2013
Year in Review

Campolo, Middleton & McCormick, LLP

Big Firm Quality. Small Firm Value.

Letter from the Managing Partner

Dear Clients and Friends:

As we look back on 2013, it has been a remarkable year for both our firm and our clients.

For the firm, we added seven new professionals who have helped us strengthen our Intellectual Property and Corporate departments, as well as our overall firm operations. We were pleased to have Hon. James F.X. Doyle join us and start our matrimonial department, focusing on business owners and high-net worth individuals. We also tripled the size of our space, relocating to 4175 Veterans Memorial Highway in Ronkonkoma, right at the entranceway to Long Island's MacArthur Airport and the center of some of Long Island's most significant investment into infrastructure (most notably the Ronkonkoma HUB project). We saw eight of our attorneys be recognized as Leaders in Law, Super Lawyers, and the "Who's Who" in their fields. We provided financial support to over 60 different charitable organizations, and 10 of our attorneys became new members of various boards of charitable organizations including the Stony Brook Staller Center, Stony Brook Intercollegiate Athletics Board, Suffolk County Women's Bar Association, Long Island Builders Institute, ConnecttoTech, Social Enterprise Alliance, Child Abuse Prevention Services, and the East End Women's Network. We provided over 1000 hours of *pro bono* service, which included helping our returning veterans deal with issues that happened during their service. We spoke on dozens of panels as experts in all fields, and published over 60 scholarly articles or client advisories. All in all it was a very busy year, and I couldn't be more proud of our team.

None of this, however, could be possible without the support of our clients and friends, who happen to be some of the most remarkable people I have ever met. With our assistance our clients have either bought, sold or raised private equity in deals in excess of two and a half billion dollars this year, and have created some of the most innovative products, services and processes. Our real estate folks helped companies acquire or lease over one-million square feet in new buildings, many times through a 1031 exchange or with the assistance of the Suffolk County IDA and the SBA, two fantastic organizations. And our litigators helped our clients obtain some incredible results at trial and through settlement. In 2013 our clients hired thousands of new employees, and have begun major expansion internationally. This "A" list roster of business owners and executives received more awards and recognitions than can possibly be included here, making us not only incredibly thankful to them but also incredibly proud of them.

So from all of us at CMM we say thanks- not only for your business, but also for your loyalty and your friendship. We are looking forward to creating with you even more prosperity in 2014!

Sincerely,

Joe Campolo

Campolo, Middleton & McCormick, LLP
Managing Partner

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NEW ADDITIONS

Lawyers

Retired Judge Hon. James F.X. Doyle Joins Firm

CMM was pleased to announce that Honorable James F.X. Doyle joined the firm's litigation department as Special Counsel in July 2013. His wealth of experience as both a judge and a litigator is a great benefit to the firm's attorneys and clients.

Judge Doyle served as a Suffolk County Court Judge, and acting NYS Supreme Court Justice, from 2003 until his term ended in 2012. His judicial experience includes a decade as an elected Suffolk County Family Court Judge and as a Suffolk County Supreme Court Justice in the Matrimonial, Civil Law, and Mental Health Terms.

"He will be an invaluable addition to our litigation practice and a priceless asset to our clients. We couldn't be happier that Jim has chosen to come on board."

Scott Middleton, Partner

Prior to being named to the bench, Doyle served in the United States Air Force as Captain and Attorney on the Trial & Defense Counsel, Military Judge and Administrative Law Hearing Officer. He completed his undergraduate degree at the College of Holy Cross, his law degree at Fordham Law School and later his Master's in Public Policy at Stony Brook University. Doyle was also the Senior Law Clerk to County Court Judge and Supreme Court Justice John. J. J. Jones, Sr. for a decade.

Additionally, Judge Doyle served as President and 10th Judicial District Representative of the County Judges Association of New York State and the President of the Suffolk County Judges Association. He also served as Officer and Director of the Suffolk Academy of Law, as well as an Adjunct Professor, Pre-Law Advisor and Alumni Association Vice President at Stony Brook University.

Ellen Bissett DeRiggi Joins Firm

The firm welcomed Ellen Bissett DeRiggi as our newest Of Counsel attorney in October 2013. Along with her wealth of experience and knowledge, she brought her Huntington-based business law practice to Campolo, Middleton's team. She is now an integral member of our Corporate and Labor & Employment departments. Her practice focuses on corporate law and concentrates on representing businesses and individuals in commercial transactions and business succession planning.

Prior to joining Campolo, Middleton, Ellen founded her own private firm where she handled a wide range of business related matters. Prior to that, Ellen was associated with one of Long Island's top full service commercial law firms, where she practiced in the corporate and securities department. Her past experience also includes practicing law at a well-known boutique commercial law firm on Long Island where she concentrated in the areas of corporate law and commercial litigation.

Throughout her career, Ellen has gained extensive experience drafting, negotiating and analyzing a wide range of business related contracts and documents. She also has substantial experience in representing clients in complex commercial litigation in State and Federal courts on both the trial and appellate level, as well as before regulatory boards such as the New York State Division of Human Rights, the U.S. Equal Employment Opportunity Commission, the Department of Labor, the Department of State, and the New York State Banking Department.

Alan Weinberg Joins Firm as Counsel

Joining the firm's Corporate and Real Estate practice groups as Counsel, Alan focuses on Merger & Acquisition transactional work.

Alan has negotiated and closed a wide range of complex corporate and real estate matters and transactions, including stock sales, asset purchases, joint ventures, financings, intellectual property licensing, commercial property sales and leases.

His background includes practicing law at a large New York City firm, serving as General Counsel, Principal and Advisor for a national consumer product company, Managing Director of an M&A advisory firm and prior to coming on board with Campolo, Middleton & McCormick, Alan served as Vice President of ProtegrityMPS, a managed professional services firm.

Sharon Barkume Joins Firm Of Counsel

Joining the Intellectual Property Group this year is Sharon Barkume, registered patent attorney with the U.S. Patent and Trademark Office with a background in tyelectrical engineering and experience in patent prosecution, trademark registration and trade secret protection.

Sharon Barkume is Of Counsel to Campolo, Middleton & McCormick. Her practice is focused on representing businesses and individuals with matters involving intellectual property ("IP"), namely patents, trademarks, copyrights, and trade secrets. She specializes in helping companies identify, evaluate, and strategically acquire IP by performing prior art searches, competitive analyses, infringement analyses, brainstorming sessions, IP audits, IP acquisitions, IP litigation, IP licensing, and establishment of best practices and procedures for IP ownership protection.

Sharon is very involved in the Long Island business and entrepreneurial community, assisting Accelerate Long Island, the Center For Biotechnology at Stony Brook University, the Clean Energy Business Incubator Program at Stony Brook University, the Long Island Innovation Boot Camp/Pre-Seed Workshop, and the Touro Law Center Institute for Business, Law and Technology.

NEW ADDITIONS
Staff

Jessica Keane
Jessica Keane is a paralegal specializing in negligence and personal injury. She graduated from Stony Brook University with a Bachelor's Degree in Political Science. Jessica began her legal career in Manhattan, and has worked in the areas of personal injury, no-fault litigation, product liability, mass tort litigation, workers' compensation and insurance litigation defense. She has over 11 years of legal experience in the civil litigation field.

Jennifer Albrecht
Jennifer Albrecht graduated from Briarcliff College with an Associate's Degree in Paralegal Studies in 2004. She began her career in San Diego, California working for a real estate attorney. In 2007, she began working as a paralegal for the Campolo Law Firm and then as a receptionist and office manager of Campolo, Middleton & Associates. With 16 years of administrative experience, Jennifer came back to join the team this year as Campolo, Middleton & McCormick's Marketing Coordinator. In this role she helps implement the firm's extensive marketing plans and events.

Dawn LoBasso
Dawn LoBasso is the firm's Operations Coordinator who joined Campolo, Middleton & McCormick this past August. She graduated from Nassau Community College with an Associate's Degree in Psychology. Dawn began her career as an executive assistant and has held various positions in the corporate banking field, worked in the financial planning department of Paramount Pictures, and the Human Resources Department at Estee Lauder Companies. Before joining Campolo, Middleton & McCormick LLP, Dawn was an Assistant Coordinator in the Professional Development and Training Department at Paul, Weiss, Rifkind, Wharton & Garrison LLP in NYC.

FIRM GROWTH

CMM Relocates Offices to Accommodate its Growth

Campolo, Middleton & McCormick celebrated its fifth anniversary this year by tripling the size of its office space. The expansion will assist the firm's strategic growth plans while improving daily operations to provide outstanding service that their clients have grown to expect. Now located on the fourth floor of 4175 Veterans Memorial Highway in Ronkonkoma, at the entrance to MacArthur Airport, the new space offers state of the art technology, more offices, a more efficient layout and larger event rooms.

In announcing the move, Managing Partner Joe Campolo said, "Ronkonkoma is an ideal location for us in terms of its size, close proximity to the airport, the LIRR and its easy access to the major highways. The redevelopment of the area, known as the Ronkonkoma Hub project, will revitalize the community and the firm is excited to be a part of that economic growth for the region."

Firm Expands Intellectual Property Practice

In light of recent changes to the U.S. patent laws, CMM expanded its Intellectual Property Group to now offer our clients a full range of IP services including portfolio analysis and management, audit and due diligence, trademark and copyright registration, prior art search and third party submissions, patent prosecution, licensing agreements, infringement and competitor analysis, domain name disputes, website and email privacy, security and compliance as well as patent, trademark, copyright and trade secret litigation.

Matrimonial Department Added

In November, CMM welcomed the addition of a Matrimonial Department, started by the Honorable Judge James F.X. Doyle (retired). As Special Counsel to the firm, Doyle brings his extensive judicial experience to the Matrimonial team, led by firm partner, Scott Middleton. Campolo, Middleton & McCormick will serve as counsel to clients in matrimonial law matters from pre-marital planning by way of prenuptial agreements to postnuptial mediation, settlement and litigation, when needed. We understand the client's needs when dealing with custody, complex financial structures, business valuation and division issues, real estate, pensions, retirement plans, stock options and other forms of deferred compensation as they relate to matrimonial matters.

ACHIEVEMENTS

Long Island Business News 2013 *Who's Who* Awards

Alyson Repp, Esq. named *Who's Who* in Commercial & Residential Real Estate Law

Eryn Truong, Esq. named *Who's Who* in Intellectual Property Law

Arthur Yermash, Esq. named *Who's Who* in Labor Law

Arthur Yermash, Esq. named *Who's Who* in Corporate Law

Hayley Gregor, Esq. named *Who's Who* in Women in Professional Services

Middleton & McCormick Among New York's 2013 Super Lawyers

September 2013 – Two CMM partners were selected for inclusion in the *2013 New York Super Lawyers – Metro Edition.* Scott Middleton, Esq. and Patrick McCormick, Esq. were a part of the top 5 percent of attorneys in the state to earn the title "Super Lawyer."

Scott Middleton heads up the firm's Negligence and Matrimonial Department and his experience includes representing individuals and defending small and large corporations, as well as municipalities in a wide array of personal injury matters including general negligence cases, motor vehicle, wrongful death, labor law, civil rights, product liability and architect and engineer cases.

Patrick McCormick manages the firm's Commercial Litigation and Appellate Practice teams. He specializes in litigating all types of complex commercial and real estate matters and provides legal counsel to clients on issues including business disputes related to contract claims, disputes over employment agreements and restrictive and non-compete covenants; corporate and partnership dissolutions, mechanics liens, trade secrets, insurance claims, real estate title claims, complex mortgage foreclosure cases and lease disputes.

Campolo & Navas Win Leadership in Law Awards

Campolo, Middleton & McCormick, LLP takes great pride that Joseph N. Campolo, Esq., and Kristen Navas were both recipients of the 2013 Long Island Business News' "Leadership in Law" Awards. The awards recognize individuals whose dedication to excellence and leadership in both the legal profession and the community and has had a positive and lasting impact on Long Island.

Joe Campolo, the firm's managing partner, was selected by a committee of business leaders and was honored along with 12 other recipients in the Partner category. Kristen Navas, the firm's Director of Operations, was the sole recipient of the Unsung Hero Award.

PEOPLE ON THE MOVE

April 2013 - **Lauren Kanter, Esq.** was named Board Member of the Social Enterprise Alliance of Long Island. The SEA is the leading membership organization in North America for for-profit and nonprofit social enterprises, service providers, business corporations, and venture capitalists that is actively building the field of social enterprise.

June 2013 – **Alyson Repp, Esq.** was elected to the Suffolk County Women's Bar Association Board of Directors. SCWBA is a chapter of the Women's Bar Association of the State of New York.

June 2013 – **Hayley Gregor, Esq.** was appointed secretary of the East End Women's Network, a networking organization that brings together women of diverse accomplishments and experience.

July 2013 – **Eryn Truong, Esq.** joined the ConnectToTech Board. ConnectToTech is a non-profit whose mission is to inspire students to pursue STEM careers.

July 2013 – **Patrick McCormick, Esq.** was named President of Child Abuse Prevention Services. Since becoming involved in 2009, McCormick has made tremendous strides for Long Island's leading organization dedicated to preventing bullying and child abuse.

September 2013 – **Alyson Repp, Esq.** was named the 2013 Long Island Builders Institute's Rising Star Award. Repp was recognized for her involvement in LIBI committees and activities.

November 2013 – **Scott D. Middleton, Esq.** was named Chair of the Stony Brook University Intercollegiate Athletics Board. The IAB serves as a liaison between the various members of the campus community and the Department of Intercollegiate Athletics providing feedback and advice to the Department of Athletics on matters concerning compliance functions, academic issues, gender equity, and budget development.

November 2013 – **Joe Campolo, Esq.** was elected to Stony Brook University Staller Center for the Arts Advisory Council. Located on the Stony Brook University campus, the Staller Center for the Arts offers a wide variety of world class performances in dance, music, theater and film.

December 2013 – **Alyson Repp, Esq.** was named the Campolo, Middleton & McCormick Associate of the Year. She has been recognized for her notable client relationship skills, growth and dedication and leadership both within and outside the firm. **Michelle Rankin** was named the Campolo, Middleton & McCormick Employee of the Year. The awards are given annually to the firm professionals who show exceptional and outstanding achievement and contribution to the practice.

NOTEWORTHY TRANSACTIONS

CMM Announces Photonics Expansion Deal Closes

September 2013 - Campolo, Middleton & McCormick is proud to announce that they represented Photonics Industries International, Inc. in their expansion of their operations in Suffolk County in conjunction with the Suffolk County Industrial Development Agency (IDA). The company invested $5.4 million in its acquisition of a new building and manufacturing equipment, which will add a significant number of new jobs to the Long Island economy.

Photonics Industries International, Inc.

Photonics Industries, headquartered in Bohemia, New York, is the pioneer of intra-cavity solid-state harmonic lasers, the highest output power of lasers available, and provides various types of lasers to industrial and scientific customers.

CMM Successfully Closes Multiple Multimillion Dollar 1031 Exchange Deals

Campolo, Middleton & McCormick's Real Estate Department successfully worked on several complex multimillion-dollar 1031 exchange deals this year. In early 2013 we closed on an out-of-state $4.6 million dollar apartment complex which was "parked" and used as a replacement property in an intricate reverse 1031 exchange.

More recently CMM closed simultaneously on the sale of a $2.7 million dollar piece of agricultural land and one of multiple replacement properties in connection with a 1031 exchange. Both properties are anticipated to be used for development and business growth on Long Island.

CMM Announces Private Jet Service Asset Sale Closes

November 2013 – Campolo, Middleton & McCormick is proud to announce that they represented a Bohemia-based private jet charter business in the sale of their business. The acquired assets will allow the buyer to offer expanded private jet charter services in connection with their other offerings.

CMM Announces Major Medical Company Financing Closes

December 2013- Campolo, Middleton & McCormick is proud to announce that they represented the shareholders of a major medical company in connection with a multi-million dollar bank financing. The financing will help the company expand its operations in Long Island's competitive healthcare field.

NOTEWORTHY TRANSACTIONS

CMM Announces Bovie Medical Corporation Financing Closes

December 2013 - Campolo, Middleton & McCormick is proud to announce its representation of Gilford Securities Incorporated in the $7 million investment by Great Point Partners LLC in Bovie Medical Corporation. Gilford acted as the sole placement agent in the transaction.

The $7 million funding is structured as 3.5 million shares of Series A 6% Convertible Preferred Stock and 5.25 million common stock purchase warrants. The Preferred Stock is convertible into shares of the Company's Common Stock on a 1:1 basis and accrue a 6% annual cash dividend, compounded annually, which is payable by the Company on demand of the holders forty-eight months after closing. The holders of the Preferred Stock have certain redemption rights as well. Additionally, the Company agreed to register the sale of the shares of common stock underlying the shares of Preferred Stock and into which the warrants are exercisable. Bovie's management believes that this funding and the associated operational changes will accelerate the growth of the Company's innovative new product, J-Plasma®, which has been gaining support from influential surgeons across the United States.

CMM Closes on International Stock Transaction

October 2013 – Campolo, Middleton & McCormick represented its client in a multi-million dollar acquisition of a widely-recognized distributor of dental products. As a result of this transaction, which also involved an internationally-recognized manufacturer of dental products, high-quality dental products will be available to dentists and their patients throughout North America.

CMM Prevails in Canadian Domain Name Dispute Resolution

Our Intellectual Property group prevailed in a domain name dispute resolution action in Canada against a cybersquatter. On behalf of our client, Amscan Holdings Inc., we filed a complaint with the Canadian Internet Registration Authority for the domain name at issue, halloweencity.ca. The single-member panel found that the domain name was confusingly similar to Complainant's mark, the registrant had no legitimate business interest in the domain name and that the domain name was registered in bad faith. Our team successfully framed the complaint, adhering to the CIRA Domain Name Dispute Resolution Policy Requirements, and the domain name will be transferred to our client.

ZEALOUS LITIGATION

CMM Obtains First Civil Judgment Against Sub-brokers of Cosmo Ponzi Scheme

NEWSDAY, April 2013 - A judge has awarded $4.1 million, plus attorneys' fees, to eight victims of convicted Long Island swindler Nicholas Cosmo, according to court papers. Cosmo's $400 million-plus Ponzi scheme operated out of two Hauppauge-based companies, Agape World and Agape Merchant Advance, bilking more than 4,000 people, many of them on Long Island, by selling worthless investments in bridge loans to commercial borrowers and promising low risk and high returns. He was arrested in 2009 and pleaded guilty to mail fraud and wire fraud the following year. In September another court upheld his 25-year prison sentence.

The $4.1-million damage award, according to a transcript of the proceedings, was made in a bench ruling April 16 by State Supreme Court Justice Emily Pines in Riverhead against two of Cosmo's sub-brokers, siblings Martin C. Hartmann III of Massapequa and Laura Ann Tordy of Wantagh. Sub-brokers worked for brokers to help them solicit investors and received commissions from the brokers.

The law firm representing the plaintiffs, Campolo, Middleton & McCormick LLP, of Bohemia, said the award was the first civil judgment obtained against the sub-brokers of Cosmo's two firms.

Pines ruled at the close of the trial that Hartmann and Tordy were liable to the plaintiffs for selling them a total of $1.36 million of phony investments in Agape World and receiving more than $3 million in commissions. Claims still are pending against a third defendant, Martin C. Hartmann II, the father of the other two defendants, said Campolo. Pines has reserved decision against him, pending receipt of post trial briefs by the parties on May 20.

Cosmo is serving his sentence at the Federal Correctional Institution in Fort Dix, N.J.

CMM Obtains Defense Verdict for Amscan in Breach of Contract Suit

November, 2013 - Campolo, Middleton & McCormick litigators Joe Campolo and Eryn Truong, along with co-counsel Cody Weston from Perkins Coie, obtained a complete defense verdict on behalf of Amscan Inc. and prevailed on Amscan's counter-claim in a week-long jury trial that took place in Multnomah County, Oregon. The action was brought against Amscan by Interpersonal Management, Inc., a company that had contracted with Amscan to be its exclusive agent for sales on Amazon. Interpersonal sought $5,000,000 in damages plus attorneys' fees from Amscan.

amscan® The Party People

Witnesses in this trial included several senior executives from both companies, and numerous experts for both sides. Managing partner of CM&M and lead trial counsel, Joe Campolo, stated: "Amscan faced challenges from the beginning as the action was brought against the New York company by a fifth generation Oregonian in Oregon, and would be decided by an Oregon jury. However, after a full week of highly contentious procedural and factual arguments, the jury saw this case for what it was -- a shake down, pure and simple." Having prevailed on its counter-claim, Amscan was awarded its attorneys' fees. Interpersonal will likely appeal.

CMM Obtains Complete Dismissial of Federal RICO Claim

Campolo, Middleton & McCormick represented a landlord client in the United States District Court for the Eastern District of N.Y. obtaining a complete dismissal of plaintiff's complaint alleging claims under the Federal RICO (Racketeer Influenced and Corrupt Organizations Act) statutes.

After landlord commenced a summary proceeding against a commercial tenant operating a pet grooming business to recover possession of certain premises, the tenant commenced a federal lawsuit in the Eastern District of New York against its prior landlord, the landlord's managing member individually, and related entities of the landlord's managing member. The former tenant asserted a claim for federal RICO violations based on what it alleged was a fraudulent scheme by the landlord, which included mail fraud, wire fraud, and extortion, in an effort to ultimately force the tenant out of business. The tenant also alleged claims for conversion, fraud, unjust enrichment and New York general business law violations.

Our firm, representing the landlord/defendants, moved to dismiss the tenant's Complaint in its entirety on the ground that the tenant had failed to satisfy the required elements of any of its claims, especially the RICO claim. The Court, in its decision, granted our motion to dismiss in its entirety, dismissing the tenant's RICO claim with prejudice finding that the tenant, under no circumstances, could meet the required elements of a RICO claim based on the alleged facts. Having dismissed the tenant's only federal claim, the Court also dismissed the tenant's remaining state law claims.

