups. He previously was an Associate at Bennett, Bricklin & Saltzburg. Mr. Steinberg represents buyers and sellers, landlords and tenants, and developers and investors in various commercial real estate transactions.

Joshua A. Steinberg

buyers and sellers, landlords and tenants, and developers and investors in various commercial real estate transactions.



Dayna Rose Benn is an Associate in the Estates, Administration & Planning and Tax groups. Dayna previously worked at Wells Fargo bank in wealth management.

Dayna Rose Benn



Lynn Sturdivant is a Paralegal in the Real Estate Transactions and Estate Administration & Planning groups. Ms. Sturdivant was previously a Paralegal at Lavin, O'Neil, Ricci, Cedrone & DiSipio.

In addition to her involvement with real estate transactions, Ms. Sturdivant works on preparation of estate planning documents, taxation and formation of tax-exempt entities.

We hope you have a chance to meet Mike, Josh, Dayna and Lynn.

☞ **Karin Corbett**, an Associate in the Construction Law and Business & Commercial Litigation groups, conducted a CLE about Equine Law for the Women in the Law Committee of the Montgomery Bar Association on May 9, 2013. Karin's practice in Equine Law developed from her long time participation as a competitive equestrian and active member of the United States Equestrian Federation. She represents professional equestrians and Olympians, horse owners, products companies and other business owners in the industry.

☞ **Kevan F. Hirsch**, a principal in the Business & Commercial Litigation group, has been appointed as Chair of the Pennsylvania Bar Association's Lawyers' Assistance Committee for the 2013/2014 year. The Lawyers' Assistance Committee develops programs to assist impaired lawyers and their families.

☞ **Pamela Tobin**, a member of the Business & Commercial Litigation group, has been appointed to the Legal Studies Advisory Board of Manor College in Jenkintown, Pennsylvania. Manor College is a private two-year institution offering transfer and career oriented programs to traditional age and adult students.

KUDOS...

Kaplin Stewart has many lawyers of distinction in their fields of law. We are pleased that some of our outstanding attorneys have been recognized by various publications for excellence in their specific areas of practice. These attorneys exemplify the quality of legal representation that our firm provides for each and every client, and we are delighted that their professional accomplishments have been widely recognized.

☞ Recognized by Best Lawyers for 2013 are [from left to right] **Jeffrey Silberman** in Real Estate law, **Andrew Cohn** and **Robert Korn** in Construction Law; **Marc Kaplin**, **Neil Stein** and **George Broseman** for Land Use & Zoning Law.



☞ Recognized by Super Lawyers as 2013 Rising Stars are **Gregg Adelman** in Land Use & Zoning Law, **Mohammad Ghiasuddin** in Business Litigation, and **Dirk Simpson** in Estate & Probate Law.



☞ Recognized as Super Lawyers for 2013 are [from left to right] **Andrew Cohn**, **Joshua Quinter** and **Robert Korn** for Construction Litigation, **Marc Kaplin** for Land Use & Zoning, and **Neil Stein** for Real Estate Law.



Meet Our Litigation Professionals

This month we shine the spotlight on Barbara Anisko, a partner in our commercial litigation department. For 30 years, Barbara has represented clients in diverse commercial litigation matters. A large portion of her current practice focuses on real estate litigation and transactions.

Born in Poland, Barbara immigrated to the U.S. on July 4th at the age of six. Barbara's father was a civil engineer who built one of the first post WWII housing developments in Poland. It is prophetic that she now represents homebuilders.

Believing in the "American Dream", Barbara's family came to the United States not knowing a word of English. With two small children and only the possessions they could fit in a suitcase, they started their new life living in a one-bedroom apartment over a grocery store. Both parents worked long hard hours and instilled in their children a desire to succeed. Barbara's desire to become a lawyer grew from listening to her parents speak about their life in Poland under Communism and the freedoms that Americans at times take for granted. With her parents' work ethic as an example, Barbara studied hard, won academic scholarships and graduated from Saint Joseph's University and Temple University School of Law with honors. At Temple, she was Editor for the Temple Law Review. She also worked in the United States Attorney's Office in Washington, D.C. and for the Honorable John B. Hannum in the United States District Court



Barbara Anisko

for the Eastern District of Pennsylvania.