CMM Defeats Summary Judgment Motion in Multi-Million Dollar RICO Case

The firm successfully opposed a motion for summary judgment brought by the defendants in a multi-million dollar action pending in the Eastern District of New York involving RICO, fraud, breach of fiduciary duty, and unjust enrichment claims. The case, involving dozens of individual and corporate defendants located across the country, is scheduled for trial in May 2014.

PERSONAL INJURY PRACTICE HIGHLIGHTS

Rosenbloom v. Bar Americain: Venued in Supreme New York, this slip and fall was settled pre-suit for $90,000.00. Injuries included hip fracture and hemi arthroplasty in a 70-year-old woman. We argued that the wet condition on the floor was caused and created by the employees of the restaurant. This was a difficult argument in that we really could not establish for how long a period of time the condition existed before the client fell.

Butler v. Koutoulas: Venued in Supreme Suffolk, this was a motorcycle accident where the defendant made a left turn into the plaintiff resulting in severe leg/ankle injuries requiring open reduction internal fixation, multiple muscle and skin surgeries to the leg and ankle. The case settled after depositions for the extent of all applicable insurance coverage, $400,000.00.

Cottone v. IRA Kennels: This matter involved an intersection collision where we won summary judgment on liability in Supreme Suffolk. Damages included fractured scapula, fractured sternum, fractured clavicle and multiple rib fractures and tracheotomy. The case settled against Allstate Insurance just prior to jury selection for $900,000.00 (remainder of 1 Mil policy).

Collazo v. Suffolk Transportation: This case was successfully defended through discovery and settled with no contribution on behalf of the client prior to jury selection. The school district was held solely responsible.

Funk v. Schoolman: In this case, liability was conceded to avoid award of summary judgment. This matter focused on a bus accident where the bus struck a light pole stanchion in a parking lot. The case went to trial with plaintiff demanding $1.75 million for claimed injuries which included a torn rotator cuff, multiple cervical spinal surgeries and placement of a spinal cord stimulator. We argued that the only causally related injury was the torn rotator cuff. The case settled for value of that injury (approximately 10% of initial demand) prior to jury deliberations.

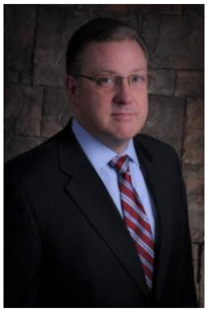
"THE ATTORNEYS AT CAMPOLO, MIDDLETON & MCCORMICK ARE AN EXCEPTIONALLY TALENTED TEAM OF LAWYERS WHO COMBINE A FIRST RATE LEGAL INTELLECT, A WILLINGNESS TO WORK HARD AND A PASSION FOR EXCELLENCE WITH A TRUE TALENT TO EFFECTIVELY PARTNER WITH THEIR CLIENTS. TOO OFTEN I'VE EXPERIENCED LAWYERS WHO ARE EAGER AND READY TO BILL THE HOURS AND PROVIDE OPTIONS BUT NEVER TAKE A MEANINGFUL POSITION ON THE BEST PATH TO CHART FOR THE RIGHT LEGAL AND BUSINESS SOLUTION."

JOSEPH J. ZEPF, ESQ., VICE PRESIDENT & GENERAL COUNSEL, AMSCAN HOLDINGS, INC.

ORGANIZATIONS WE SUPPORT

Accountant Attorney Networking Group (AANG)
American Bar Association (ABA)
American Cancer Society Relay for Life
American Heart Association (AHA)
American Intellectual Property Law Association (AIPLA)
Angela's House
Brookhaven Business Advisory Council (BBAC)
Center for Cost Effective Government
Child Abuse Prevention Services (CAPS)
Comsewogue for Students Foundation
Cornell Alumni Admissions Ambassador Network (CAAAN)
Defense Research Institute (DRI)
Developmental Disabilities Institute (DDI)
East End Women's Network
Fordham Law School Alumni Association
Habitat for Humanity (Suffolk County)
Hauppauge Industrial Association (HIA-LI)
Long Island Builders Institute (LIBI)
Long Island Capital Alliance
Long Island Software & Technology Network (LISTnet)
Lymphatic Research Foundation
Make-a-Wish Foundation (Suffolk County)
Marine Corps Scholarship Foundation
Muscular Dystrophy Association (MDA)
Nassau County Bar Association (NCBA)
Nassau-Suffolk Trial Lawyers Association
New York Intellectual Property Law Association (NYIPLA)
New York State Bar Association (NYSBA)
New York Supreme Court Civil Task Force Subcommittee
NYS Tax Relief Now!
Pet Peeves – The Voice of Long Island Pets
The Rollstone Foundation
Social Enterprise Alliance -- Long Island Chapter
Special Olympics New York
Stony Brook University
Stony Brook University Alumni Association
Stony Brook University Athletics
Stony Brook University Children's Hospital
Stony Brook University Staller Center for the Arts
Strength for Life
Suffolk Academy of Law
Suffolk County Bar Association (SCBA)
Suffolk County Community College Foundation
Suffolk County Court Officers Association
Suffolk County Police Department Cops Who Care
Suffolk County Restaurant & Tavern Association
Suffolk County Women's Bar Association
Sunrise Fund
Touro Law Alumni Association
Transportation Lawyers Association (TLA)
Trucking Industry Defense Association (TIDA)
Victims Information Bureau of Suffolk (VIBS)

LITIGATION UPDATES



Plaintiff's Claim of Continuing Damages Precluded
by Scott D. Middleton, Esq.

On February 14, 2013, the New York Court of Appeals ruled on a case that will drastically affect damage awards in cases where a plaintiff has made a worker's compensation claim contemporaneous with a personal injury suit.

Auqui v. Seven Third One Limited Partnership, 2013 N.Y. Slip Op 00950, involved a case where plaintiff, a food service deliveryman, was injured when a sheet of plywood fell from a building under construction and owned by defendant. While receiving worker's compensation benefits, plaintiff commenced a personal injury action. While the personal injury action was pending, the worker's compensation carrier for plaintiff's employer moved the Worker's Compensation Board to discontinue plaintiff's benefits on the grounds that he was no longer disabled as a result of the accident. The administrative law judge ruled in favor of the employer's carrier, thus terminating plaintiff's benefits in 2006. In 2007, a full panel of the Worker's Compensation Board upon appeal affirmed the administrative law judge's ruling, finding plaintiff's disability had ended as of January 24, 2006 and that plaintiff required no further medical treatment other than for post-traumatic stress disorder.

In April 2009, the defendants in the personal injury matter moved to preclude plaintiff from re-litigating the duration of his work related injury on the grounds that the issue was already fully litigated and decided in the administrative proceedings.

The Court determined that the doctrine of collateral estoppel is applicable to determination of quasi judicial administrative agencies like the Worker's Compensation Board, if the identical issue the movant seeks to preclude was decided in an earlier action, at which a party opposing preclusion had a full and fair opportunity to contest the issue.

The court determined that findings of fact that are necessary for an administrative agency to reach are entitled to such effect. Here, plaintiff was represented by counsel in the administrative proceeding, submitted evidence including medical reports, expert testimony and cross examined the defendant's expert regarding the issue of the existence of an ongoing disability.

Based upon the foregoing, the Court of Appeals determined that plaintiff had a full and fair opportunity to litigate the issue and thus the doctrine of collateral estoppel is applicable and plaintiff would be precluded from introducing any evidence of disability beyond January 24, 2006, thereby precluding more than 3 years of potential damages.

Scaffold Law Reform Update
by Nicole Marmanillo, Esq.

New York's controversial Scaffold Law imposes absolute liability on general contractors and property owners (subject to statutory limitations regarding one and two family dwellings) when construction workers sustain injuries as a result of gravity-related accidents. The law is 130 years old and New York is the only state in the country that has not yet repealed or amended it.

On February 12, 2013, over 175 contractors, builders, small business owners, developers, lawyers, municipal officials, and representatives from over 30 advocacy groups met at the State Capitol to encourage lawmakers to pass legislation to reform the antiquated law. Over the years, advocates of reform have sought to have the law extinguished entirely. This time, a different approach was taken. Advocates, recognizing that New York remains the most unionized state in the nation, pushed bipartisan legislation that would not extinguish the law, but would allow employers to defend themselves where there is evidence of a worker's negligence. They cite situations that involve criminal acts, drugs, alcohol, failure to use provided safety gear or failing to adhere to safety training provided by the employer. The law, as it exists today, would hold a property owner 100% at fault for the injuries a worker sustained when he was injured in a gravity-related accident . . . regardless of whether the accident occurred as a result of his own negligence. Advocates for reform emphasize that they are not seeking to extinguish the right of workers to sue those responsible for their injuries. Rather, they are asking for an opportunity to defend themselves in situations where they are not at fault or have limited fault.

The lawsuits that rely on the Scaffold Law typically result in enormous settlements and verdicts to compensate injured plaintiffs. As a result, insurance premiums in New York continue to rise. Oftentimes, companies are forced to go out of business or move out of the state because they can no longer afford the premiums, which are between 300% and 1200% higher than in neighboring states.

Sen. Pat Gallivan, a Republican and former Erie County sheriff, is co-sponsoring the bill with Assembly Majority Leader Joe Morelle, a Democrat from a Rochester suburb. “Do you think your business has a competitive advantage being in New York State? The answer is no, absolutely not,” Gallivan said. “And it’s because our regulatory environment is as bad as our tax climate.”

In these tough economic times, the statistics need to be carefully considered. If Scaffold Law reform would result in substantial job growth and economic development, as advocates suggest, New York State legislators will have to take the push seriously and be able to back up any position they take to turn down the legislation.

NY Labor Law Reform Died in Legislation but Proponents Continue the Fight
by Nicole Marmanillo, Esq.

We previously reported that a bill, carried by Senator Gallivan (R) and Assemblyman Morelle (D) that sought to reform the New York Labor Law 240(1), was to be proposed over the 2013 legislative session this past summer. New York Labor Law 240(1) provides in part that "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." The law imposes absolute liability on general contractors and property owners when construction workers sustain injuries as a result of gravity-related accidents; it is 130 years old and New York is the only state in the country that has not yet repealed or amended it.

The Gallivan/Morelle reform bill sought not to abolish the law in its entirety but to allow juries hearing these types of personal injury suits to consider the workers' actions with regard to personal negligence. In other words, rather than imposing absolute liability on general contractors and property owners, without allowing them an opportunity to defend themselves, juries would be allowed to consider if the worker was partially or entirely responsible for his/her own accident.

The reform bill was supported by contractors, builders, small business owners, developers, lawyers, municipal officials, and representatives from numerous advocacy groups, but died when State Assembly Speaker Sheldon Silver struck down the proposed changes. He announced through his spokesman, Michael Whyland, that changes to the Scaffold Law would not being considered and that he did not believe it was the right policy to further burden injured workers. Even though the proposed legislation was defeated it is unlikely that the debate will end.

The Common-Interest Doctrine and Its Effect on Attorney-Client Privileged Communications
by Jeffrey Basso, Esq.

It is widely understood that communications between an attorney and his/her client are protected from disclosure under the attorney-client privilege. It should be equally understood that the attorney-client privilege is lost or waived if a third party is present for those communications. However, there is an exception to the latter rule: the common-interest doctrine.

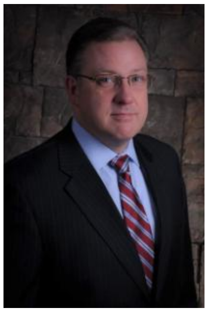
The common-interest doctrine holds that a third party may be privy to an attorney-client privileged communication, and the privilege will stay intact, if the communication is made for the purpose of furthering a nearly identical legal interest shared by the client and the third party. *Hyatt v. State Franchise Tax Bd.*, 105 A.D.3d 186, 205 (2d Dep't 2013). Courts have interpreted the "furthering a nearly identical legal interest" portion of the doctrine to require that the communication be made in pending litigation or in reasonable anticipation of litigation where the client and third party have a common legal interest. *Id., Aetna Cas. And Sur. Co. c. Certain Underwriters at Lloyd's London*, 176 Misc.2d 605 (N.Y. Sup. 1998), aff'd, 263 A.D.3d 367 (1st Dep't 1999).

In a recent decision dated October 16, 2013 from the New York County Supreme Court, the Court refused to expand the reach of the common interest doctrine to communications between two parties involved in a merger and one of the parties' counsel. In *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 2013 NY Slip Op 51673(U), the Court reviewed the determination of a Special Referee following a discovery dispute who decided not to extend attorney-client privilege protection over communications related to a merger between Countrywide Home Loans, Inc. ("Countrywide"), its counsel, and co-defendant Bank of America Corp. ("BOA"). Counsel for BOA sought to have the Special Referee's determination vacated arguing that the common-interest doctrine should apply to the communications between Countrywide, BOA, and counsel.

However, the Court in Ambac, citing to Hyatt and various other cases applying New York law, held that the common-interest doctrine extends only to situations where there is, at minimum, a reasonable anticipation of litigation. While the Court observed that the common-interest doctrine would also apply to a situation where there was dual representation – i.e. if Countrywide and BOA were represented by the same counsel – this was not the situation here. In addition, although the Court did note that at least one federal court elsewhere in the country had found that communications make *after* a merger agreement was signed did fall within the common-interest doctrine, no New York cases has expanded the doctrine to that extent.

Based on this decision, it would certainly be wise for attorneys and clients alike to take extra caution when communicating to make sure that the all-important attorney-client privilege remains in place.

Special Note for Commercial Litigators The New York State Courts website now allows you to specifically search for decisions from the Commercial Division, whether in an appellate court or one of the lower courts. If you want to search the Commercial Division decision database, simply go to *http://iapps.courts.state.ny.us/lawReporting/Search*. Once on the site, select Commercial Division at the bottom of the drop down list that appears in the "Search by Court" field of the Advanced Search form. From there, you can type search terms into the "Search Full Text" field (at the bottom of the Advanced Search form) and hit Enter or click Find. This database is a great way to stay on top of recent case law affecting commercial litigators.



When in Doubt, Don't Throw it Out: A Spoliation Primer
by Scott D. Middleton, Esq.

With increasing technology, the responsibilities regarding the protection of evidence have become more and more burdensome. This is true not only with respect to electronically stored data but evidence of all kinds. "Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in a pending or reasonably foreseeable litigation." Silvestri v. General Motors. The penalty for failing to properly maintain this evidence can be severe.

When does the duty to preserve material evidence arise? The duty comes about not only during litigation, but even extends to before the litigation begins when a party should reasonably know that the evidence may be relevant to anticipated litigation. The duty applies whether you are plaintiff or a defendant.

For example, in a product liability action arising from a vehicle collision, even where a vehicle is not owned by the plaintiff, the plaintiff has an obligation to notify the manufacturer of when and where the vehicle will be available for inspection prior to its repair or destruction. When it comes to electronically stored data, the risk of negligent loss of data increases. Many companies store this type of data for a pre-set period of time. For instance, e-mails may be maintained for a period of one year or video surveillance is on a short loop before it is recorded over or electronic crash data is overwritten when a vehicle is placed back on the road after an accident. It is important to remember that as soon as a party can reasonably anticipate litigation, affirmative acts must be taken to prevent the routine destruction of evidence. From a practical standpoint, once a company reasonably anticipates litigation, word must get out to key individuals and IT personnel to maintain relevant data. Relevant data is anything reasonably calculated to lead to the discovery of admissible evidence. For example, in the event of an accident involving a product, vehicle or premises, all relevant information should be gathered and maintained. If it's a premises accident, on-site management personnel should be trained to examine videos to determine if the incident was captured. If a video shows the incident, be sure to maintain the footage. If no video footage exists, create a writing indicating what was done to determine that no relevant video footage could be obtained. In the event of a bus or truck accident, download any video footage of the event (if none was stored on the video recorder, create a writing indicating this); download any electronic data on the vehicle's engine control monitor (ECM); maintain driver logs, vehicle maintenance records, and vehicle inspection reports; photograph any physical damage to the vehicle; and keep records of repairs. If the damage is significant, maintain the vehicle in this post-accident condition long enough to have an expert examine the vehicle and offer the adverse party the opportunity to inspect. Simply maintaining records pursuant to government agency requirements or standards (i.e. DOT document retention requirements) will not be sufficient.

It is always better to be aware of problematic evidence and deal with it realistically than to suffer the possibility of a draconian sanction being imposed by a court, especially if there was no intent to hide anything but a simple error in terms of document retention procedures. Should your company be interested in discussing ways to implement a program of proper evidence retention when faced with the possibility of litigation, please contact us to set up a meeting to discuss this very important topic. For examples of what not to do, please read the case Ashton

v. Knight Transportation at *http://www.cmmllp.com/documents/1309_Litigation_Ashton-Knight.pdf*

Electronic Discovery Update -- Second Circuit Clarifies Preservation Duty and Spoliation Consequences when Evidence is Knowingly Destroyed
by Hayley M. Gregor, Esq.

Ten years ago, U.S. Southern District of New York Judge Shira A. Scheindlin issued a series of opinions in *Zubulake v. UBS Warburg* regarding the scope of a litigant's duty to preserve electronic documents and the penalties for noncompliance. In her recent decision in*Sekisui American v. Hart*, Judge Scheindlin set a new standard in the fast-changing world of electronic discovery regarding the appropriate penalty for intentional and permanent destruction of email files despite knowledge of the likelihood of litigation.

Sekisui concerns a breach of contract action arising out of a stock purchase agreement. Sekisui acquired America Diagnostica Inc. (ADI), a medical diagnostic products manufacturer, whose CEO was Richard Hart. Hart stayed on with the company after the stock purchase agreement. However, suspecting non-compliance with certain representations and warranties made by Hart in the agreement, Seksui fired Hart and sent him a notice of claim on October 14, 2010. Sekisui did not implement a litigation hold until January 2012 and filed its complaint against Hart on May 2, 2012. Sekisui did not notify its outside vendor in charge of managing its information technology systems of its duty to preserve electronic documents until July 2012.

During the litigation, in February 2013, Sekisui's counsel revealed to Hart's defense team that Hart's email files were deleted in March 2011 by the outside vendor at the direction of a former ADI employee, despite recommendations to the contrary by the outside vendor's personnel. The reason for the deletion of the email file was to free up space on the ADI server since Hart was no longer receiving work-related email. Sekisui maintained that prior to deleting the email file all emails deemed pertinent to the company were identified and deleted. Hart's counsel moved for sanctions.

Judge Scheindlin applied controlling Second Circuit law regarding adverse inference instructions, which requires that the party seeking the instruction must establish: i) an obligation by the party having control over the evidence to preserve it at the time it was destroyed; ii) that the records were destroyed with a culpable state of mind; and iii) that the destroyed evidence was relevant to the claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Here there was no question regarding Sekisui's obligation to preserve the email files since it was the plaintiff and it had reason to know Hart's email file would be relevant. As to the second element, Judge Scheindlin held that the "culpable state of mind" factor is satisfied by showing that the evidence was destroyed knowingly. Judge Scheindlin found that Sekisui's "good faith" defense for destroying the email file was of no consequence because it did not change the fact that the emails were knowingly destroyed. There was also no question that the destroyed emails were relevant. However, the final factor in the analysis is the prejudice factor, i.e., that the destroyed evidence would have supported the party's claim or defense. Here, Judge Scheindlin found that the prejudice factor could be presumed from the circumstances of an intentional destruction of evidence thereby removing the burden of proof from the innocent party.

The presumed prejudice affects only the question of whether the adverse inference instruction will be given and a jury is free to determine that the innocent party was not prejudiced. Nevertheless, the Sekisui decision lays the groundwork for potentially damaging adverse inference instructions in the event evidence is knowingly or negligently destroyed during the course of litigation.

The impact of Sekisui is significant in the evolving world of electronic discovery, in large part due to the harsh sanctions litigants may face in the wake of evidence being destroyed. Sekisui articulates an expansive view of culpability and what constitutes willful destruction of evidence, and a broad conception of prejudice, which is to be presumed where evidence is destroyed willfully or with gross negligence. Thus, the act of destroying relevant electronic documents, without a showing of bad faith and without having to prove prejudice, can lead to an adverse interest instruction at trial that may be too damaging to overcome. In light of Judge Scheindlin's decision in Sekisui, attorneys and litigants alike should take extra precautions to timely implement litigation holds and not delete any potentially relevant electronic documents in order to avoid a harsh adverse inference charge at trial. Only time will tell whether the standard set forth in Sekisui becomes the new rule in the Second Circuit, or whether the proposed revisions to the Federal Rules of Civil Procedure will set forth a different rule for imposing sanctions when electronic evidence is knowingly destroyed.

Fundraiser for Senator Lee Zeldin – November 2013

L-R: Senator John Flanagan, Patrick McCormick, Steve Levy, Senator Lee Zeldin, Joe Campolo, Scott Middleton & Assembly Member Michael Fitzpatrick.

CORPORATE/PRIVATE EQUITY UPDATES

SEC Lifts Ban on Advertising Certain Private Offerings
by David Hoeppner, Esq.

The Securities and Exchange Commission voted earlier this month to lift its 80-year-old ban on general solicitation and advertising under certain circumstances (Regulation D Rule 506 offerings), permitting startups, venture capitalists, and hedge funds to openly advertise that they're raising money in private offerings. The advertising ban was originally adopted as part of the Securities Act of 1933, prompted by the concern for investor protection during the Great Depression.

The vote satisfies a provision in last year's Jumpstart Our Business Startups Act, signed by President Obama in April 2012, which was aimed at making it easier for small businesses to raise capital through private offerings of securities, and will likely transform how startups and investment firms are able to interact with and garner investors.

Private issuers of securities taking advantage of this rule change are still allowed to sell securities only to an exclusive group of investors, those who meet the criteria of "Accredited Investor." Individual Accredited Investors must have a net worth of at least $1 million excluding their primary residence, or annual income of more than $200,000 in each of the two most recent years. Fundraisers must take reasonable steps to ensure investors are in fact Accredited; the final regulation will include a list of verification methods that businesses may use to determine whether an investor is accredited, including reviewing copies of Internal Revenue Service filings, and will require companies to notify the SEC 15 days prior to engaging in any general solicitation.

While the move is widely supported by entrepreneurs, it has drawn criticism from investor advocates who believe public advertising could push investors into bad or fraudulent investments. To help the SEC monitor the advertising and collect data on how investment will change, fundraisers have to file a Form D with the SEC at least 15 days before they begin general solicitation, and amend that Form D to state that they're done soliciting within 30 days of finishing.

LLC Dissolution: Recent Decision Highlights the Perils of Not Planning for a Business Divorce
by Hayley M. Gregor, Esq.

Too often, close friends and family members enter into business relationships with little or no consideration as to what will happen if the venture does not work out as planned. At the time of entering into the business relationship, individuals are typically focused on the endless potential that can come from the venture and often do not think about what might happen if things do not go as planned, nor do they want to have that uncomfortable discussion concerning how business disputes will be resolved down the road. As unpleasant as such discussions may be at the time, a recent decision demonstrates why planning for a business divorce at the onset can provide much needed rights and remedies for LLC members seeking to redress harms caused by fellow members.

A recent decision from the Supreme Court in Kings County highlights the importance of careful drafting and consideration of an LLC operating agreement. In Mizrahi v. Cohen, two brothers-in-law formed an LLC to own a commercial building, wherein both the plaintiff and defendant would rent space for their respective businesses, in addition to renting space to unrelated tenants. Apparently the defendant failed to pay rent to the LLC and refused to contribute to the upkeep of the building, including payments on the mortgage. In an earlier decision the court granted plaintiff's petition for dissolution while reserving decision on how to liquidate the assets of the LLC. The plaintiff sought to buy out the defendant, while the defendant sought appointment of a receiver and a public auction of the real property. The court ordered an accounting and appraisal of the real estate and the results revealed that the LLC was essentially bankrupt, that the plaintiff had approximately four times the equity in the LLC as possessed by the defendant, and that by liquidating the LLC in a public auction as requested by the defendant, both members would lose their entire investment.

An issue for the court, however, was that the hastily drafted LLC operating agreement did not provide for the relief requested by the plaintiff. The court noted that:

"[t]his case presents a cautionary tale regarding the drafting and execution of the operating agreement for an LLC . . . the parties apparently summarily executed the Operating Agreement, without reviewing it, immediately prior to the closing on their purchase of the subject real property, in response to the demands of the mortgagee. The basis for the draft by counsel is not known, but it has been suggested that it was constructed by "cutting and pasting" portions of other operating agreements."

The Court went on to describe the perils of the "cut and paste" operating agreement, stating that:

"A limited liability company, though analogous to a corporation in some respects, is primarily a creature of contract. Thus, when provisions regarding management and operation are arbitrarily or carelessly adopted, without consideration to future potential problems, the parties may be forced to accept consequences that none of them wanted or intended."

In this case, the operating agreement did not expressly authorize the relief plaintiff sought in the context of a judicial dissolution. However, "in light of defendant's continuing failure to pay even the use and occupancy which is due on his premises while continuing in occupancy, and the likelihood that plaintiff continues to cover all expenses of the building with infusions of additional contributions, thus unjustly enriching defendant, the inequity of the present situation is profound and warrant Court intervention." In crafting its equitable remedy, the Court relied on Lyons v. Salamone, a 2006 1st Department case, in which the Court expressly rejected the argument that, in the absence of an express statutory provision authorizing a buyout, the Court was without authority to order mutual buyout rights permitting the members to bid the fair market value of the other member's interest, with a direction to the receiver to accept the highest legitimate bid.

The Court in Mizrahi ordered each member to submit to a trustee a proposal for the purchase of the other members interest, including satisfaction of the mortgage, along with a 25% deposit with such bid; however, the member shall be given credit against such deposit for any debt owed to him personally by the LLC and any debt owed to the LLC by a member must be paid in full, in addition to the 25% deposit, before such bid may be accepted by the trustee. The trustee was ordered to accept the highest qualifying bid. Thus, given the large amount of money owed to the plaintiff personally by the LLC, and the substantial amount of money owed to the LLC by the defendant, it was unlikely that the defendant was going to be able to present the highest qualifying bid.

In this case, the Court was able to use its equitable powers to craft a mutual buyout remedy, notwithstanding the absence of statutory or contractual provisions permitting such relief that preserved the plaintiff's investment in the LLC. Nevertheless, this case demonstrates that the absence of clear and definitive language in LLC agreements can make the dissolution process long and costly, in addition to the likelihood that the petitioning member may not get the relief requested in the end. Luckily for the plaintiff in this case, he was able to preserve his investment, but such might not be the case for others similarly situated.

Accordingly, it is imperative that prior to entering into an LLC or executing an operating agreement you carefully read the agreement and seek the advice of an attorney. A little extra time now can save you a lot of money, time and aggravation in the future.

Best Interests of the Corporation (if Minority Shareholders Agree)
by Brandon Druek, Esq.

The decision-making process for corporations is typically relegated to the directors of the corporation, appointed by vote of the holders of shares of the corporation. In managing the affairs of the company, the directors must take actions which are in the best interests of the corporation.[1] The authority to make these decisions without minority shareholder input may be a consideration when selling an interest in the corporation, to prevent holders of a minority interest from influencing corporate action.

For closely held corporations (which are essentially corporations whose stock is not publicly traded), directors must be cautious when soliciting minority investors. Directors must not only carefully consider what powers they desire to give to holders of these minority shares, but also what powers may inherently exist based on New York law. For closely held corporations, because there is no public market to sell shares and any possible sale may have many restrictions depending on the corporation, New York has added statutory protections for minority shareholders, which create additional rights or powers for these shareholders.

("BCL") § 1104–a creates a statutory power for minority shareholders in closely held corporations, which does not exist unless those minority shareholders bargained for such a voice in the corporate decision making process. BCL § 1104-a provides, in part, that "[t]he holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation…entitled to vote in an election of directors may present a petition of dissolution" when, among other reasons, the directors or those in control of the corporation are guilty of illegal, fraudulent or oppressive actions toward the minority shareholders.[2] Illegal and fraudulent actions may be fairly straightforward and apparent; however, the term

[1] See *Patrick v Allen,* 355 F Supp 2d 704, 710
[2] BCL § 1104-a

"oppressive actions" can be interpreted to mean a variety of corporate conduct which may or may not be directed at the minority shareholders. Oppressive conduct will be found "when the majority['s] conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and … central to the petitioner's decision to join the venture."[3] Directors may need to defend conduct which may arguably, or at first glance, be considered oppressive, but is actually in the best interest of the corporation.

As a remedy to the oppressed shareholder, BCL § 1104-a allows the minority shareholder to petition the court for judicial dissolution of the corporation. Additionally BCL § 1118 provides that, for actions brought under BCL § 1104-a, any other shareholder or the corporation itself may elect to purchase the shares owned by the petitioning shareholder(s) within ninety days after the filing of a petition under BCL § 1104-a (or a later time at the court's discretion), at fair value and upon terms and conditions agreed upon by the parties and approved by the court[4] or, if the value cannot be agreed upon, at fair value of the shares as of the day prior to the date on which the petition was filed, as determined by the court.[5]

While the logic behind BCL § 1104-a is apparent, especially when fraudulent or illegal conduct is concerned, it is important to understand the implications of the statute. BCL §1104-a can be used to provide minority shareholders with a tool to leverage corporate conduct, by threatening to initiate a proceeding under the statute. The director may then either perform the requested action or fight the potential BCL § 1104-a proceeding by defending its conduct through the court, essentially exhausting company assets to defend what may be a legitimate business decision. The statute, in essence, takes the place of bargaining between the parties at the time the shares were sold and provides a default power allowing the minority shareholder to instigate a corporate dissolution proceeding. If minority shareholders are concerned with being held powerless, they can bargain for more control or a potential buy out option when purchasing the shares or invest money in another corporation with those rights.

Notwithstanding the negative aspects, the statute does provide immense benefit. If a director exploits a powerless minority shareholder and essentially holds the minority shares hostage, using fraud or illegality to offer a buyout of those minority shares at a less than reasonable value, the minority shareholder can escape the oppressive conduct by petitioning the court. Along with that benefit, however, BCL § 1104-a requires that the directors consider the minority shareholder interest separately from the entire corporate interest, or else they may be required to defend their conduct in court, at the cost of corporate assets. The implications of BCL § 1104-a can effectively alter corporate management decisions from "what is best for the corporation" to "what is best for the corporation AND also avoids a potential claim by the minority shareholders." When soliciting investors, corporations should consider if the price it will receive for those minority shares is sufficient to offset that potential risk.

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[3] *In re Quail Aero Service, Inc.*, 300 A.D.2d 800, 802, citing *Matter of Kemp & Beatley Inc.* 64 N.Y.2d 63
[4] BCL § 1118 (a)
[5] BCL § 1118 (b)

REAL ESTATE LAW UPDATES

Demystifying the Mechanics of the 1031 Like-Kind Exchange
by Alyson S. Repp, Esq.

Just say the acronym "IRC" in a room full of attorneys and business owners and you can see the chills running down their spines. The Internal Revenue Code is a complicated beast which is best explained by your accountant or an experienced tax attorney. There is one section, however, that has become very important in the commercial real estate world. If you are at all familiar with commercial real estate, you have likely heard the term "1031 exchange" thrown around and may have a vague idea that it has something to do with taxes. Below, I have set out a brief overview of the sometimes frightening 1031 exchange. While I cannot fully explain all the intricacies of a 1031 exchange within this article, it is a tool which can be extremely helpful to those who invest wisely and take the requisite time to learn about it.

Generally, when you sell a commercial property, you pay capital gains tax on any gain you realize at the time of the sale. Section 1031 of the Internal Revenue Code provides an exception to this rule, allowing you to postpone or defer paying the tax if you reinvest the proceeds you have gained from the sale into a similar property under an IRS qualifying like-kind exchange.

Although not the only kind of exchange or tax saving method, there are three types of exchanges which real estate investors frequently engage in. The most simple and straightforward is known as a simultaneous exchange. In a simultaneous exchange, property A is sold and property B is purchased simultaneously. The funds obtained from the sale of property A are used to purchase property B. In order to avoid paying capital gains tax on the purchase and deferring the payment of the tax, you must invest all the funds gained in the sale of property A into property B. Any funds remaining at the end of the exchange may be immediately taxable.

The second type of exchange is considered a deferred exchange. In a deferred exchange, property A is sold (the “Relinquished Property”) and then, within a certain period of time, respectively known as the 45-Day Clock and the 180-Day Clock, you must use those funds to purchase property B (the “Replacement Property”). In this type of exchange, the disposition of the Relinquished Property and acquisition of the Replacement Property must be mutually dependent parts of an integrated transaction constituting an exchange of property. In other words, the properties must be held for investment or use in a trade or business (which has been interpreted by the IRS and courts alike), the Replacement Property must be taken in the same name as the Relinquished Property was titled in and the Replacement Property must be of a “Like Kind,” also determined by the IRS and Congress.

Often, and usually advisable, someone engaging in a deferred 1031 exchange will hire an exchange facilitator, often also acting as Qualified Intermediary, who is experienced in the 1031 procedures and can facilitate the exchange pursuant to the rules provided in the Income Tax Regulations. It is very important to have an intermediary, since according to the tax code and regulations the taxpayer can have no rights to the funds being held in the interim until the exchange is complete. The exchange facilitator often acts as the QI, holding the funds for your benefit until the exchange is complete, so as not to inadvertently invalidate the exchange. While hiring an exchange facilitator is an added expense, if you do not conduct an exchange properly, you will lose the tax benefit of doing so.

The two time frames which you must pay close attention to in a deferred 1031 exchange are the 45-Day Clock and 180-Day Clock. In a deferred exchange, you have 45 days from the date you sell the Relinquished Property to identify a potential Replacement Property or properties. The identification must be in writing, signed by you (the taxpayer), and delivered to the seller of the Replacement Property or the QI. Second, the Replacement Property must be purchased and the exchange completed no later than 180 days after the sale of the Relinquished Property or the due date, with extensions, of the income tax return for the tax year in which the Relinquished Property was sold, whichever is earlier.

The last exchange I will discuss in this article, and perhaps the most technically challenging 1031 exchange, is the reverse 1031 exchange. Yes, that sounds like some sort of figure skating move, and well, it may be just as complicated if you do not have an experienced attorney, accountant and QI guiding you through the process. In this scenario, you first acquire the Acquisition Property, property B, through an exchange accommodation titleholder ("EAT" also often the QI). Then, within the 180-Day Clock, you must sell your Relinquished Property, property A. Next, you take title from the QI of the Acquisition Property, which has been "parked" by the QI, and the exchange is complete. Simple, right? Not so fast – there are many intricacies that go into this process. These intricacies include computation of the basis for the new property, the rules of a "boot," the types of properties which may be exchanged, the roles of Qualified Intermediaries and Exchange Accommodation Holders and the pitfalls and dangers in hiring someone who is not qualified for the job. Remember to always use reputable and experienced professionals when engaging in these types of complicated exchanges in order to save you time, money and ultimately, frustration.

Demystifying the Mechanics of the 1031 Like-Kind Exchange Part II: Who is the QI?
by Alyson S. Repp, Esq.

My previous article gave a basic overview of the complexities of a 1031 exchange. Now let's delve a little deeper and discuss the players often involved in a 1031 exchange, more specifically the Qualified Intermediary or "QI." Before I explain the intricacies of the QI's role, some key consultants you should confer with are: (1) an experienced real estate attorney who will help guide you through the process of buying and selling your relinquished and replacement properties, and (2) an accountant familiar with the 1031 process to help explain tax consequences of the exchange. Besides your attorney and accountant, the key player leading this process should be an experienced and competent QI. The right QI can help facilitate the process.

What makes a Qualified Intermediary qualified?
In order to "qualify" as a QI, the person cannot be the taxpayer or a "disqualified person." The IRS has not established licensing requirements for QIs; rather, the person cannot be an unqualified or disqualified person as defined by the Internal Revenue Code. Examples of

disqualified persons include persons who have acted as the taxpayer's employee, attorney, accountant, investment banker or broker, or real estate agent or brokers within the two-year period ending on the date of the transfer of the first of the relinquished properties in a like-kind exchange (nor can the QI be related to one of the above disqualified persons).

What are you paying the QI to do?
The QI should perform the following services to facilitate the exchange: (1) prepare the 1031 exchange legal agreements and related transaction documents in order to properly structure the 1031 exchange transaction; (2) receive, hold and safeguard your 1031 exchange funds during the term of the transaction; and (3) advise and consult with you regarding the implementation of your 1031 exchange transaction to ensure compliance with applicable Internal Revenue Code sections, Treasury Regulations and related Revenue Rulings and Procedures.

The QI will generally prepare the exchange agreement, an assignment, and a notice. The Exchange Agreement will generally contain terms governing (1) the acquisition of the relinquished property from the taxpayer; (2) the transfer of the relinquished property; (3) the acquisition of the replacement property; and (4) the transfer of the replacement property to the taxpayer. The Exchange Agreement will expressly limit the taxpayer’s rights to receive, pledge, borrow, or otherwise obtain benefits of money or other property held by the QI during the term of the exchange process so as to prevent contamination of the exchange. These terms must be followed to complete the 1031 exchange. Second, the QI will prepare an assignment of the contract of sale to the QI. The assignment is because the QI will be stepping into the taxpayer’s position and selling the property. The third document the QI provides is a notice to the party on the other side of the transaction advising that the transaction is a 1031 exchange. The purpose of notification is to prove, if necessary, that the 1031 exchange was in place at the closing.

Who to choose?
Lastly, when picking a QI, you must do your due diligence. Google “QI” and you will get numerous hits of people and entities purporting to be qualified QIs. But just because they meet the definition of a QI does not meet they are competent. Qualified intermediaries are not licensed, regulated, or required to be bonded. Therefore, you should investigate your potential QI thoroughly looking into their technical ability, expertise and experience before choosing one. Do not be afraid to ask lots of questions, especially regarding the policies and procedures as well as internal audit controls. Also, find out if your QI uses segregated qualified trust accounts, which can help prevent loss of funds in case the QI declares bankruptcy. There have been numerous incidents of intermediaries declaring bankruptcy or otherwise being unable to meet their contractual obligations to the taxpayer. When this happens, taxpayers may not meet the strict timelines set for a deferred or reverse exchange and disqualify the transaction from a 1031 deferral.

INTELLECTUAL PROPERTY LAW UPDATES

Covenant Not to Sue Forestalls Trademark Invalidity Claim
by Eryn Truong, Esq.

On January 9, 2013, the U.S. Supreme Court in *Already, LLC v. Nike, Inc*. unanimously ruled that Already could not dispute the validity of one of Nike's trademarks after Nike agreed not to sue the company for infringement.

Nike sued Already, a designer and marketer of athletic footwear, for trademark infringement and already counterclaimed to declare the trademark invalid. Eight months after filing suit, Nike provided Already with a covenant not to sue, and subsequently moved to dismiss all claims. In the covenant not to sue, Nike agreed to "unconditionally and irrevocably" refrain from making any claims or demands against Already, as well as its employees, distributors and customers, for any possible cause of action based on trademark infringement, unfair competition or dilution relating to the Nike trademark. In its motion to dismiss, Nike asserted that the covenant not to sue terminated the case or controversy and rendered the case moot.

The district court dismissed the counterclaims as moot and the Second Circuit affirmed. The Supreme Court unanimously affirmed. It held that the broad covenant not to sue, which covered past and future shoes, met the demanding standard of mootness by voluntary cessation, particularly as Already has no plans to develop or market shoes which infringe on the trademark. Since Nike had agreed unconditionally not to sue Already, the federal courts lacked jurisdiction over Already's counterclaims that Nike's trademark is not valid.

The decision here demonstrates a strategic weapon that trademark holders possess to forestall invalidity claims by promising not to sue competitors for infringing their IP rights. This provides another avenue in choosing where and when to fight invalidity battles.

Fight Over Chocolate Kisses Trademark
by Eryn Truong, Esq.

As demonstrated by a recent lawsuit filed by a carpet manufacturer against chocolate-giant Hershey, one has to ask how far large companies are going to go in attempt to stretch their trademark rights. What these companies want is a monopoly over their marks in every good and service.

However, trademark rights are limited in scope. The goods and services listed on a trademark registration establish the scope of the applicant's rights in the relevant mark. This, however, does not prevent large companies from testing the boundaries.

In the lawsuit, Shaw Industries Group Inc., a carpet manufacturer owned by Berkshire Hathaway Inc., is seeking declaration that a carpet color it calls "Chocolate Kiss" does not infringe Hershey's "Kisses" and "Hershey's Kisses" trademarks.

Shaw has used the name "Chocolate Kiss" for a particular carpet color for over two decades without any indication of confusion between the products or the companies until December of 2012, when Hershey sent a cease and desist letter to Shaw in demanding that it stop using the "Chocolate Kiss" name. Despite Shaw's response that it already planned to phase out the use of the "Chocolate Kiss" color name in June of 2013, Hershey demanded that it immediately stop using the term and threatened to file suit. Shaw, however, beat Hershey to the punch.

Shaw is requesting that the court issue a declaratory judgment that it is not infringing or diluting Hershey's trademarks and that Hershey essentially agreed to its use of the name by not challenging it for twenty years. Specifically, Shaw states in its complaint that "[d]eclaratory relief is proper in this case because it will clarify and settle the actual, present dispute between the parties as to whether the plaintiffs use of the 'Chocolate Kiss' name violates defendant's rights in its Kiss trademarks," and "[i]t will allow Shaw to continue its regular business without fear of incurring further loss, as well as the uncertainty, insecurity and controversy giving rise to this action."

Large companies such as Hershey's are known to vigorously defend their brands and enforce their trademark rights, but one has to ask whether a carpet color name can be confused with Hershey's trademarks. These companies are known to push their limits and test the boundaries of their rights, but require some push back by companies, such as Shaw, so they do not get out of hand.

Copyright Claim Dismissed for Lack of Specificity
by Eryn Truong, Esq.

A recent decision from the Southern District of New York demonstrates the importance of pleading sufficient factual allegations in a copyright infringement case. In *Kane LLC v. Scholastic Corp.*, Case No. 12-cv-3890, 2013 WL 709276 (S.D.N.Y. Feb. 27, 2013), the Court dismissed plaintiff's copyright claim because it did not specify which works were at issue, which acts constituted infringement, and the time period that the infringement occurred.

Plaintiff was a stock photograph agency that licensed certain copyrighted photographs to defendant. The parties entered into a licensing agreement which granted defendant the right to use the photographs under certain limited terms. In the complaint, plaintiff alleged that defendant used the photographs without permission or beyond the scope of the licensing agreement. Plaintiff listed the works in the complaint, but indicated that the list was not exhaustive. Defendant moved to dismiss the complaint.

The Court granted the motion to dismiss on the grounds that the complaint did not specify which works were at issue and did not allege the acts that constituted infringement. Specifically, the Court noted that it was unclear whether the copyright registration numbers contained in the complaint corresponded to the list. Further, the complaint contained broad conclusory statements of infringement because it did not provide factual support that defendant exceeded the licenses and used the works without permission. The most significant deficiency in the complaint was its failure to specify a time period of the alleged infringement.