Barbara started her legal career at one of Philadelphia's top law firms and made partner after eight years. She joined Kaplin Stewart in 1999. In her practice, Barbara handles complex commercial disputes ranging from contract disputes and real estate and zoning claims to partnership disputes, officer/director liability claims, employment and civil rights

claims and antitrust and securities claims. She also has represented clients in commercial transactions, recently closing a \$220 million dollar real estate sale. Barbara is a member of the elite Million Dollar and the Multi-Million Dollar Advocates Forums.

In her free time, Barbara is a news junkie and an avid reader. She sketches, gardens and spends time at the beach. Barbara and her husband collect wine, enjoy country music, and are regular tailgaters with family and friends at the annual Kenney Chesney Concert in Philadelphia. Barbara's client, who is in the racehorse business, has also gotten her interested in horse racing.

Barbara has four children and is proud of their accomplishments. Her oldest son works in finance at Bloomberg in New York. Her oldest daughter is a law student, interning this summer at the Department of Education in Washington, D.C. and the youngest daughter is an Assistant Race Horse Trainer at Parx Racing in Philadelphia. Her youngest son, a high school junior, competes on a premier soccer team and is being recruited for college soccer.

Do You Know...

The Difference Between "Above-the-Line" and "Below-the-Line" Non-Recourse Carve-outs?

With securitized, non-recourse loans more common again, borrowers should know the difference between an "above-the-line" and "below-the-line" non-recourse carve-out. The lender in a typical non-recourse loan is usually limited to seizing the collateral for the loan. Borrowers and guarantors are not personally liable for the debt, except for certain "carve-outs." A carve-out (or "bad-boy carve-out") is an exception to the non-recourse nature of a securitized loan. Carve-outs describe events (such as fraud), which can create partial or total personal liability under the loan. These liabilities depend on being characterized as an



"above-the-line" or "below-the-line" non-recourse carve-out. "Above-the-line" is when the borrower's or guarantors' liability for "bad-boy acts" is limited to the lender's actual losses. "Below-the-line" is when the borrower's or guarantors' liability for "bad-boy acts" causes the loan to become fully recourse to both the borrower and the guarantor. When negotiating the loan, borrowers should limit "below-the-line" carve-outs to certain situations (such as voluntary bankruptcy) to avoid it becoming fully recourse.

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Legal Perspectives

Worker Misclassification Enforcement on the Rise

If recent developments are any indication, companies should start paying closer attention to how they are classifying workers. The Wage and Hour Division of the U.S. Department of Labor is increasing its efforts to identify and prosecute companies that improperly classify workers as independent contractors. Calling it a serious problem "for affected employees, employers, and to the entire economy", the Department is investing \$14 million in its 2013 budget to address this issue. It has also entered into Memoranda of Understanding with various other federal agencies and states to share information as part of their coordinated enforcement efforts. This means governmental agencies at both the state and federal level are looking at these issues closer than ever.

The applicable tests on how a worker is to be classified vary and can be confusing. Different agencies and states use different standards. Courts even set their own and they can vary by jurisdiction. Companies should learn the specific standards that

apply in their jurisdiction, but the central theme in most cases is control and risk. While a generalization for illustration purposes only, the more control a company exercises over how a worker performs its work and the less economic risk there is for the worker if the work fails pushes the worker closer to a classification as an employee. The inverse is also true. The less control exercised by the company over the work and the more risk taken by the worker pushes the worker closer to an independent contractor status. Importantly, issuance of a 1099 form is not dispositive of the issue by itself.

The federal government sees the misclassification issue as a drain on tax revenue by depriving it of valuable Social Security, Medicare, unemployment, and workers' compensation insurance funds. It estimates that the government has lost approximately \$2.7 billion a year as a result. The Department also cites what it calls an unfair competitive advantage created by lower administrative costs associated with misclassifying workers. If taken on their word, the reasons given for the increased enforcement will not likely go away in

the near future. The current political climate and budget gaps mean it is not unreasonable to conclude that these types of enforcement actions will be prevalent for at least the next 2-3 years.

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Joshua Quinter



Keeping You Informed

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