Although defendant's motion to dismiss was granted, plaintiff was granted leave to file an amended complaint.

This case demonstrates that copyright plaintiffs must sufficiently plead the factual allegations regarding the works at issue, the infringing acts, and the relevant time period. Although a correctable error in this case, plaintiff suffered a loss at the offset.

License is Required for Playing Music in Public Establishments
by Eryn Truong, Esq.

Business owners should be advised that a license is required for any public performance of music. Some owners are unknowingly playing music in their restaurants, bars, gyms, and storefronts from CDs, iPods, or MP3 players in violation of Copyright Laws.

What is needed are public performance rights -- the right to play music that the general public will hear in one way or another. Public performance rights licenses are handled by two very large companies named ASCAP (American Society of Composers, Authors and Publishers) and BMI (Broadcast Music Incorporated). Each one handles a catalog of about 4,000,000 songs. Their fees depend upon the type of establishment, size, etc.

Further information on how to obtain a license from BMI and ASCAP can be found at:
www.bmi.com/licensing and *www.ascap.com/licensing/generallicensing.aspx*

The penalty for failing to obtain a license is a potential lawsuit for copyright infringement. Under the Copyright Law, the violator can be subject to sanctions, which can include an injunction and the copyright owner's actual damages, as well as the infringer's profits, or statutory damages of up to $30,000 for each copyrighted song performed without a license (up to $150,000 if the infringement is willful). The infringer can also be required to pay the copyright owners' legal fees. The law further provides for criminal sanctions against those who willfully infringe on a copyright for commercial advantage or private gain.

Being caught without a license is a risk that some establishments are taking every day. The license fees, however, are nominal compared to the potential penalty, if caught. Although music may not be a major part of a business, any public establishments that plays or wishes to play music for their patrons should be aware of the license requirement.

Second Circuit Holds that Appropriation Art Constitutes Fair Use
by Eryn Truong, Esq.

In a recent decision, *Cariou v. Prince*[1], the Second Circuit held that 25 works of appropriation art that incorporated original copyrighted photographs constituted fair use under the Copyright Act, 17 U.S.C. § 107. Appropriation art is the "more of less direct taking over into a work of art a real object or even an existing work of art."[2]

In this action, defendant Prince took Cariou's photographs and incorporated them into 30 works. Images of the 30 works and the corresponding Cariou photographs used are available through the Second Circuit's website: http://www.ca2.uscourts.gov/11-1197apx.htm.

Cariou sued for copyright infringement and the district court granted Cariou summary judgment, holding that no reasonable jury could find Prince's work to be fair use. The Second Circuit reversed in part, vacated in part and remanded for further proceedings.

The Second Circuit's analysis focused on the four non-exclusive fair use factors provided in the Copyright Act: (i) the purpose and character of the use, including whether the use is commercial or for nonprofit educational purposes; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for the value of the copyrighted work.

Under the first standard, the Second Circuit found that 25 of the 30 works were transformative because they "manifest an entirely different aesthetic from Cariou's photographs."[3] The court focused on the differences between the two artists' "composition, presentation, scale, color palette, and media."

Under the second factor, the Second Circuit acknowledged that Cariou's work was both creative and published, which weighted against a finding of fair use, but noted that this factor is of less importance where, as here, the work is used for a transformative purpose.[4]

Under the third factor, even though Prince used all or substantially all of Cariou's photographs in some of his works, the Second Circuit held that this does not necessarily weigh against fair use because the copying of the entirely of a work is sometimes necessary to make a fair use of the image. In this case, Prince's 25 works transformed Cariou's photographs into "something new and different."[5]

Lastly, under the fourth factor, the Second Circuit focused on whether the secondary work usurps the market of the original work. An alleged infringer usurps the market of the original work and its derivatives when the target audience and the nature of the infringing content are the same as the original. In this case, the Second Circuit found that Prince's work appeals to "an entirely different sort of collector than Cariou's" work and that this factor weighs in favor of Prince.[6]

With respect to five of the 30 works at issue, the Second Circuit remanded the case back to the district court for further proceedings.

[1] *Cariou v. Prince*, Case No. 11-CV-1197, 2013 WL 1760521 (2d Cir. April 25, 213).
[2] *Cariou*, 2013 WL 1760521, at *2.
[3] *Id.* at *6.
[4] *Id.* at *9.
[5] *Id.* at *10.
[6] *Id.* at *9.

Obama Plans to Take Action Against Patent Trolls

by Eryn Truong, Esq.

President Obama announced earlier this month a set of executive actions directed at cracking down on patent-holding firms that interfere with competition and abuse the patent system. The Wall Street Journal reports that these "patent trolls" are forcing technology companies, financial institutions and others into costly lawsuits to protect their products by collecting large numbers of patents and then pursuing licensing fees while not actually producing any products themselves. Many technology companies have dealt with multiple lawsuits from so-called "patent trolls," which aim to make money primarily through licensing fees.

These firms, also known as non-practicing entities (NPE) or patent assertion entities (PAE), say they are doing nothing wrong, just using patents that were legally granted by the U.S. Patent and Trademark Office. They say they promote a fair market by protecting smaller inventors.

Obama has constructed a five-step plan with a total of seven legislative changes, which will be released as part of a White House report on patent trolls. The plan includes a recommendation that the U.S. Patent and Trademark Office create rules that require patent owners to be identified and a request for Congress to pass legislation that puts sanctions on questionable lawsuits filed by patent-holding firms.

Additionally, Obama hopes to cut down on the International Trade Commission's involvement in patent disputes. Claims filed with the ITC are often resolved more quickly than standard federal lawsuits. The Obama administration would like Congress to change certain ITC legal standards and ensure that the agency has flexibility in hiring its judges. Officials say that the President will order a review of existing procedures at the ITC. Reliance on the ITC has not been limited to patent trolls, as a number of technology companies such as Apple, Samsung, and Google have increasingly used the International Trade Commission to settle a number of patent disputes. The so-called "Smartphone Patent Wars" have ballooned in recent years and today, several major companies spend more on patent litigation and defensive acquisition than on research and development.

According to President Obama, patent-holding firms are a drain on progress. The firms, he says, "don't actually produce anything themselves. They're just trying to essentially leverage and hijack someone else's idea to see if they can extort some money out of them."

The US patent system is meant to reward Americans for their hard work, risk-taking and creativity and encourage innovation and invention. But in recent years, there has been an explosion of abusive patent litigation designed not to enforce intellectual property rights, but to threaten companies in order to extract settlements costing the economy billions of dollars.

According to the White House blog, in the last two years the number of lawsuits brought by patent trolls has nearly tripled, and account for 62% of all patent lawsuits in America. All told, the victims of patent trolls paid $29 billion in 2011, a 400% increase from 2005 -- not to mention tens of billions dollars more in lost shareholder value.

It's a problem not limited to wealthy multinational corporations and venture capitalists, but small business owners as well. Businesses of any size are vulnerable to these tactics. The White House estimates that last year patent trolls sent out over 100,000 demand letters, threatening everyone from Fortune 500 companies to corner coffee shops and even regular consumers to pay a settlement or face a day in court.

Obama's initiative will help protect against frivolous litigation, and deter patent trolls from simply racking up licensing fees through the threat of litigation. This firm will be closely watching the bills being introduced under Obama's plan as it will greatly affect the number and type of patent litigations that can be brought by these NPEs.

Use of Designer Handbags Images Leads to False Advertising Suit
by Eryn Truong, Esq.

Designer fashion label Michael Kors recently filed suit against Costco in the U.S. District Court for the Southern District of New York for falsely advertising that Michael Kors products were sold at Costco.

This action arose from an email that Costco sent to its customers offering handbags on sale for $99.99. The email used images of Michael Kors handbags, but the problem was that Costco is not an authorized retailer of Michael Kors products. In addition, Costco does not even sell Michael Kors handbags.

Michael Kors alleges that Costco's use of images of its handbags would make customers believe its handbags are for sale at Costco, effectively luring away prospective customers from Michael Kors retailers into Costco stores, and the advertisement of a low price destroys the value of the brand. The average price of Michael Kors handbags ranges from $128 to $1,395.

While the ad did not explicitly state that the purses in the photos were Michael Kors, the photos did depict features that would identify the bags as products of the luxury designer.

Michael Kors is seeking a court order barring any future marketing of Michael Kors products, as well as payment of monetary damages.

A similar suit was filed against Costco by Tiffany & Co. back in February for its sale of "Tiffany" brand diamond engagement rings. The rings sold at Costco were not affiliated with the company, and use of the "Tiffany" trademark was not authorized. Tiffany & Co. also brought its action in U.S. District Court in New York's Southern District alleging that Costco's use of the "Tiffany" brand has tarnished its image and done irreparable harm to the brand.

These cases demonstrate that special attention needs to be paid to marketing and branding of products. Choosing images and names, while the function of the creative minds in marketing, requires cross-checking to ensure that the final product does not infringe the rights of others.

Skipping this step may subject non-intending companies to potential claims similar to those brought by Michael Kors and Tiffany & Co.

Cease and Desist Letter Imposes Reasonable Remedial Measures
by Eryn Truong, Esq.

According to a recent decision, recipients of cease and desist letters should do more than perform cursory remedial measures.

Consistent with similar situations in the U.S. Court of Appeals for the Seventh, Ninth and Second Circuits, the Sixth Circuit affirmed liability of a flea market operator for contributory trademark infringement for failure to stop the sale of counterfeit goods at the market despite numerous warnings. *Coach Inc. v. Frederick Goodfellow*, 717 F.3d 798 (6th Cir. 2013).

Plaintiffs, Coach, Inc. and Coach Services, Inc., who design and sell the famous Coach handbags, filed suit under the Lanham Act against Defendant, Frederick Goodfellow, who owned and operated a flea market in the Memphis area. After Goodfellow failed to take action in response to letters from Coach and the local district attorney informing him that counterfeit sales of Coach products were occurring at the flea market, Coach filed suit. In a raid by law enforcement officers, counterfeit Coach products were seized. Goodfellow admitted knowing that vendors were selling counterfeit Coach products, but did not take any effective remedial measures.

The district court granted summary judgment on liability to Coach after Goodfellow failed to respond to Coach's motion for summary judgment. After a jury trial on damages, Coach was awarded just over $5 million dollars in damages based upon willful infringement of 21 of Coach's marks. The district court also awarded Coach attorneys' fees and costs, finding the case exceptional based on Goodfellow's failure to litigate liability, and the jury finding of willful infringement.

The Sixth Circuit affirmed the district court's summary judgment, finding that Goodfellow was contributorily liable for the vendors' actions. In particular, the court noted Goodfellow's failure to undertake reasonable remedial measures after receiving actual notice of ongoing infringing activity. Goodfellow's knowledge that vendors were engaging in trademark infringement was established by his receipt of the letters from Coach and the district attorney. Furthermore, Goodfellow's remedial measures taken after receipt of these letters were insufficient. In this case, Goodfellow distributed pamphlets to vendors, but they were distributed randomly and incompletely. He posted a sign stating "counterfeit is prohibit [*sic*]," but evidence established that this was intended to address an issue with counterfeit currency, not products. Finally, he called a meeting with vendors, but attendance at the meeting was voluntary and the meeting was scheduled for a day on which the flea market was not open. As a result, the Sixth Circuit found no clear error in the district court's ruling and affirmed liability.

This case is consistent with *Inwood Labs v. Ives Labs*, a 1982 Supreme Court decision, and other circuit court decisions from the Seventh, Ninth and Second Circuits that applied *Inwood*and found flea market operators subject to liability for trademark infringement by vendors.

As demonstrated, recipients of cease and desist letters should take care to ensure remedial measures are effectively implemented to avoid potential claims of contributory liability.

A Word of Precaution with Use of Olympic Marks
by Eryn Truong, Esq.

With less than two months until the start of the 2014 Winter Olympic Games, it is important to keep in mind that any unauthorized commercial use of the Olympic trademarks, logos or symbols is prohibited and will be enforced vigorously by the U.S. Olympic Committee (USOC).

Federal law gives the USOC exclusive rights to the symbol of the five interlocking rings, the Olympic flame and torch, and to the words "Olympic," "Olympiad," "Team USA," and "Sochi 2014," among others. The statute is further extended to prohibit any advertising that tends to suggest a connection with the Olympics or the USOC. The USOC's rights, however, are limited to situations where these words or symbols are used (1) to offer goods or services for sale; or (2) to promote a theatrical exhibition, athletic performance, or competition.

In addition to the exclusive statutory rights, the USOC holds trademark rights to Olympic-related words and symbols. Section 43(a) of the Lanham Act prohibits the use of trademarks when they (1) are likely to deceive or create a false impression of affiliation or endorsement; or (2) misrepresent in adverting certain aspects of the product. Unauthorized use of the trademarks could subject a user to possible claims of false endorsement or affiliation, which operate separately from USOC's exclusive statutory rights. Although there are certain exceptions to infringement based on fair use, with the heightened exclusivity in regard to its trademarks, the USOC is not afraid to object to use of one of its trademarks by another party.

Some creative marketers have attempted to find a route around USOC's rights by creating adverting materials with some Olympic flavors without using the protected marks, such as photographs of national flags or competing athletes. Such could be eye-catching to consumers, but they can also cross the line. For example, the USOC had previously alleged that a Subway television advertisement, which featured Michael Phelps swimming to "where the action is this winter," to falsely imply that Subway was affiliated or associated with the Olympics. The USOC characterized this advertisement as "ambush marketing" and an attempt to associate Subway with the Olympics or as a sponsor.

In short, the USOC has a reputation for aggressively policing their exclusive rights to certain words, phrases and symbols and they have a special federal law to back them up. Be cautious of the use of Olympic marks by knowing and understanding where the boundaries are.

HEALTHCARE LAW UPDATE

HIPAA Settlement
by Arthur Yermash, Esq.

The U.S. Department of Health and Human Services (HHS) reported a settlement this month with Affinity Health Plan, Inc. for potential violations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules. The seven-figure fine for HIPAA violations resulted from a failure to remove protected health information or "PHI" from the hard drive of a leased photocopier. The $1,215,780 settlement with Affinity Health Plan, Inc., a not-for-profit managed care plan serving the New York metropolitan area, resulted from their failure to erase the PHI of up to 344,579 individuals when it returned multiple photocopiers to a leasing agent.

Affinity filed a breach report with the HHS Office for Civil Rights (OCR) on April 15, 2010, as required by the Health Information Technology for Economic and Clinical Health, or HITECH Act. The HITECH Breach Notification Rule requires HIPAA-covered entities to notify HHS of a breach of unsecured protected health information. CBS had purchased a photocopier previously leased by Affinity and had notified Affinity as part of its investigatory report that the copier that Affinity had used contained confidential medical information on the hard drive. On May 19, 2010, in response to Affinity's report, OCR initiated its investigation into Affinity's compliance with the Privacy, Security, and Breach Notification Rules.

The investigation also revealed that Affinity failed to incorporate the electronic protected health information (ePHI) stored on photocopier hard drives in its analysis of risks and vulnerabilities as required by the Security Rule, and failed to implement policies and procedures when returning the photocopiers to its leasing agents.

"This settlement illustrates an important reminder about equipment designed to retain electronic information: Make sure that all personal information is wiped from hardware before it's recycled, thrown away or sent back to a leasing agent," said OCR Director Leon Rodriguez. "HIPAA covered entities are required to undertake a careful risk analysis to understand the threats and vulnerabilities to individuals' data, and have appropriate safeguards in place to protect this information."

In addition to fine, the settlement includes a corrective action plan requiring Affinity to use its best efforts to retrieve all hard drives that were contained on photocopiers previously leased by the plan that remain in the possession of the leasing agent, and to take certain measures to safeguard all ePHI.

This enforcement action provides important reminders for all regulated entities:

- Computers and laptops are not the only devices with hard drives. Photocopiers, fax machines, notebooks and PDAs are all devices with internal storage drives where PHI can reside and must be protected.

- A self-reported breach of unsecured PHI may prompt investigation. In this case, OCR's investigation and the ensuing settlement resulted from Affinity's own report of the breach, not by complaint or audit.

- Large data breaches typically prompt larger fines.

- Large fines are bad, but Corrective Action Plans can also be harsh – and expensive. Affinity's Corrective Action Plan requires comprehensive follow up on a tight timeframe and with strict oversight by OCR. Affinity is responsible for its own expenses in implementing the plan.

Department of Health Issues New Privacy Rules to Expand Patient Privacy Protection
by Michele Gipp, Esq.

On January 17, 2013, the U.S. Department of Health and Human Services ("HHS") released new updates to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") to expand patient privacy regulations.

Originally, HIPAA applied only to covered entities (i.e., healthcare providers, health plans, and organizations that process health insurance claims), and covered entities entered into contractual arrangements with business associates to further protect patient privacy. Now, the final rule applies to business associates directly and business associates are separately and directly liable for HIPAA violations. Business associates include parties providing legal, accounting, consulting and certain other services to or for covered entities and any party that creates, receives, maintains or transmits ("PHI") on behalf of a covered entity. Furthermore, if the business associate discloses PHI to a subcontractor, there must be a business associate agreement between the parties to satisfy HIPAA requirements.

For business associate agreements that are already in place, such agreements will likely need to be amended to include additional provisions for the reporting of breaches to the covered entity, directly complying with HIPAA, and complying with the HIPAA security rule for electronic PHI.

Additionally, the final rule increases the disclosure standard for breaches. Previously, HIPAA required notification only if the breach involved significant risk of monetary, reputational or other harm to the patient. The new rule now requires that organizations notify HHS and patients if any health information is likely compromised, which includes an impermissible access, use, acquisition or disclosure of unsecured PHI. However, if a security breach involving encrypted PHI occurs, the breach is not reportable because encrypted PHI data is considered secure.

The burden is on the covered entity to demonstrate that there is a low probability that the PHI has been compromised by performing a risk assessment and evaluating the following factors: (i) nature and extent of PHI involved; (ii) the unauthorized person who used the PHI or to whom the disclosure was made; (iii) whether the PHI was actually acquired or viewed; and (iv) the extent to which the risk to the PHI has been mitigated.

Covered entities must also inform the local media if the breach affects more than 500 people in a certain area. A covered entity can choose to automatically report to HHS without doing a risk assessment.

An individual's right to request copies of his or her PHI is also expanded. The new rule requires covered entities to provide copies of PHI in the format requested by individuals, and if PHI is not readily producible or maintained electronically, covered entities must provide the PHI in electronic format. Additionally, individuals can request that a covered entity provide a third party with an electronic copy of his or her PHI. Such requests must be in writing and identify the name and address of the third party.

Covered entities and their business associates have until September 23, 2013 to comply with the new rule. With respect to currently compliant business associate agreements, covered entities and business associates may operate under an existing business associate agreement until September 22, 2014, provided two requirements are met: (i) the current agreement is fully compliant under the current HIPAA regulations; and (ii) the agreement is not amended or renewed between March 26, 2013 and September 22, 2014. If the agreement is amended or renewed during such time, the new or amended agreement must comply with the new rules.

EMPLOYMENT LAW UPDATES

Recent Decision Denies Injunctive Relief for Company Against Former Employee
by Jeffrey Basso, Esq.

One of the major concerns that many business owners deal with on a regular basis is protecting their confidential information (i.e. trade secrets, customer lists, pricing information, contracts, proprietary information, intellectual property, etc.) in the event an employee leaves the company for a competing business. Many businesses have employees sign written non-compete, non-disclosure and/or non-solicitation agreements to put protections in place in advance of such a scenario. Of course, there are also situations in which no agreement is in place with an employee who then bolts for a competitor while taking along his or her former employer's confidential information to the new company.

A recent decision in Suffolk County Supreme Court (Whelan, J.) dated February 7, 2013 dealt with the latter scenario described above in which no agreement was in place between the company and the employee. In *RBR Melville Contractors, LLC v. Feehan, et al.*, the Court faced a motion from the plaintiff company seeking preliminary injunctive relief against its former employee as well as the company started by the employee to compete with his former employer.

Plaintiff, RBR Melville Contractors, LLC ("RBR") is engaged in the snow removal business at commercial premises and multi-unit residential communities. RBR's former employee, Feehan, had worked for RBR for ten years, with the last six of those years working as RBR's sales manager. As sales manager, RBR alleged that Feehan regularly communicated with RBR's customers and had access to customer lists, contracts, pricing lists and other confidential information and even had his personal phone number and e-mail address listed on RBR's business cards. RBR alleged that Feehan abruptly resigned in July 2012, approximately one month after Feehan formed his own company, Professional Snow Management, LLC ("PSM"). RBR alleged that when Feehan resigned from RBR, he took with him RBR's confidential information to use for PSM, which was a direct competitor.

In August 2012, RBR commenced the action against Feehan, PSM, and another company that apparently financed PSM, alleging causes of action for: conversion of contracts with its customers, former customers, etc.; breach of fiduciary duty against Feehan for actions taken by Feehan before he left RBR; unfair competition against all defendants; and an injunction. RBR then brought an order to show cause in January 2013 (which is the subject of the decision discussed herein) seeking preliminary injunctive relief to restrain the defendants from soliciting RBR's customers, interfering with RBR's contractual relationships, and using RBR's confidential information. RBR also sought mandatory injunctive relief demanding that defendants return documents and other confidential information taken from RBR.

The Court ultimately denied RBR's motion in its entirety finding that it could not establish the elements necessary for injunctive relief, most notably a likelihood of success on the merits. Specifically, the Court noted that when there is no restrictive covenant in place (i.e. non-compete agreement), an employee is free to compete with a former employer unless the employee is using trade secrets or fraudulent methods to compete. In this case, the Court held that RBR's customer lists and other information it alleged was confidential did not qualify as "trade secrets" because RBR failed to take any measures to protect the information and did not require Feehan to guard the secrecy of the information. In addition, simply having knowledge of the intricacies of a business operation or utilizing one's memory of information does not constitute a trade secret without a showing of some other wrongdoing. In that regard, the Court found that there was insufficient proof to establish that Feehan engaged in any wrongful conduct to unfairly compete with RBR either during or after his employment with RBR. There was also insufficient evidence to demonstrate that Feehan took, stole, or converted any documents belonging to RBR.

Overall, the Court's denial of RBR's motion for injunctive relief further establishes the need for business owners to put safeguards in place to prevent situations like what happened to RBR. It is important to have written agreements in place with employees that clearly define the company's confidential information and trade secrets and set forth remedies for the company, including injunctive relief, in the event of a breach by the employee as it pertains to competing with the company, soliciting the company's customers, and using and/or disclosing the company's confidential information and trade secrets. If a written agreement is in place, the company must also ensure that the agreement is narrowly tailored and reasonable in scope or the Court could find it unenforceable as being overly broad.

Department of Labor Inspection Preparation for Employers
by Arthur Yermash, Esq.

Most employers know that the U.S. Department of Labor (DOL) oversees compliance with the Fair Labor Standards Act (FLSA) and other statutes that protect workers. What many employers may not be aware of, however, is that the DOL has the authority to conduct inspections of workplaces and bring enforcement actions against employers found to be in violation of the FLSA and related statutes governing wage payments. Employers may be investigated, inspected, audited, or visited by the DOL Wage and Hour Division ("WHD") without explanation. Most often, complaints prompt DOL visits, though the existence of a complaint is not always disclosed to the employer. It is critical for employers to prepare for and understand their rights during inspections, investigations and audits. The following highlights some key points to prepare you and your team for a U.S. Department of Labor investigation.

1. Pre-inspection preparation. Before a government investigation begins, there are preventive measures that employers should take.

   a) Check current and past 1099s going back several years to review job duties to ensure proper classification of independent contractors vs. employees.

   b) Review timekeeping systems to ensure that non-exempt employees are being paid for all work performed (including overtime).

c) Ensure that all required payroll records and written policies and procedures are current, accurate and complaint and updated regularly, keeping on top of applicable laws and regulations.

d) Train managers with key concepts of Wage Hour Law (exempt vs. non exempt).

e) Familiarize all employees with the basics of overtime and record keeping under the FLSA.

f) Familiarize key employees with DOL inspection procedure and appoint an employee representative for WHD inspector interviews.

2. Opening Conference & Preliminary Inspection. The inspection begins with the arrival of the investigator who will likely identify him or herself. The investigator will either present their credentials or an employer may request them. The investigator will request to meet with the employer or representative. An opening conference is conducted, which is when the employer is informed of the purpose of the inspection and the investigation process is explained. Some tips:

a) Clarify the scope of the investigation. Know exactly what they are looking for and don't provide more than what is asked.

b) Consider your option to demand a subpoena vs. consenting to an investigation.

c) Know that the DOL must give the employer 72 hours to respond to demands and conduct the investigation during reasonable hours not to interrupt normal business operations.

d) Expect the DOL to request and be prepared to provide copies of at least the previous three years of payroll records, and all written policies, practices and procedures (i.e. timekeeping requirements and procedures).

e) It is not unreasonable to request additional time to prepare the requested documents, although not all investigators will comply with this request.

3. Document Production. The investigator may request records for examination. Records are examined to determine of the amount of business transactions, interstate commerce participation, government contracts, the layout of the facility, and payroll and time records.

a) Label all documents produced with "Confidential and Proprietary," and keep all trade secrets or confidential business information under cover sheets.

b) Make and keep duplicates of every record produced to the DOL.

c) Bates-stamp each produced document to better track and reference what was produced.

4. On-Site Inspections and Interviews. Investigators may conduct private employee interviews that may occur on the employee's premises, at the employee's home, by mail, or by telephone. Both former and present employees may be subject to investigation interviews.

a) During the investigation have a manager escort the WHD representative at all times while on site (except during interviews)

b) Track the activity of the WHD representative; subjects of his questions, written notes, etc

c) Employers do not have the right to participate in non-exempt employee interviews, but do have the right to attend all management interviews.

d) Once DOL decides who they want to interview, schedule all interviews in advance and prepare employees.

e) Remember that you must never retaliate against employees for agreeing to be interviewed or because of anything they say during an interview.

5. Closing Conference. A closing conference is conducted at the end of the investigation with the employer. The investigator will inform the employer of standards violated, corrections to be made, abatement dates, and citations may be issued. If the DOL finds any violations:

   a) Copies of the citation will be provided by mail and employers must post citations where affected employees can view them.

   b) Be prepared for follow up inspections to ensure corrections are made and citations are posted.

   c) Request time to provide supplemental information to correct any factual errors that form the basis of a proposed violation.

   d) In deciding wither to contest the DOL's findings, consult counsel to review whether the alleged violations are accurate, if the penalties are excessive and if the finding exposes you to costly compliance measures.

   During more in-depth investigations, compliance officers may conduct preliminary investigations including looking into whether or not a complaint is valid, and checking on prior or current investigations for the same employer. Additionally, they may collect copies of prior inspection reports, inspector's notes, interviews, signed statements, and information on previous complaints. An employer may provide a written position statement and request time to consult legal counsel. Investigators may also subpoena documents and witnesses.

6. Remedies for Violations. Depending on the violation, type of investigation, and who performed the investigation, remedies will vary. Financially, employers may be subject to the payment of back wages, civil money penalties, employee suits for recovery, and Secretary of Labor lawsuits brought on behalf of employees. Legally, employers may be subject to court injunctions brought by the Secretary of Labor, criminal penalties, and court injunctions that prohibit further violations. Certain statutes subject employers to the withholding of funds, administrative hearings, court actions, loss of federal contracts, and the declaration of ineligibility for future contracts. Protection will be provided to the employees who file complaints or provide information for the investigation. Charges of retaliation, and potentially criminal sanctions, may occur if employees are affected after an investigation.

7. Conclusion. Employers should be proactive as opposed to reactive in this area. They should conduct self-audits at least yearly to make sure they are in compliance with applicable laws enforced by the United States Department of Labor. Employers should also train their employees what to do if when an investigator shows up at the facility. Early planning and knowing how to respond to an inspection could potentially save an employer thousands of dollars and protect the employer from criminal prosecution.

LANDLORD TENANT LAW UPDATES

Is it a License or a Lease?
by Patrick McCormick, Esq.

Perhaps the better question is not whether the relationship at issue is one between a landlord and tenant or between a licensor and license, but whether it matters legally or practically? The short answer is that it does matter both legally and practically. But first, what is the distinction between a lease and a license?[1]

The Court of Appeals, long ago, described a license as "a personal, revocable and non-assignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interest therein." Licenses are commonly used for kiosks found in shopping malls or for cellular towers on roofs of buildings. Under a lease, the landlord surrenders "absolute possession and control of property to another for an agreed-upon rental."[2] Thus, the primary factor is whether the occupant has the exclusive right to use the premises. If the use is exclusive, the relationship is most likely a landlord/tenant relationship. If not, a licensor/licensee relationship likely exists.[3] As will be discussed below, there may be reasons a landowner may want a licensor/licensee relationship, but it is important to note that courts will analyze the relationship to determine whether it is a licensor/licensee or landlord/tenant relationship and will not simply acquiesce in the characterization of the relationship used by the parties.[4]

In addition to obtaining the exclusive use of premises that is the hallmark of a lease, what are the other factors to consider when deciding whether to enter a license or lease? The most obvious consideration relates to termination of the relationship and resulting eviction. Initially, as set forth above, the license may be revoked at any time. Thus, absent an agreement, the revocation, and thus termination of the license can generally come with no notice whatsoever. Any resulting eviction requires service of a 10 day notice to quit before commencement of a summary proceeding. Notably, the 10 day notice to quit is also required if the license term expires.[5]

Another significant factor involves the ability of a licensor to exempt himself from liability for damages resulting from his own negligence. New York General Obligations Law §5-321 generally provides that a lease clause attempting to exempt a landlord from damages resulting from his own negligence is void as against public policy and is thus not enforceable. There is no analogous statutory provision applicable to a licensor. Thus, it is possible for a licensor to exempt himself from damages caused by his own negligence.

Yet another consideration is whether a licensee is able to obtain a *Yellowstone* injunction. As discussed in a prior article, to obtain a *Yellowstone* injunction to toll the running of a cure period, one of the requisite elements to be shown by the party seeking the injunction is the existence of a commercial lease. If no lease exists, it follows that a *Yellowstone* injunction is not available. Also, because a license is revocable at will, there will not likely be a cure period to be tolled by a *Yellowstone* injunction.

Thus, a licensee may not enjoy all the rights enjoyed by tenants, but is protected by some procedural safeguards. In evaluating whether to enter into a license or lease, both the owner and potential tenant/licensee need first to evaluate whether the exclusive right to possess the subject premises is important and, if not, whether the protections available to tenants but not licensees is significant given the particular circumstances at hand. Whether a license or lease is ultimately chosen, the most important factor is that both parties understand the nature of the relationship from the beginning, so that there are few surprises if the relationship turns sour.

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[1] *Greenwood Lake & P.J.R. Co. v. New York & G.L.R. Co.*, 134 N.Y. 435, 440 (1892)
[2] *Davis v. Dinkins*, 206 A.D.2d 365,366 (2d Dep't 1994)
[3] See, *Tsabbar v. Auld*, 276 A.D.2d 442 (1st Dep't 2000)
[4] *Federation of Organizations, Inc. v. Bauer*, 6 Misc.3d (App. Term 2d Dep't 2004)
[5] RPAPL 713(7)
[6] See, *Balyszak v. Siena College*, 63 A.D.3d 1409 (3d Dep't 2009)

Split Decision-Nonpayment Proceedings Against Month-to-Month Tenants
by Patrick McCormick, Esq.

In *1400 Broadway Associates v. Henry Lee and* Co. of NY, Inc.,[1] the parties' commercial lease expired January 31, 1990 and the tenant, who did not realize the lease had expired, continued to make monthly rent payments, in the amount set forth in the expired lease, for six months. The tenant learned that the lease had expired during negotiations for a new lease and during the negotiations continued to pay rent through October 1992. Tenant then stopped making monthly rent payments and landlord commenced a nonpayment proceeding. Tenant moved for summary judgment to dismiss the complaint for failure to state a cause of action. The Court granted the motion holding that a nonpayment proceeding could not be maintained against a month-to-month tenant because, "absent a meeting of the minds, no agreement exists regarding the monthly rental rate." The Court held:

> A month-to-month tenancy, by its nature, is renewable by the parties' conduct, i.e., by continued payment and acceptance of agreed-upon amounts each month. When the parties no longer agree to continue the relationship, either party can terminate it. However, if the tenant does not voluntarily surrender, the owner must serve a statutory notice of termination at least 30 days before expiration of the monthly term, as a condition to bringing a holdover proceeding.

Thus, the Court held that "Petitioner's acceptance of respondent's monthly payments created a month-to-month tenancy, by operation of law, which could be terminated only by service of a 30-day notice." A 30-day termination notice, the predicate to commencing a holdover proceeding against a month-to-month tenant, was not served and therefore a holdover proceeding was not possible.

The Court concluded that:

> [t]o permit petitioner to maintain a nonpayment proceeding under these circumstances, seeking payment at the lease rate, would permit a landlord unilaterally to bind a tenant to payment at a rate predicated on a continuing agreement, even though there

> no longer was a meeting of the minds. Such a result would vitiate the intent of RPL §232-c.

RPL 232-c provides:

> Where a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term solely by virtue of the tenant's holding over. In the case of such a holding over by the tenant, the landlord may proceed, in any manner permitted by law, to remove the tenant, or, if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term.

The Court's analysis has been generally accepted.[2] But, in *Tricarichi v. Moran*[3] the Appellate Term reversed an oral order dismissing a nonpayment proceeding brought against month-to-month tenants and in its decision explicitly rejected the analysis set forth in *1400 Broadway Associates v. Henry Lee and Co. of NY, Inc.*

In *Tricarichi*, the Appellate Term specifically held:

> Real Property Law §232-c is inapplicable to month-to-month tenants, since the term of a month-to-month tenancy is not 'longer than one month.'

The Court explained that:

> Real Property Law §232-c did not abolish a landlord's right to elect to hold a month-to-month tenant for a new term solely by virtue of his holding over. Indeed, the requirement of Real Property Law §232-b --that both a landlord and a tenant wishing to terminate a month-to-month tenancy must give a month's notice -- remains unaffected by the subsequent enactment of Real Property Law §232-c. Here, both the making of a rent demand by landlord and the commencement of a nonpayment proceeding constitute an election by landlord to treat the holdover tenants as tenants for a new term and not as trespassers (see Friedman on Leases §18:4). Their month-to-month tenancy continues on the same terms as were in the expired lease, if, in fact, the lease has expired.

This statutory analysis by the Appellate Term, at least in the 9th and 10th Judicial Districts and until a higher court weighs in, permits a landlord to commence a nonpayment proceeding against a holdover month-to-month tenant. The obvious benefit to a landlord is time. Rather than being compelled to serve a 30-day termination notice to terminate a month-to-month tenancy under RPL §232-b before commencing a holdover proceeding, the landlord may now commence a nonpayment proceeding against a month-to-month tenant upon making an oral demand for rent or serving a 3-day written demand under RPAPL §711(2).

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[1] 161 Misc.2d 497, 614 N.Y.S.2d 704 (NYC Civ. Ct., NY Co. 1994)
[2] See, *Krantz & Phillips, LLP v. Sedaghati*, 2003 N.Y. Slip Op. 50032(U) (App. Term 1st Dep't 2003)
[3] 2012 N.Y. Slip Op. 22395 (App. Term, 9th & 10th Judicial Districts 2012)

Death of a Tenant
by Patrick McCormick, Esq.

Suppose you are a landlord and lease space, commercial or residential, to an individual tenant. Tenant timely pays rent for a while but, suddenly, rent payments stop. Upon investigating, you learn that the tenant has died. Does the death terminate the lease? Is a nonpayment proceeding available to obtain possession of the premises?

While not a common occurrence, this simple fact pattern raises several issues regarding when, and against whom, a nonpayment proceeding may be brought.

Initially, while perhaps not well known, but certainly well settled, the death of a tenant does not terminate an unexpired lease or the tenant's leasehold estate. In such situations, generally, the executor, administrator or legal representative is permitted to remain in possession of the demised premises until the expiration of the lease.

Under our facts, how can the landlord obtain possession of the premises? The answer lies buried in RPAPL §711(2). The last sentence of RPAPL §711(2) provides: "Where a tenant dies during the term of the lease and rent due has not been paid and no representative or person has taken possession of the premises and no administrator or executor has been appointed, the proceeding may be commenced after three months from the date of death of the tenant by joining the surviving spouse or if there is none, then one of the surviving issue or if there is none, then any one of the distributes."

In *Poulakas v. Ortiz* a nonpayment proceeding was commenced against respondent, the son of the deceased rent-stabilized tenant. In this case, it was not disputed that there was no administrator, executor appointed or surviving spouse of the tenant; that 3 months had elapsed from the date of death of the tenant before commencement of the nonpayment proceeding; and, the lease had not yet expired. In moving to dismiss, among other things, the respondent argued that he occupied the premises and therefore the statute was inapplicable causing the Court to examine the portion of the statute that provides "and no representative or person has taken possession of the premises . . ."

In denying the motion, the Court held that this phrase "should be construed as meaning that there is no person either in possession of the premises on behalf of the estate of legally authorized to act on behalf of the estate." The Court specifically found that "the legislature did not intend that the 'deceased tenant' section of §711(2) be applied only in situations where the premises are vacant, as this would limit the remedial nature of the statute."

Thus, when a tenant dies, a little investigation by the landlord is necessary to determine the date of death and whether an administrator or legal representative of an estate of the deceased tenant has been appointed and, if not, to identify the "issue" or distributes. Once this investigation is completed, a landlord is able to commence a nonpayment proceeding to obtain possession of leased premises. The Court's analysis of the issues in *Poulakas* is must reading.

[1] Dolan, Rasch's New York Landlord and Tenant including Summary Proceedings, 32:12 (4th ed); *Marine Terrace Associates v. Kesoglides*, 24 Misc.3d 35 (App. Term 2d, 11th and 13th Judicial Districts, 2009)
[2] 25 Misc.3d 717 (NYC Civ. Ct., Kings Co. 2009)

Derivative Claims in Landlord/Tenant Court
by Patrick McCormick, Esq.

In a case of apparent first impression in New York, in *Gorbrook Associates Inc., and Norman Fishman, derivatively on behalf of Gorbrook Associates, Inc., v. Ilene Silverstein, John Doe and Jane Doe*[1], Judge Scott Fairgrieve held that the summary holdover proceeding was properly instituted derivatively by a shareholder on behalf of the corporation.

The petition alleged that petitioner Norman Fishman was an officer and owned 25 shares of Gorbrook and that Fishman and Allen Silverstein were the only directors of Gorbrook. As set forth in the decision, the petition further alleged that Ilene Silverstein was the daughter of Allen Silverstein and sister of Eric Silverstein and that Allen Silverstein and/or Eric Silverstein "arranged for Ilene Silverstein and her husband to move into the premises without a lease or contractual or statutory grant, authority or other basis." Further still, the petition alleged that Fishman had demanded that Allen Silverstein cooperate or not interfere with Gorbrook's efforts to secure use and occupancy payments from Ilene or to remove Ilene and her husband from possession of the premises; that Allen Silverstein was aware that Fishman wanted to collect such payments or to obtain possession of the premises; that Allen Silverstein refused to cooperate with Gorbrook's efforts and that Allen Silverstein opposed the relief sought in the petition so that "it would have been futile for N. Fishman to attempt to secure the approval of A. Silverstein to seek such relief assuming *arguendo* that such approval was necessary." A thirty day notice to quit was served and upon the refusal to vacate the premises the holdover proceeding was commenced. Respondents moved to dismiss under CPLR 3211(A)(7) alleging that Norman Fishman did not have authority to bring the proceeding and that a shareholder could not maintain a summary proceeding derivatively.

Not surprisingly, there is more to the story. The moving and opposing papers revealed that Ilene Silverstein had entered into a contract to purchase the subject premises and that the contract was signed by Fishman. When the closing did not occur after the declaration of a "time of the essence" closing date, Gorbrook, by Fishman, terminated the contract and an action was commenced in Nassau Supreme Court wherein Ilene Silverstein sought a declaratory judgment that the contract was valid. Ilene Silverstein also alleged in an affidavit that Fishman owned 25% of Gorbrook's shares, that Allen Silverstein owned 25% of the shares; 25% were owned by her sister-in-law Robin Silverstein and 25% were owned by Rita Fishman as beneficiary of the estate of Ted Fishman, Norman's brother. Ilene also alleged that there were 3 directors of Gorbrook: Norman Fishman, Allen Silverstein and Robin Silverstein. Ilene also alleged that she moved into the premises with Fishman's consent. Robin Silverstein submitted an affidavit wherein she claimed she was a 25% shareholder and was a director and secretary of Gorbrook and that Fishman commenced the proceeding "on his own volition and does not have authority to evict Ilene Silverstein." Allen Silverstein submitted an affidavit claiming he owned 25% of the shares and was a director with Robin Silverstein and that he was the vice-president of Gorbrook. The Silversteins alleged that Fishman did not have authority to commence the summary proceeding and that the proceeding was vindictive and designed to force Allen Silverstein to make financial concessions in a dissolution proceeding for Gorbrook.

Norman Fishman submitted an affidavit stating that: "Respondents are trying to use Allen Silverstein and Robin Silverstein's membership on the board of directors to prevent Gorbrook and Norman Fishman from acting derivatively on behalf of Gorbrook"; that he "has a 31.25% ownership interest and that Allen Silverstein has a 18.75% interest"; that the "only two members of the board are Norman Fishman and Allen Silverstein"; and that neither the sale contract or any modification permitted occupancy of the premises and that he protested the occupancy.

Judge Fairgrieve held that "a derivative action may be maintained by Norman Fishman on behalf of the corporation Gorbrook." The court reasoned that "[t]he economic benefit of the summary proceeding belongs to the corporation and not to Norman Fishman, individually . . . Any recovery from a shareholder's derivative suits inures to Gorbrook and not to the shareholder who instituted the suit . . . Thus any recovery belongs to the corporation. Since the corporation is the owner of the premises and will receive the benefit of the summary proceeding an action may be brought pursuant to RPAPL §721 because Gorbrook is the owner of the property." The Court also found that Fishman's pleading adequately pled grounds establishing that a demand on the board of directors to initiate the summary proceeding would be futile and that sufficient specific facts were alleged showing that the other directors would not be impartial and therefore, because "Gorbrook has the right to protest and enjoy the economic benefits to be derived from ownership of said premises . . . this summary proceeding may be brought by Norman Fishman derivatively on behalf of Gorbrook Associates."

The Court's Decision/Order is worthy of review not only for the discussion of the viability of the derivative claim but also for the Court's analysis and determination that Norman Fishman did not have the authority as a director and treasurer to institute the proceeding directly in the name of Gorbrook. This proceeding and the Court's Decision confirm that sometimes summary eviction proceedings can involve complex issues usually reserved for Supreme Court litigation.

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[1] District Court of Nassau County, First District, L&T Part, Index Number LT-004906-10, Decided May 14, 2013

Tenant Liability in Commercial Leases
by Patrick McCormick, Esq.

This article will address two recent appellate court rulings involving commercial leases and the tenant's liability for certain damages incurred by the landlord. The first, from the Appellate Division, First Department, involves an action by a landlord against a tenant for damages resulting from a flood caused by a rusted gauge on tenant's supplemental HVAC system. The second case is from the Appellate Division, Second Department and involves tenant's liability for post-termination rent.

In *45 Broadway Owner, LLC v. NYSA-ILA Pension Trust Fund*[1], the tenant's predecessor installed a supplemental HVAC system that connected to the building's water risers. The lease provided that the parties' respective insurance policies would each contain an endorsement by which their respective insurance companies would "waive subrogation or permit the insured, prior to any loss, to waive any claim it might have against the other." The lease also provided that "each party releases the other with respect to any claim (including a claim for negligence) which it might otherwise have against the other party for loss, damage or destruction with respect to its property by fire or other casualty . . . occurring during the terms of this lease." In April 2010, in connection with certain work to be performed, the landlord notified the tenants that they were required to shut down any supplemental HVAC systems. During the work, the lobby of the building flooded and it was determined that a rusted and corroded pressure gauge on defendant/tenant's supplemental HVAC system burst, allowing water to flow out. The landlord suffered total damages (exclusive of attorney's fees and costs) of $136,055.22. The landlord's motion for summary judgment was granted and the tenant's cross-motion for summary judgment was denied.

The Appellate Division, First Department noted that the release language contained in the lease "constitutes an enforceable reflection of the parties' decision to allocate the risk of liability for these claims [resulting from negligence] to third parties through the device of insurance - a choice that contracting parties are permitted to make as long as their intent to do so is clear and unequivocal." The Court then found that the concept of "casualty" as used in the parties' lease included "the flood resulting from the rusted gauge . . ." The Court held that the lease "does not suggest that 'casualty' is an event resulting only from an 'act of God.'" The Court confirmed that "'casualty' may be defined as an 'accident' or an 'unfortunate occurrence.'"

In *Patchogue Associates v. Sears, Roebuck and Co.*[2], plaintiff/landlord commenced an action to recover damages sustained by landlord after the termination of the landlord/tenant relationship which occurred before the end of the lease term. The trial court granted defendant/tenant's to dismiss the first cause of action to the extent it sought post-termination damages under the lease and declaring that defendant/tenant had no liability to plaintiff/landlord for breach of contract, holding that "a landlord may not recover such claimed post-termination damages in the absence of a lease provision that specifically makes a tenant responsible for the payment of rent to the landlord after the landlord-tenant relationship ends." In reversing, the Appellate Division held that the absence of a "survival-of-rent" or "acceleration" clause "does not foreclose a landlord from seeking, after mitigation, its actual contract damages resulting from the breach . . ." Thus, the Appellate Division concluded that "although the landlord has already recovered pre-termination rent from the tenant pursuant to a summary eviction proceeding, the terms of the lease did not limit the landlord to recovery only of pre-termination rent in the event it commenced a summary eviction in the District Court to regain possession of the subject premises."

The lesson to be learned from these cases is that disputes involving liability for various types of damages may be avoided with carefully negotiated and specific lease clauses addressing damages.

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[1] 107 A.D.3d 629, 2013 Slip Op. 04895 (1st Dep't 2013)
[2] 108 A.D.3d 659, 2013 Slip Op. 05305 (2d Dep't 2013)

Well Settled Legal Principles and Proof Required to Prevail
by Patrick McCormick, Esq.

Three recent appellate decisions, each sparse on fact, nevertheless remind us of the relevance of well settled legal principles and confirm the proof required to prevail on each. The first, *Tewksbury Management Group, LLC v. Rogers Investments NV LP*[1], involves application of the doctrine of *res judicata*; the second, *Bonacasa Realty Company, LLC v. Salvatore*[2], discusses the concept of piercing the corporate veil; and the third, *MH Residential 1, LLC MH v. Barrett*[3], *inter alia*, discovery.

In *Tewksbury*, the commercial tenant commenced an action against its landlord claiming landlord breached the lease by failing to obtain a valid certificate of occupancy, remove building violations that allegedly interfered with tenant's use of the premises, to provide heat and to deliver possession of the entire premises. By order entered April 19, 2012, the Supreme Court granted landlord's motion to dismiss the complaint.

As it turns out, several years earlier in 2008, landlord commenced a nonpayment proceeding against tenant. That proceeding ended with a consent judgment of possession and judgment for rent arrears. In affirming the dismissal of tenant's claims upon the doctrine of *res judicata*, the Appellate Division held that tenant's claims were "inextricably intertwined with defendant's claims in the summary proceeding" and could have been raised by tenant in that summary proceeding. Obviously, tenant's claims, if proved, would have provided a defense to landlord's claims for possession and rent. Having failed to raise the claims in the summary proceeding and, more importantly, having consented to a judgment for rent arrears and possession, tenant necessarily acknowledged rent was owed, thus precluding its claim that landlord breached the lease. If you represent a tenant and have claims that could provide a defense to a claim of nonpayment and that would also result in an award of damages, the claim must be raised in the summary proceeding or it may be forever lost.

In *Bonacasa*, tenant vacated the demised premises prior to the expiration of the lease. Landlord thereafter commenced an action against the corporate tenant for rent due and owing and also asserted claims against the corporation's principal. Landlord alleged that the corporation was a sham corporation "formed solely for the purpose of leasing the premises" and the individual defendant exercised dominion and control over the corporation and thus sought to pierce the corporate veil. In affirming the dismissal of the claim against the individual defendant, the Appellate Division found the evidence supported the finding that the individual "executed the lease in his corporate capacity as a principal of [the corporate tenant] and that he did not exercise dominion and control over [the corporation] to commit a wrong or injustice against the plaintiff." The Court further found that "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil."

Finally, *MH Residential 1, LLC*, involved protracted residential holdover proceedings. Tenants filed two motions for leave to conduct various discovery. In affirming the denial of the first motion, the Appellate Term noted that the motion was made eleven months after an unappealed order denied a prior motion for similar relief and tenant had not shown a "material change in circumstances." As for the second motion, the Court determined movant had not demonstrated "ample need" for the discovery sought. These standards for obtaining discovery are well known, but need to be remembered as litigation progresses.

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[1] 2013 WL 5712338, ___N.Y.S.2d___ (1st Dep't 2013)
[2] 109 A.D.3d 946, 972 N.Y.S.2d 84 (2d Dep't 2013)
[3] 41 Misc.3d 24,___N.Y.S.2d___(App. Term 1st Dep't 2013)

Around the Appellate Bench
by Patrick McCormick, Esq.

In a decision dated November 13, 2013, the Appellate Division, Second Department decided a case involving a contractor, Matell Contracting Co., Inc., who performed work for a commercial tenant, attempting to enforce a mechanic's lien against the owner of property, Fleetwood Park Development Co.[1]

Fleetwood leased certain property to a new tenant and, pursuant to an agreement with the new tenant, permitted the tenant to renovate the leased property for use as a supermarket. The tenant retained Matell Contracting as general contractor. The tenant failed to pay $1,800,000 allegedly due for work performed by Matell and Matell filed a mechanic's lien against the property. Matell then commenced an action to foreclose the mechanic's lien against, *inter alia*, Fleetwood Park. Fleetwood asserted several affirmative defenses including that it did not consent to the subject work. Matell moved for summary judgment on the complaint on the ground that Fleetwood consented to the work and to dismiss several affirmative defenses asserted by Fleetwood Park. The Supreme Court denied the motion and Matell appealed.

In affirming that portion of the order denying Matell's motion for summary judgment on the complaint and to dismiss the affirmative defense relating to consent, the Appellate Division examined the knowledge required of an owner before the owner will be liable for work performed for a tenant. The Appellate Division confirmed that Matell "presented evidence showing that Fleetwood Park had knowledge of, and acquiesced in, the work performed to convert the leased property into a supermarket . . ." But, of primary importance, the Appellate Division determined that Matell nevertheless failed to make a *prima facie* showing that Fleetwood Park actually affirmatively consented to the subject work. The Court confirmed the distinction between the situation where an owner has simply approved or agreed that the work be performed and where the owner affirmatively gave consent for the specific work directly to the contractor. It is this specific consent by the owner directly to the contractor that is required to be proved by a contractor attempting to hold an owner liable in connection with the foreclosure of a mechanic's lien.

The second appellate decision comes from the Appellate Term in *New World Mall, LLC v. New World Food Court, Inc*[2]. and addresses whether a sublease is subject to a conditional limitation clause contained in a master lease.

The facts in *New World* are straightforward. Sublessor alleged that the sublease terminated following its service of a 10-day default notice on subtenant alleging nonpayment of late charges and electric charges. Sublessor alleged that it had the right to terminate the sublease because the sublease incorporated by reference all the terms of the master lease including the conditional limitation clause contained in the master lease. It should be noted that this type of incorporating by reference language is typical in subleases. The master lease required the tenant (sublessor) to pay certain "Minimum Rent" in the amount of $2,500,000 annually commencing on a specified date and "Interim Rent" of $60,000 per month before that specified commencement date. In contract, the sublease provided for the payment of "Basic Rent" of $110,000 per month for the first three years of the sublease plus other charges specifically designated as additional rents. The sublease did not contain a conditional limitation provision for a default in paying the Basic Rent or the additional rents.

The conditional limitation clause contained in the master lease provided that a default occurs: "If Tenant shall fail to pay (a) any Interim Rent or Minimum Rent when the same shall become due and payable, and such failure shall continue for ten (10) days after Landlord shall give notice of the failure to Tenant, or (b) any other charge required to be paid by Tenant hereunder, when the same shall become due and payable, and such failure shall continue for thirty (30) days after Landlord shall give notice of the failure to Tenant." Despite the fact that the sublease incorporated by reference "the terms, covenants, conditions and other provisions" of the master lease, the Appellate Term determined that the default provision of the master lease "is not subject to incorporation into the sublease . . ."

The Court's rationale was quite simple: the default clause in the master lease referenced defaults in payment of rent due under the master lease-specifically "Interim Rent" and "Minimum Rent." The Court held that those terms had no "application" to the amounts due under the sublease "which are defined in other terms." While somewhat troubling, the remedy is simple-either the terms, definitions and relevant default clauses in a sublease should mirror the same terms, definitions and clauses used in the master lease or, instead of taking the easy way out by simply incorporating the master lease into a sublease by reference, the sublease should contain any relevant or necessary term as if it were a stand-alone document.

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[1] Matell Contracting Co., Inc., v. Fleetwood Park Development, LLC, 2013 WL 5989744 (2d Dep't 2013)
[2] 2013 WL 6098424 (App. Term 2d Dep't 2013)

Supreme Court of the United States: SCOTUS Updates

Supreme Court Holds that the "First Sale" Doctrine Applies to Copies of Copyrighted Works Lawfully Made Abroad

by Lauren Kanter, Esq.

Copyrighted works imported into the United States from abroad are subject to the same "first-sale" rules as items purchased in the United States, according to a Supreme Court decision issued last month (*Kirtsaeng v. John Wiley & Sons, Inc*., No. 11-697).

Supap Kirtsaeng, a citizen of Thailand, came to the United States in 1997 to study mathematics at Cornell University and the University of Southern California. While working on his degrees, Kirtsaeng asked friends and family in Thailand to buy copies of foreign edition English language textbooks in Thailand, where they were sold at low prices, and mail them to him in the United States, where he then sold the books, reimbursed his family and friends, and kept the profit.

Publisher John Wiley & Sons commenced a copyright infringement lawsuit against Kirtsaeng in 2008, alleging that Kirtsaeng's resale of the books infringed on Wiley's exclusive right to distribute under §106(3) of the Copyright Act. Kirtsaeng countered that he had acquired the books legitimately and that the "first-sale" doctrine codified in §109(a) of the Copyright Act allowed him to resell or otherwise dispose of the imported books without permission from the copyright owner.

The first-sale doctrine is a limitation on the exclusive right of copyright owners to distribute copies of their work under the Copyright Act. The first-sale doctrine provides:

> Notwithstanding the provisions of §106(3) [the section granting the owner exclusive distribution rights], the owner of a particular copy or phonorecord lawfully made under this title . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

Kirtsaeng's defense, therefore, was that although §106(3) forbids distribution of a book without the copyright owner's permission, once he lawfully obtained a copy, he was free to dispose of it as he wished. Essentially, that "first sale" in Thailand, Kirtsaeng argued, exhausted the copyright owner's exclusive distribution right under §106(3).

However, the District Court sided with Wiley at trial, finding that the first-sale defense did not apply to "foreign-manufactured goods." On appeal, the Second Circuit agreed, noting that the first sale doctrine applies only to "the owner of a particular copy . . lawfully made under this title." According to the Second Circuit, works made abroad could not have been made "under this title" or under American law, and thus the first-sale doctrine was inapplicable.

But the Supreme Court rejected this argument last month, holding that the first-sale doctrine indeed applied to copies of copyrighted works lawfully made abroad. Writing for the majority, Justice Breyer noted that the phrase "lawfully made under this title" was not intended to exclude works made overseas. (The Court also observed that "geographical interpretations create more linguistic problems than they resolve.") Instead, the Court focused on the serious consequences of upholding the Second Circuit's analysis, such as preventing a buyer in the United States from selling or giving away copies of a foreign film or a dress made abroad, finding that this scenario could not possibly have been the legislative intent.

The Court's decision in *Kirtsaeng* affirmatively settled a long ambiguous question as to whether the first-sale doctrine applied to copyrighted works manufactured abroad and imported into the United States. The Supreme Court had previously held in *Quality King Distributors, Inc. v. L'Anza Research International, Inc.*, 523 U.S. 135 (1998) that the first-sale doctrine applied to works manufactured in the United States but first sold outside the United States, then imported back. But the Quality King court never resolved the issue ultimately decided in *Kirtsaeng* as to the more common situation in which copyrighted works manufactured abroad are then imported into the United States.

The *Kirtsaeng* decision may result in lower prices in the United States on copyrighted works such as books, because publishers can no longer use American copyright law as a basis to sell similar versions of the same work at greatly varying prices depending on the country. But, copyright owners may respond by localizing their offerings in particular markets so that, for example, the English language version of a textbook sold in Thailand would no longer serve as an adequate substitute for the American version of the same book. Others may rely more heavily on encoding products in region-specific formats, so that a DVD purchased in one country will not play on a player in another country. Undoubtedly, although long awaited, the Court's decision will not be the last word on this issue.

With a Little Help from My Friends: Study Finds the Roberts Supreme Court the Friendliest Court to Business in Decades
by Lauren Kanter, Esq.

The decisions of the current Supreme Court are the friendliest to business of any court since World War II, according to a recent study published in the Minnesota Law Review.

In "How Business Fares in the Supreme Court," Lee Epstein, William M. Landes, and Richard A. Posner discuss their analysis of nearly 2,000 decisions from 1946 through 2011. The study considered cases with a business on only one side. A vote in favor of the business was considered a pro-business vote.

The authors concluded that five of the ten Supreme Court Justices who have been most favorable to business currently serve on the Court, and two of them, Chief Justice John G. Roberts, Jr. and Justice Samuel A. Alito, Jr., ranked at the top of the list of the 36 most pro-business Justices in the study. The study found that after Roberts and Alito were appointed to the Court, the other three conservative Justices became more business-friendly in their decisions. The authors surmise that "the three may not have been as interested in business as Roberts and Alito and decided to go along with them to forge a more solid conservative majority across a broad range of issues."

In an article about the Minnesota study that appeared earlier this month in the New York Times (*http://nyti.ms/19krzbQ*), Adam Liptak highlighted two areas in which the Supreme Court has recently exercised its pro-business view: (1) by protecting companies from class action lawsuits, and (2) favoring arbitration to resolve business disputes.

In March, the Court dismissed an antitrust class action that Comcast subscribers brought against the company, finding that the plaintiffs were not sufficiently cohesive as a class to allow the suit to continue as a class action. In that decision, *Comcast v. Behrend*, the Court affirmed its 2011 decision in *Wal-Mart v. Dukes*, in which the Court threw out a sex discrimination class action brought by a million and a half female employees. As Liptak noted in his article, "[t]he decisions essentially required early scrutiny-by a judge, not a jury-of the ultimate legal question in high-stakes cases [i.e., which party should prevail], sometimes before all the relevant evidence has been gathered." Business groups, which have sought to limit plaintiffs' ability to bring class actions, applauded the decision.

The Supreme Court has also given businesses extra protection in the area of dispute resolution. In *AT&T Mobility LLC v. Concepcion*, the Court found that a form AT&T required its customers to sign requiring the resolution of disputes through arbitration rather than in court was a valid contract. As Liptak notes, this decision empowered businesses by allowing them to shield themselves from class actions by way of arbitration agreements.

According to the Minnesota study, the Roberts Court is far friendlier to businesses than any of its recent predecessors. This blog will trace decisions of import from the Roberts Court and analyze the impact of these decisions on business.

Supreme Court Focuses on Arbitrations and Class Actions
by Lauren Kanter, Esq.

According to Justice Elena Kagan, the Supreme Court's recent decision confirming a corporation's ability to require arbitration in the event of a dispute is "Too darn bad."

The June 20, 2013 decision in *American Express Co. v. Italian Colors Restaurant* (No. 12-133) considered the situation of an Oakland, California restaurant which, along with other merchants, had commenced a class action lawsuit against American Express for violations of the Sherman and Clayton federal antitrust acts. According to Italian Colors and its fellow merchants, American Express used its monopoly power in the credit card market to force merchants to accept credit cards at rates 30% higher than the fees for competing cards.

The credit card agreements between American Express and each of its merchants require that all disputes be resolved by arbitration, and provide that there "shall be no right or authority for any Claims to be arbitrated on a class action basis." Citing these agreements, American Express moved to dismiss the class action and to compel individual arbitration with each merchant under the Federal Arbitration Act. In opposition to the motion, the merchants submitted an affidavit from an economist who estimated that the expert analysis required to prove the merchants' antitrust claims could cost "at least several hundred thousand dollars, and might exceed $1 million," while each plaintiff's maximum recovery would be $38,549. Even so, the District Court granted the motion, but the Court of Appeals reversed, finding that the merchants "would incur prohibitive costs if compelled to arbitrate under the class action waiver." If all of the merchants could share the costs in a class action, pursuing these claims would be much more feasible.

Although the merchants argued that requiring each of them to individually arbitrate their claims would violate federal antitrust laws, the Supreme Court disagreed, finding that Congress had established the legality of binding arbitration agreements (such as that at issue in this case). As Justice Antonin Scalia, writing for the majority, noted: "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." The Court found that even with a class action off the table, each merchant still had a remedy, albeit an expensive one: "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." The Court's decision essentially validated the credit card company's contract mandating arbitration and eliminating the possibility of a class action.

While some observers lauded the decision as an endorsement of alternative dispute resolution and a win for contractual freedom, others, such as Justice Kagan, voiced their concern. Recognizing that cost effectively barred Italian Colors from proving its case outside a class action setting, Justice Kagan wrote that under the majority's decision, "Amex has insulated itself from antitrust liability -- even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."

Supreme Court Defines "Supervisor" for Purposes of Workplace Harassment Claims
by Lauren Kanter, Esq.

An employer's liability for workplace harassment could turn on whether the harasser meets the Supreme Court's newly adopted definition of "supervisor" of the victim, according to the Court's opinion in *Vance v. Ball State University*, handed down on June 24, 2013.

Petitioner Maetta Vance, an African-American woman, had worked in the Ball State's Banquet and Catering Department since 1989. Over the course of her employment there, Vance made numerous complaints regarding her interactions with Saundra Davis, a white catering specialist in her department. Vance filed complaints with the university and charges with the Equal Employment Opportunity Commission (EEOC), alleging racial harassment and discrimination, mainly stemming from her interactions with Davis.

Despite these efforts, the problem persisted. Vance eventually filed a lawsuit in 2006 in the United States District Court for the Southern District of Indiana, alleging that she had been subjected to a racially hostile work environment in violation of Title VII of the 1964 Civil Rights Act. Vance alleged that Ball State was liable for the hostile work environment created by Davis, whom Vance alleged was her supervisor.

Under Title VII, an employer's liability for workplace harassment depends on whether the harasser is considered a co-worker or a supervisor. If the harasser is the victim's co-worker, the employer may defend itself simply by showing that it was not negligent in addressing harassment complaints. However, if the harasser is the victim's supervisor and no "significant change in employment status" occurs, such as the victim's firing or demotion, the employer may avoid liability only by establishing that "(1) the employer exercise reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonable failed to take advantage of the preventive or corrective opportunities that the employer provided." If a significant change in employment status does occur, the employer is strictly liable.

In Vance's case, the District Court granted Ball State's motion for summary judgment, finding that the university was not vicariously liable for Davis's actions because Davis, who did not have firing power over Vance, was not, in fact, Vance's supervisor. The Seventh Circuit affirmed, and eventually so did the Supreme Court. The Court rejected the "nebulous" definition of "supervisor" in the EEOC guidelines, instead specifically defining "supervisor" as an employee who has the power "to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'"

Writing for the majority, Justice Alito explained that, in the Court's mind, the newly adopted definition of "supervisor" would eliminate the question of supervisor status from a trial, which in turn "will focus the efforts of the parties, who will be able to present their cases in a way that conforms to the framework that the jury will apply."

But Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, argued in her dissent that the majority's decision "ignores the conditions under which the members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces." The majority's definition of "supervisor," according to Justice Ginsburg, "strikes from the supervisory category employees who control the day-to-day schedules and assignments of others." Although Justice Ginsburg herself questioned whether Davis would qualify as Vance's supervisor even under this more relaxed definition, she lamented that "the Court has seized upon Vance's thin case to narrow the definition of supervisor, and thereby manifestly limit Title VII's protections against workplace harassment."

Employers should take care not to view this employer-friendly decision as shielding them from hostile workplace claims. Instead, employers should take the opportunity to review their internal policies to ensure they provide for the prompt investigation of any such allegations and that employees are trained and remain up-to-date with Equal Employment Opportunity laws.

Supreme Court Sharpens Focus on Arbitration and Class Actions
by Lauren Kanter

I previously explored the Supreme Court's June 2013 decision in *American Express Co. v. Italian Colors Restaurant*, in which the Court validated the credit card company's contract with merchants mandating arbitration and eliminating the possibility of a class action (a result Justice Elena Kagan memorably described as "Too darn bad").

Shortly before deciding the apparently contentious *Italian Colors* case, however, the Supreme Court unanimously decided *Oxford Health Plans LLC v. Sutter*. The facts leading up to this case began over a decade ago, when physician Ivan Sutter and Oxford Health Plans entered into an agreement whereby Oxford would pay Dr. Sutter for the medical services he provided to Oxford members. The agreement contained an arbitration clause prohibiting litigation of disputes in court, instead mandating arbitration.

Several years into the agreement, Dr. Sutter filed a class action on behalf of himself and other physicians in Oxford's network, claiming that Oxford had failed to promptly and fully pay the doctors for their services. Oxford moved to compel arbitration, which request was granted by the New Jersey Superior Court. The parties then agreed that the arbitrator should decide whether their agreement authorized class arbitration.

During the course of the arbitration proceedings, the Supreme Court decided *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), holding that the Federal Arbitration Act ("FAA") prohibits class arbitration absent contractual evidence that the parties had agreed to allow it. Meanwhile, in *Sutter*, the arbitrator found that the contract between Oxford and Sutter did allow for class arbitration.

Oxford then moved to vacate the arbitration award in federal court, arguing that the arbitrator had exceeded his powers under the FAA. The District Court denied the motion, and the Third Circuit affirmed, upholding the arbitrator's decision to allow Sutter's claim to proceed in class arbitration. The case then made its way to the Supreme Court, which unanimously affirmed, holding that the arbitrator had not exceeded the scope of his power. In fact, the arbitrator had done precisely what the parties had requested: interpret the agreement and decide whether it permitted class arbitration.

Under FAA § 10(a)(4), a Court can vacate an arbitration award only "Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." As the arbitrator did not exceed or "imperfectly execute" his powers in this case, the Supreme Court, given the limited scope of review, confirmed that the arbitrator's decision could not be overturned-even if they thought it was wrong. (Although *Oxford* had relied on the Court's decision in *Stolt-Nielsen* in its efforts to overturn the award, the Court rejected Oxford's arguments, pointing out that in that case the parties had stipulated that they had never reached an agreement regarding class arbitration.) As Justice Kagan summarized: "The arbitrator's construction holds, however good, bad, or ugly."

The *Sutter* decision is a reminder that arbitration, while often considered an appealing and less expensive alternative than litigation, is not without risk. Businesses should take care to ensure their agreements set forth their arbitration procedures with specificity.

NEGOTIATION TRENDS

Learn to Spot these 10 Negotiating Tactics
by Joe Campolo, Esq.

Here's how to spot 10 tactics that many negotiators use. These have nothing to do with the win-win successful agreements of a good negotiation. Learn what to do when somebody pulls these tricks. Awareness of these tactics can strengthen your own negotiation skills.

1. Left at the altar - The other party feigns backing out of a deal just before you are ready to complete the agreement. Hoping the tactic brings the other party closer to their position, the tactic often yields 11th-hour concessions.
   Your countermeasure: Don't fall for the bait. Let the deal drop and go through a quiet period. Try resurrecting the deal after no less than 30 days, or when the other party calls you. At that point, it will be your turn to get concessions.

2. Making balloon futures - The other party forecasts future sales growth, which is accelerated from historic averages. This is similar to the "call-girl principle," in which a service is worth more before it's performed.
   Your countermeasure: Base your decision or price only on past history. Make future bonuses or payouts available if accelerated growth actually happens.

3. Calling a higher authority - The other party says that they are unable to make a final decision or won't tell you who the final decision maker is.
   Your countermeasure: Stop negotiating until you are discussing directly with that decision maker. You are wasting your time and energy.

4. Crunch time - The other party applies a lot of pressure by saying, "that's nonsense, you have to do much better than that."
   Your countermeasure: Use the "flinch" tactic, showing shock and amazement that this issue has been raised. Repeat the offer you just made.

5. Bring in the dancer - This is when a member of the other party talks for a long time without saying anything substantive to the real issues. This is usually intended as a distraction. This can also be a snow job, bringing in unnecessary data to support the other party's position.
   Your countermeasure: Ask, "specifically, what does this have to do with what we are talking about?" Repeat several more times if necessary.

6. Re-trading the deal - The opposite party attempts to reopen points from the negotiation after agreement has been reached. This is also called "forgotten issue."

   Your countermeasure: Simply say no. Call them out for breaking the agreement. This may become "left at the altar" (#1).

7. Huntley and Brinkley - Two people for the other party team up against you at the same time.
   Your countermeasure: If you can't handle the pressure, get someone to join you or ask to negotiate with only one person at a time.

8. Turning Soviet - A really mean negotiator that doesn't care if the your side gets anything out of the deal. This is the opposite of win-win.
   Your countermeasure: Ask for someone else to negotiate with and don't start again until your request is granted.

9. The walkout - Deliberately walking out of a negotiation to show disinterest.
   Your countermeasure: Let them walk out. If they do not come back, leave. Do not call them for a month.

10. Roaring brains - These are people that talk a lot with no real experience in a particular area.
    Your countermeasure: Do the research so you have the facts to question their experience and data.

Negotiating Strategies for Buying a Home (Part 1)
by Joe Campolo, Esq.

Negotiation strategy is different from negotiation style. From pit bull to diplomat, each of us has a personal style. But the strategy for negotiating the purchase of a home is based on facts: the real estate market at the moment and what we know about the seller's needs and the property.

Market knowledge courses through the veins of experienced real estate agents, which is one good reason to use one. Another is that agents are experienced negotiators who speak the same lingo. That means your agent probably will find out more about the seller's situation than you will working on your own. And for those of us who start sweating at the very thought of confronting a seller and the seller's agent face-to-face, why not pay a commission to someone who will relieve us of the task?

Can you negotiate without an agent? Absolutely. Many buyers do. It means:

- Doing intensive research about the market, the property you want to buy, and the seller's situation
- Figuring out an appropriate negotiating strategy and style based on that information

Tips for Staying Sane With or Without an Agent

- Do your homework.
- Ask questions constantly.
- Share the details of your budget, emotions, and mental state only with your advocates (this does not always include your agent).
- Find an agent with whom you feel comfortable from the start - this will save you headaches later in the process.

Setting Strategy

Market conditions are the single most important factor in negotiation strategy. And just like the weather, the landscape is a crazy quilt of micro-climates. Markets vary nationwide from place to place and neighborhood to neighborhood. The first thing you need to know is whether you're in a buyer's, seller's, balanced, or red-hot, bidding war market.

Negotiating in a Buyer's Market

You have more leverage in a buyer's market than any other type because there are more homes for sale than buyers to make offers. For sellers, especially those who have to move for whatever reason, this is the most nerve-wracking market. Property takes longer to sell. They can't let potential buyers slip their grasp. They may hate your demands, but they have to wrangle and they almost always have to sell for less than the asking price.

Buyer's Market Strategy: Ask for the Moon

- Make an offer at least 10 percent under the price you want to end up paying.
- Ask for seller-financed closing costs and a closing time convenient for you.
- You want all the appliances and the entertainment center? Ask for them.
- You'd really like the gas grill and flower pots on the deck? Go for it.

Buyer's Tip: You're most likely to win concessions and personal property in a buyer's market.

Negotiating in a Seller's Market

Pit bulls beware. In a seller's market, buyers don't have much clout, and style matters. If the seller has a desirable home and doesn't like your offer, he won't invest time in negotiating with you. In a seller's market, a good strategy is to make a straightforward, "clean" offer.

Buyers cannot procrastinate once they've found a home they want. Any agent worth her commission will urge you to make a quick decision, perhaps drawing up an offer the same day you tour the property. Yes, she'll earn her money putting in fewer hours on your behalf than in a slower market, but don't get paranoid and feel ripped off. This is how she makes her living. She wants you to get this home and knows it will sell quickly.

Seller's Market Strategy: Keep It Simple

- Getting pre-approved for a loan is an essential first step in any market.
- Offer the asking price or close to it.
- Ask only for the standard contingencies -- financing, appraisal, inspection -- to protect yourself.
- Expect the seller to set the closing date to his advantage.
- Don't expect to receive the personal property you want. (But if the seller is planning a garage sale, you may be able to work a deal ahead of time.)

Buyer's Tip: Forget the wrangling and go for the house. You'll feel lucky to get it.

Negotiating Strategies for Buying a Home (Part 2)
by Joe Campolo, Esq.

Real Life Example
THE MARKET: A seller's market
WHO: Hannah, a first-time homebuyer who had been going to open houses for months.
THE HOUSE: One day she drove down a side street and spotted a for sale sign on a house that wasn't advertised in that Sunday's paper. She knew the instant she walked in the door that she wanted the house.
THE AGENT: Hannah was not working with an agent. She sat down with the seller's agent and drew up a full price offer with standard contingencies.
THE OUTCOME: Could she have paid less? Maybe. Did she feel burned? No. Her homework told her this was an unusually good property priced to sell.

Negotiating in a Balanced Market
A balanced market feels less like a pressure cooker because there is a more equal supply of homes and buyers. Since neither side is feeling market urgency, personal priorities reign. Expect the back-and-forth counteroffer phase to take longer than it does in either a buyer's or seller's market. After several rounds of paperwork, buyer and seller might agree to do a 50-50 split of their differences on price, terms, and personal property.

Balanced Market Strategy: Split Your Differences

1. Offer less than the asking price.
2. Include the standard financing and inspection contingencies.
3. Offer terms beneficial to you.
4. Ask for whatever personal property you want.

Buyer's Tip: Both buyer and seller are likely to feel good about the transaction. They will each gain and give up something in the spirit of compromise during the negotiation.

Real Life Example
THE MARKET: A balanced market
WHO: Sarah had been looking for a house for some time when she spotted a FSBO in a desirable neighborhood and knocked on the door.
THE HOUSE: The home belonged to an elderly woman who was selling it with the help of her sons.
THE SITUATION: The homeowner fixed a pot of tea and the two women sat down for a friendly conversation. Two hours later, they had a verbal agreement, which was written up and led to a sale that left both of them pleased.
THE OUTCOME: A year later, the same neighborhood was in a tumultuous bidding war market. If the elderly woman had waited and worked with an agent, she would have gotten thousands of dollars more for her home. But this sale was more about getting a fair price for a sacred space and selling it to someone who would appreciate it.

Buyer's Tip: Buying and selling a home is not always about money.

Building Rapport During Negotiations
by Joe Campolo, Esq.

IMPORTANCE OF RAPPORT
If you are like most busy professionals, you are typically pressed for time and would prefer to not waste time on small talk and just get to the issues at hand. This "small talk," however, if used correctly, has value and should not just be dismissed or glossed over. When bargaining parties take the time to establish some rapport and develop personal relationships, they tend to behave more cooperatively and enhance the likelihood they will achieve mutual agreements. It's important to remember that you shouldn't build rapport simply to win the upper hand in negotiations. Only building a sincere and genuine rapport can promote trust and credibility.

Many believe that the ability to connect with people is a natural gift -- either you can build rapport or you can't. However, developing rapport, like all negotiation skills, is something that anyone can learn, and then use. Here are some tips.

HOW TO BUILD RAPPORT
<u>Non-Verbal:</u> Unconsciously mimicking each other's gestures, facial expressions and tone of voice. Keeping your arms uncrossed, the occasional head nod to assure your attention. Maintaining eye contact, leaning toward the other person, and smiling are indications of openness and interest in each other.

<u>Meet in Person</u>: Easier to build rapport face-to-face rather than via email or over the phone, many of the above mentioned non-verbal communication cues are lost via email.

<u>Common Interests</u>: These can be found via casual conversation and "small talk" or actively researching the other person's bio or background. The more you know about your counterpart before you meet them, the more likely you are to find a common bridge that builds trust.

<u>Thoughtful Gestures:</u> Remembering birthdays, alma maters, favorite sports teams, details of family life & children all show genuine interest. Compliment your counterpart.

<u>Self-Disclosure</u>: Share information about yourself, your background and interests. This may uncover common interests and experiences, and sets the stage for open communication.

<u>Beware of Ethical Pitfalls</u>: Once a friendly, positive rapport has been established, negotiators may be more reluctant to share bad news and be tempted to sacrifice ethical values in the interest of maintaining rapport and reaching an agreement. Always keep in mind the potential long-term consequences of your decisions during important negotiations.

Ethics in Negotiations
by Joe Campolo, Esq.

Legal commentators have written countless articles and entire CLE courses are dedicated to discussing what an attorney may or may not say in negotiations. Ethics in negotiations is tricky. On one hand, a lawyer must show honesty and good faith, and not accept a result that is unconscionably unfair to the adverse party. On the other hand, the attorney is obligated to obtain a result that is in the client's best interest and must do everything, short of fraud or deceit, to do so. The absence of a clear line between puffing and misrepresentation has resulted in a considerable body of ethics decisions and commentary.

Many lawyers refer to Model Rule 4.1 which states: "In the course of representing a client a lawyer shall not knowingly (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." As the commentary to the Rule makes clear, a misrepresentation occurs when a lawyer incorporates or affirms a statement by another person that the lawyer knows to be false. A misrepresentation also includes misleading statements and omissions that are the equivalent of affirmative false statements.

Generally, Rule 4.1 defers to the parties and the circumstances of the transaction to determine what is factual, what is ethical, and what is legal. Here is where the line of negotiation ethics gets blurry. Not all untruths are equal. Posturing or "puffing" during negotiations is not a breach of the Rules. Specifically, statements regarding a party's negotiating goals or its willingness to compromise are not seen as actionable misrepresentations of fact but as negotiation tactics.

While there is a certain degree of deception inherent in some negotiations which arguably helps to promote resolution of conflicts, it is critical to keep in mind the parties involved. The ABA Ethics Committee notes that it is never acceptable to lie to a judge. If a judge were to ask about the limits of settlement authority given to a lawyer by a client, the lawyer might decline to answer but may not answer falsely. By contrast, the Committee concluded that "posturing and puffery" are acceptable between the opposing lawyers or with a neutral mediator. A lawyer may downplay the client's desire to settle or overstate the strength and understate the weaknesses of the client's case. Nonetheless, an attorney may not misstate facts, such as knowingly misstating applicable insurance policy limits. Thus in non-judicial settlement negotiations and mediations, a degree of posturing and puffery is permitted but the knowing or intentional misrepresentation of material facts is not.

Negotiation and Active Listening Skills: Talk Less and Listen More
by Joe Campolo, Esq.

Few negotiators would argue the value of good listening skills. Listening skills can calm tensions, break stalemates, and help build creative deals. Most people overestimate their ability of this key skill, and lack an accurate understanding of the concept of active listening.

Active listening doesn't mean sitting patiently while your counterpart talks or does it simply entail saying "I understand" and establishing good eye contact. Rather, active listening is a dynamic process and key in any negotiation. Here are some tips to become a skillful active listener.

1. Showing Your Interest: Prove you're listening by using body language or brief verbal replies that show interest and concern. Simple phrases such as "yes," "OK" or "I see" effectively show you are paying attention. This encourages the other person to continue talking and relinquish more control of the situation to the negotiator.

2. Paraphrasing: Tell the other person what you heard them say, either quoting them or summarizing what they said.

3. Emotion Labeling: This means attaching a tentative label to the feelings expressed or implied by other person's words and actions. This shows you are paying attention to the emotional aspects of what other person is conveying. When used effectively, emotion labeling is one of the most powerful skills available to negotiators because it helps identify the issues and feelings driving the other person's behavior.

4. Mirroring: Repeating the last words or main idea of other person's message. This indicates interest and understanding. For example, a subject may say, "I'm sick and tired of being pushed around," to which a negotiator can respond, "Feel pushed, huh?" Mirroring can be especially helpful in the early stages of a crisis, as negotiators attempt to establish a non confrontational presence, gain initial intelligence and build rapport.

5. Open-Ended Questions: Use open-ended questions instead of "why" questions, which could imply interrogation. If you do most of the talking, you decrease the opportunities to learn about other person. Effective open-ended questions include, "Can you tell me more about that?" "I didn't understand what you just said; could you help me better understand by explaining that further?" and, "Could you tell me more about what happened to you today?"

6. "I" Messages: Negotiators have to avoid being provoking when they express how they feel about certain things the other person says or does. Using "I" statements lets you ostensibly shed the negotiator role and react to the subject as just another person.

7. Effective Pauses: Any good interviewer knows the power of the long, awkward silence. People tend to speak to fill spaces in a conversation. Therefore, you should, on occasion, consciously create a space or void that will encourage the other person to speak and, in the process, provide additional information.

Adapted from the article "Crisis Intervention: Using Active Listening Skills in Negotiations" by Gary W. Noesner and Mike Webster, published in the 1997 issue of the Law Enforcement Bulletin.

Negotiation Trends: Salary Disclosure
by Joe Campolo, Esq.

Have you ever revealed how much you earn to coworkers? Your answer to that question may depend on your age.

The September issue of Harvard Law School's Program on Negotiation newsletter discusses the trend of openness about wages between coworkers and how it may be affecting job negotiations.

Comparing salaries has long been a social taboo in the United States, but members of the millennial generation -- people born in the 1980s and 1990s -- are changing that, according to Kevin Hallock, director of Cornell University's Institute for Compensation Studies.

According to a recent *Wall Street Journal* article, when 25-year-old Dustin Zick was preparing to leave his job with an online retailer, he compared salaries with five or six co-workers. Several of the coworkers strategized about salaries they hoped to attain and how they might negotiate for them. The discussions helped Zick meet his target salary at his next job.

Accustomed to sharing minute details of their lives on Facebook and Twitter, Millennials appear to be carrying that penchant for self-disclosure into their work lives. Websites such as Glassdoor.com, where people can post their salaries and other information about their jobs, are spurring this trend. That may be bad news for employers, who see value in encouraging employees to keep mum about their salaries.

<u>What's fair?</u>

Employers have long believed that open discussion of salaries can create problems in the workplace. Knowledge of pay differences can reduce morale and productivity, researchers have found. To take just one example, the smaller the salary gap between the highest- and lowest-paid players within Major League Baseball teams, the better the team's performance, Craig Depken of the University of North Carolina found. When we feel unfairly compensated by our organizations relative to others, we may not work as hard as we would otherwise.

Human beings have a strong desire for fairness. Yet our interpretation of what constitutes a fair salary is strongly skewed by our perspective. If you learn that a colleague who has the same job earns more than you do, you may overlook the fact that she has more experience or greater responsibilities. Our perceptions of unfairness, whether factual or not, can breed envy, discontent, and lower productivity.

Moreover, we tend to be highly driven by status concerns -- that is, we care a great deal about how we measure up to others. Finding out that someone you consider to be a peer is earning more than you do could cause you to be less satisfied with your own accomplishments and also more displeased with your organization.

<u>Negotiating in a more open workplace</u>

If salary disclosure is, indeed, a growing trend, how can managers and employees alike engage in salary negotiations that satisfy both parties' interest?

For employees, it's important to move beyond your own perspective to consider possible explanations for pay discrepancies that you might have overlooked, such as whether similar-seeming colleagues have stronger credentials, greater seniority, or longer work hours. Consult others in your field, or review objective industry standards before making demands that could offend or annoy your employer. If you do find solid evidence that you are underpaid, present your employer with the facts as you see them, being careful to stress that you believe any discrepancy is unintentional.

As for employers, many rely on elaborate job grade systems that divide employees into levels with set salaries. Such clear guidelines may seem rigid, yet they can improve the odds that employees will feel fairly treated relative to others at their level.

Some employers are throwing the old rules about salary sharing out the window and striving for complete transparency. New York data analytics company SumAll, for example, reveals pay scales and individual salaries companywide. SumAll believes its employees are more efficient when they aren't trying to guess how much others are earning, according to the *Journal*.

5 Hard-nosed Negotiation Tips from Steve Jobs
by Joe Campolo, Esq.

A judge ruled last month that Apple violated antitrust laws in conspiring with some of the largest book publishers to fix e-book prices. While Apple continues to fight the allegations, there is a lot to be learned from the released e-mail exchange between Steve Jobs and James Murdoch. The e-mails had an important role in the lawsuit, but they also provide an savvy high-stakes negotiation between the leaders of two powerful firms.

Eric Sherman writer for Inc.com, reviews the series of e-mails and the negotiation principles used to create the best conditions for winning.

"A series of emails about ebook prices between Apple and HarperCollins, including ones written by Steve Jobs, were recently released as part of the Department of Justice price-fixing suit against Apple and a number of major publishers. As the site Quartz pointed out, these offer some great insight into how Jobs negotiated.

However, Zachary Seward at Quartz called it an example of "hard-nosed" negotiation at which Jobs excelled. I'd take a different view. This is not hard-nosed. The emails show how an excellent negotiator used a series of principles to create the best conditions for winning. Let's look in greater detail at the exchange between Steve Jobs and James Murdoch, son of Rupert Murdoch and the ultimate decision maker, and see how Jobs ultimately got his way."
First, set the stage. Apple and HarperCollins had been discussing bringing the latter's ebooks into the iTunes store for the launch of the iPad. Apple had presented its standard contract. HarperCollins wanted to address the following issues:

- flexibility to price on a title-by-title basis outside Apple's pricing tiers
- no so-called most favored nation status, so Harper would not have to give Apple as good a deal as any other retailers in case the two companies disagreed on prices and HarperCollins wanted to make titles available through other outlets at higher prices and, potentially, higher income for those retailers
- a lower than 30 percent commission on new works
- six month windows on using an agency model (publisher sets the price and retailer gets a commission) instead of the 12-month window that Apple wanted

- concern that Apple wanted to set prices too high, meaning that competition with Amazon would be difficult

And yet, Jobs ultimately prevailed. Here is how.

1. Understand the importance of the negotiation.
According to one of the emails, Steve Jobs got on the phone with Murdoch right away. Jobs was a busy man, but he knew that some deals are critical. To have a credible showing of ebooks, he needed *all* the major publishers, including HarperCollins. However, there was another aspect of importance that didn't pass him by. If he caved on what he thought he really needed with one publisher, others would eventually find out and push back. Not only was the deal important in and of itself, but also in terms of the effect it could have on other deals.

2. Show that you understand the context and why your proposition is better.
Jobs knew, as did everyone in the publishing industry, that Amazon was driving much of the ebook business. Murdoch verified that Amazon paid $13 wholesale for an ebook title and sold it for $9.99--a loss, but Amazon wanted market share. However, buying high and selling low wouldn't last forever, as Jobs pointed out:

The current business model of companies like Amazon distributing ebooks below cost or without making a reasonable profit isn't sustainable for long. As ebooks become a larger business, distributors will need to make at least a small profit, and you will want this too so that they invest in the future of the business with infrastructure, marketing, etc.

Furthermore, Jobs argued that the $9 HarperCollins would get per title was actually sustainable and that the only way to pay more, given that in retail a 30 percent margin is relatively modest, would be to raise prices, angering consumers.

3. Show both kinds of value.
Jobs showed two kinds of value in his email exchange. One was positive value--what HarperCollins would get by working with Apple--and the other was negative, or what HarperCollins would lose by not working with Apple. For example, Jobs wrote that "Apple is the only other company currently capable of making a serious impact, and we have four of the six big publishers signed up already." On one hand, he offers HarperCollins a tool to oppose industry domination by Amazon. On the other, he offers a soft hint that if HarperCollins doesn't play ball, it may get left behind by its major competitors.

4. Lay out the reality.
The Jobs coup de grâce relates to the first point. When Murdoch shows signs of compromise, while trying, as Jobs did, to show positive and negative benefits to Apple, Jobs lays out a stark reality:

As I see it, HC has the following choices:

1. Throw in with Apple and see if we can all make a go of this to create a real mainstream ebooks market at $12.99 and $14.99.
2. Keep going with Amazon at $9.99. You will make a bit more money in the short term, but in the medium term Amazon will tell you they will be paying you 70% of $9.99. They have shareholders too.
3. Hold back your books from Amazon. Without a way for customers to buy your ebooks, they will steal them. This will be the start of piracy and once started there will be no stopping it. Trust me, I've seen this happen with my own eyes.

Maybe I'm missing something, but I don't see any other alternatives. Do you?

At that point, the gloves are off and Jobs shows that HarperCollins, and the wider industry, face a stark choice, and that he, Jobs, knows it and recognizes that giving in to Murdoch would actually mean putting HarperCollins in a medium-term bind.

5. Play the emotion

One of the biggest mistakes that businesspeople make is to assume that the process is a rational and logical one. But negotiation is almost always an emotional play. People make decisions because of ego, fear, greed, a need to please, and so on. Notice that Jobs *shows* the benefit and the risks by painting pictures and not enumerating lists. For instance, he mentions the 120 million customer credit card numbers on file. He deliberately left the image of all that potential money in Murdoch's mind.

You don't often see an extended example of a negotiation process handled by someone gifted in the field. It is worth reading through the transcript to follow the back and forth and see how skilled Jobs was.

http://www.inc.com/erik-sherman/5-negotiation-tips-from-steve-jobs.html

CBS and Time Warner Negotiations

by Joe Campolo, Esq.

On Aug. 2nd, CBS-owned stations in New York, Los Angeles and Dallas went dark on Time Warner Cable systems after talks between the companies broke down. Time Warner also removed Showtime and three other cablers from lineups nationwide in the dispute. The blackout was a result of a dispute over CBS' request for higher fees from the cable company to retransmit CBS stations.

They ended their one month battle/contract dispute, with CBS winning not only a significant financial increase for its programming, but also its stake in the digital future. The outcome should set a precedent for cable companies and their view of blackouts as a viable negotiation tool. Last month, Time Warner Cable reported a huge quarterly loss of television subscribers, the largest in its history: 306,000 of its 11.7 million subscribers dropped the company. While CBS has came out unscathed.

Harvard Law School's Program on Negotiation published an article written by Katie Shonk entitled "The CBS - Time Warner Cable Dispute: Making a Bad BATNA Even Worse." She discusses how the CBS/TWC standoff is a perfect example of how attempting to punish a negotiation counterpart into conceding often backfire. As Time Warner played hardball with CBS in an attempt to frighten the network into conceding, they lost focus on how the standoff would impact its customers and ultimately lose subscribers. Time Warner's BATNA -- its "best alternative to a negotiated agreement" with CBS -- was a bad one from the start.

http://www.pon.harvard.edu/?p=37938/?mqsc=NI1119201336780658utm_source=WhatCountsEmail&utm_medium=PON%20Harvard+Negotiation%20Insider%20Tuesday&utm_campaign=Negotiation_Insider_11192013

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WILLS, TRUSTS & ESTATES

Looking Over the Cliff
by Martin S. Glass, Esq.

Well, happy new year to all. At the 11th hour Congress decided not to let us fall off the Fiscal Cliff by passing the American Taxpayer Relief Act of 2012. But what does that mean in the world of estate planning? There are a number of things that happened (or didn't happen). So let's go through each one.

First, the federal exemption for gift and estate taxes was fixed permanently at $5 Million indexed by inflation, instead of reverting back to $1 Million. As of January 2013, that amount became $5.25 Million. This means that you can transfer the first $5.25 Million tax free, whether it was by gifting to people during your lifetime or to your loved ones upon your death. Of course 'permanent' just means until Congress changes it.

What about transfers between spouses? The IRS still looks at this as a special type of transfer. They still have what's called an unlimited marital deduction, meaning you can transfer all of your estate to your spouse tax free, regardless how large it is! Just remember that now the surviving spouse has all of the assets and will be taxed for anything over the exempted amount when he or she dies. Also remember that this marital deduction is only available to spouses who are U.S. citizens.

The second item, which is sort of attached to the first, is that Congress raised the top tax rate on the estate tax from 35% to 40% on the amount that is greater than the exemption. This is still better than the 55% that it was going to go up to had Congress not acted.

UPDATE: THE IRS RAISED THE LIFETIME EXEMPTION FROM 5.25 MILLION IN 2013 TO 5.34 MILLION IN 2014. THE ANNUAL GIFT LIMIT WILL REMAIN AT $14,000 PER PERSON.

The third item is a thing that the legal and financial world has dubbed 'portability' of your estate tax exemption. This is another added benefit for married couples. When the first spouse dies, the surviving spouse can elect to add any unused portion of the deceased spouse's exemption to their own. This would then allow the surviving spouse to transfer up to $10.5 Million if the deceased spouse did not use any of his or her exemption.

Remember that portability of the deceased spouse is not automatic. The administrator of the deceased spouse's estate must file an estate tax return for the deceased spouse, even if no tax is due. This return is due nine months after death with a six-month extension allowed. If the administrator doesn't file the return or misses the deadline, the spouse loses the right to portability. Surviving spouses should file it even if they're not wealthy today, because who knows what the future holds.

What about making a gift during your lifetime? Not everything is taxed, or counted against your $5 Million exemption. Every person has an annual exclusion. As of January 2013, that amount went up to $14,000. This means that you can literally stand on the street corner and give every person who walks by $14,000 and never have to tell the government about it. Now I don't necessarily recommend doing that, but you can if you want, without paying any taxes and without telling the IRS. Anything above the $14,000 has to be reported to the IRS. They will keep tabs to see if and when you go over your $5 Million lifetime exemption.

There's one other thing that I need to remind everyone about. Although the federal estate tax exemption has been locked in at $5 Million, New York State estate tax exemption is only $1 Million. The tax rate varies but averages around 10%-12%. So, for a $5 Million estate there may be no federal tax due, but your heirs might be paying New York up to $500,000 in taxes. New York doesn't have any gift tax so there are ways to minimize, if not eliminate, the estate tax with proper planning.

Estate Planning: Do "DIY" Wills work?
by Martin S. Glass, Esq.

In today's world of electronics and the Internet, people are turning to their computer for answers to even the most complex questions. Estate planning websites are all over the place. They all claim to help you prepare a valid will at an extremely low price. Personally, I'm a big believer in "you get what you pay for." Is it worth it to save a few hundred dollars and risk putting your entire estate at risk?

Online legal document services offer an enticing bargain. Most people realize that they need an estate plan to manage their affairs if something happens to them. But, estate planning attorneys can be expensive. That's why many potential clients are now questioning whether it's possible to skip the attorney fees and use a low-cost Web site to prepare estate planning documents. The short answer is that, yes, it is possible. The longer answer, in my humble opinion, is that it's not recommended. You could save a few bucks now, but end up creating an expensive and frustrating mess for your family.

Hiring an estate planning attorney may seem overwhelming to you and you may wonder if it is really worth it. Let's look at this on a basic level. An attorney is a live person, professionally trained in a specific area of the law, who will listen to your particular needs and goals. A computer program cannot take into account all the particulars of your circumstances and help you make strategic decisions to meet the needs of your loved ones. A Web site cannot anticipate what you may need in the future, like the appointment of a guardian or a healthcare directive or your plans to move to Florida in three years.

If you are considering using a website to create your estate plan, you should at least meet with an estate planning attorney first to discuss your options. It would be a tragedy to save a few dollars now, only to end up having documents that fail to protect your estate or fail to provide for your loved ones when they need it the most. In the end, contacting an experienced estate planning attorney today may save your family a fortune in the future.

Unfortunately, most people don't realize what they are getting themselves into with an online document service. That's because the online services have spent millions trying to create the impression that their services are similar to those of an attorney. They put lawyers in their commercials, hire celebrities to promote them, and parade multitudes of people who have supposedly successfully used their documents. But all the marketing in the world can't erase the simple truth. These online services aren't law firms. They aren't lawyers. They can't give legal advice. Instead, they are just "document assistants." It's just a mindless program typing whatever your information is into a form, whether or not it makes sense and whether or not it is a good idea. If you are stuck, they can't help you. If you make a huge mistake, they can't warn you. It would be a crime for them to warn you. It doesn't matter if the guy working on your documents is an estate planning genius. He's not allowed to give legal advice.

These companies design their generic forms so that even without legal advice, it's hard to make mistakes. That may seem like a good thing. However, it turns out that the best way to make sure that your documents don't do anything wrong is to make sure they don't do anything at all. They're just do-nothing, one-size-fits-all generic documents.

That leads to another problem with the online services. They can't even promise you that the documents will work. Again, they can't. They aren't attorneys. After sitting down and discussing a particular situation, many clients are excited to learn that they can leave assets to a special needs child without jeopardizing government benefits or that they can protect a child's inheritance from frivolous lawsuits, divorce or bankruptcy. A well-designed estate plan makes sure that your assets get where you want them and that they are used in the way you instruct. It's about creating legally-enforceable provisions that do what you want done.

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The online document services can't promise any of that. They can't promise you'll achieve your goals. They can't point out opportunities, and they can't warn you about hidden hazards. Really, all they can do is save you a few bucks. But they play a clever price game, too. Most of the online services compare their prices to what an attorney would charge for similar documents. Their comparisons are misleading in two ways. First, they often compare the price they charge for a single document to the price that an attorney charges for an entire estate plan, which includes numerous documents. Secondly, and more importantly, there is no way to compare the prices because they aren't even offering the same thing that you would get from an attorney. It's like trying to compare a steak at a fast food restaurant versus a high-end steakhouse. Fortunately, most people can taste the difference and pay for (and get) what they actually want. And, that might include some ambiance and waiter service. That's because most people have experience with restaurants, both good and bad. They know how to judge quality, and they understand the "you get what you pay for" concept.

When it comes to legal planning, most people don't have the experience to know better. You only get to use an estate plan once. If you screw it up, you'll never know, but trust me, your family will know. If your estate plan doesn't work properly, your family could end up paying the price and cleaning up the mess long after you're gone.

Estate Planning: Does Your 18-Year-Old Need It?
by Martin S. Glass, Esq.

The quick answer to that question is "yes." When your child turns 18 years of age, he is considered a legal adult. As such, he should have an estate plan. This includes a health proxy, power of attorney, and even a will or trust. While it is difficult for parents to think about this as being necessary, failure to take these measures can have unexpected or severe consequences.

When your child reaches the age of maturity, HIPAA (Health Insurance Portability and Accountability Act) prevents even you, his parents, from obtaining confidential medical information. He needs to have communicated that he wishes for you to still be involved through HIPAA release documents. Additionally, if your child is unable to communicate his desires for his own medical care (or decisions regarding life support) you would need to be appointed as his health care proxy to make these decisions on his behalf. Otherwise, it could require years of litigation before you can make those types of decisions.

While it may be difficult to do, it is important that you discuss with your young adult their end-of-life wishes. You should know whether or not she wishes to be kept alive by heroic measures, even if it means she would not have a meaningful quality of life. As hard as it may be, you should even discuss with her other issues such as burial preferences, organ donations and cremation. Other important decisions, such as who may receive her important tangible property (her "stuff") and her financial assets need to be worked out and documented as well.

It is important to note that not every person has the capacity to make decisions. In those cases you, as the parent, must now seek legal guardianship through the courts. You do not have the power to make medical and financial decisions on your child's behalf without it. But even then, in a situation where your child still has the ability to state her preferences, goals, and objectives, and also supply input as to whom would make her decisions, her input should be considered, even if you are appointed as her guardian.

You should also be aware that often a parent or grandparent has given funds to a minor, and upon the age of 18, these funds are vested and are now owned by this young adult. In the unfortunate event that your child should predecease you, these assets may have to be probated and will pass to that person's heirs-at-law. Assuming that they don't have a spouse or child, in New York the next in line are his parents. In many situations, you have set up an estate plan for yourselves divesting assets in order to reduce your estate. This is typically done for estate tax or for asset protection purposes. The unplanned receipt of assets from your child could greatly impact your plan. A straightforward will, directing that the assets be left to individuals other than you, possibly siblings, or a charity, would alleviate this unintended problem.

So, whether it's to make sure their wishes are being carried out or to further accomplish your planning goals, it may become important for your child to create an estate plan. This usually would simply be a straightforward will, power of attorney, health care proxy and living will. Of course, if your young adult has already accumulated some assets, his or her estate plan may be more complex and require the use of trusts. A qualified estate planning attorney would be able to help create the best plan of action.

Planning for one!
by Martin S. Glass, Esq.

In some ways, estate planning for a single person can be more challenging for an estate planning attorney than planning for a couple. When a couple puts together an estate plan, the easiest and most natural thing to do is to entrust one another with all of the fiduciary responsibilities in the event of one spouse's disability or death. Among these responsibilities are the execution of each other's health care proxy, power of attorney, access to medical records in end-of-life scenarios and the administration of the estate.

The ease in dealing with these issues for couples is that the surviving spouse is most often the closest emotionally and geographically to the deceased and their assets. Spouses are uniquely qualified to speak for each other, because over the years they hopefully have had discussions concerning end-of-life scenarios with each other. Moreover, the surviving spouse is more likely to have been included in the financial decision making throughout the marriage, making the surviving spouse the best person to continue making the financial decisions beyond the marriage.

Those who never married and those who have been widowed do not have the luxury of entrusting emergency or end-of-life responsibilities to their spouse. These responsibilities typically fall to other members of the immediate family, such as children or siblings. In my experience, if there are children, the burden of these responsibilities tends to fall on the daughter. If not her, then the child in closest physical proximity to the surviving parent. Hopefully that child has had discussions with both parents and knows their wishes, no matter which one ends up the surviving parent.

Siblings and other family members are often less knowledgeable about one's financial and medical wishes than a spouse or adult child might be. Therefore, a single person who is planning for his/her estate should make sure that any fiduciary responsibilities entrusted to a relative are clearly spelled out in the appropriate documentation. Medical emergencies and end-of-life scenarios are emotional times in which people must often make quick and decisive decisions. This is most easily achieved when there has been discussions between the planner and the person whom he or she is entrusting these decisions, along with a clear delegation of authority backed by the proper legal paperwork.

On that note, single people should bear in mind that the best people to entrust with medical responsibilities are often within relatively close geographic proximity. It makes little sense for a New Yorker to entrust the authority in a health care proxy to a relative living somewhere far, such as San Diego. People given financial responsibilities usually do not require that same proximity with the use of computers, overnight mail and the telephone.

Younger single people have even more estate planning considerations to think about. One such consideration is the unavailability of supplemental sources of income in case of disease, disability, or incapacity. Singles should consider these possibilities in their estate planning efforts. Those who are still working should ensure that they are covered by sufficient disability insurance, either privately or through their work. As single people get older, they should also consider purchasing long term care insurance to supplement any health insurance they may have. Long term care insurance typically covers expenses incurred in things like nursing home or hospice care that are typically not covered by normal health insurance coverage.

But of all things a single person needs to do, the most important is to talk to the people who are getting these fiduciary responsibilities. Make sure they not only understand your feelings and desires, but totally agree with them. This holds true for both medical and financial decisions. If they're not on board, maybe you need to find someone else.

I Left a Child Out of My Will. Now What?
by Martin S. Glass, Esq.

Is this a tragic scenario? Probably not, but it certainly represents what is an entirely avoidable estate planning consequence. Here's the dilemma. Assume after having your first child, you do the smart, responsible thing -- you draft a Last Will and Testament which sets forth your final wishes with regard to the distribution of your estate. Fast forward a couple years and say that your first child now has a sibling and that you unintentionally failed to accommodate for in your Will. OK, one last fast forward in time. Twenty-five years later, despite your best intentions and the daily grind always seemingly getting in the way, you find that you never quite got around to updating your Will to reflect your wishes regarding that later born child before you pass away. So much for the best laid plans.

Even though you love your children equally and probably want them to similarly share in your estate, will that actually happen? Will that later born child you omitted from your Will be disinherited because of your planning error, or will the law accommodate her somehow? These are scary questions. It's my hope to not only calm your fears, but prompt you to action in order to avoid any unwanted estate planning consequences down the road.

If it's not already abundantly clear, today I'm writing about the inheritance rights of children in New York, and specifically those that are left out of a parent's estate plan (sometimes referred to pretermitted heirs). For better or worse, it's more common than you might think that children are left out of a parent's Will. The good news is that New York State recognizes that drafters sometimes make unintentional planning errors. The legislature has set in place certain rules to ensure that pretermitted children are not precluded from inheriting.

Under New York law, a child omitted from a Will is entitled to inherit the equivalent of his or her intestate share of the estate, which translates into that portion of the estate that he or she would have received had the parent died without a Will in the first place. The only caveat to this rule is that the parent must not have expressly disclaimed or disinherited the child. In New York, short of successfully contesting a Will, testamentary provisions that disinherit an adult child will typically stand. So while disinheriting a child can prove to be the death knell to his inheriting, a simple inadvertent omission won't typically prove fatal to a child inheriting.

Could the confusion of this entire scenario have been avoided from the get go? Of course, and in particular, there are two ways it could have been achieved. The first method I offer is a simple alternative for those who don't want to regularly revisit their wills. For anyone planning on having more than one child (and even those who aren't), a qualified estate planning attorney knows the proper language to include in a Will to accommodate for the possibility of after born children. Consult with counsel and be sure he knows your plans/intentions so that the proper verbiage can be included in your Will. Although this does usually work, it is not my preferred method. It could easily cause resentment between the siblings-either because Mom didn't love me enough to even bother updating her Will, or the classic, "Mom loved you best."

The second method I offer is a bit harder to accomplish. As far as I'm concerned, Wills and Estate Plans occasionally need to be revisited and adjusted based on the present conditions of your life. Plain and simple, these adjustments are absolutely necessary as the circumstances in one's life change, whether it be because of a new child, divorce, retirement, etc. In order to do your heirs justice and make sure that your wishes are carried out, update your Estate Plan as necessary. While it's easy to be lazy and assume that your existing Will accomplishes all of your intended estate planning goals, don't make assumptions. It might cost you a little bit extra to revisit your plan on occasion, but it could mean the difference between your wishes being carried out or not.

College Kids Are Adults
by Martin S. Glass, Esq.

The summer before my oldest went off to college, we all went for an orientation weekend. While there, he went off and did his thing and my wife and I went off and did ours. In one of our parent orientation seminars we were reminded that, now that he is 18, he is officially an "adult" in the eyes of the law. We, as parents, would no longer have the automatic legal right to make his healthcare decisions, have access to his healthcare records in an emergency, or be included in any of his financial decisions. Who was paying their enormous bill was irrelevant. His life became private and confidential.

HIPAA IS THE FEDERAL LAW WHICH PROHIBITS PHYSICIANS AND HOSPITALS FROM DISCLOSING CONFIDENTIAL MEDICAL RECORDS TO ANYONE OTHER THAN THE PATIENT, UNLESS THE PATIENT HAS EXPRESSLY AUTHORIZED ANOTHER PERSON TO HAVE ACCESS TO HIS RECORDS.

Amid the hustle and bustle of getting your kids off to college, it is easy to forget that you need to make sure they have signed a healthcare proxy and a HIPAA authorization form. The Health Insurance Portability and Accountability Act gives the right to privacy to individuals from age 12 through 18. The provider must have a signed disclosure before giving out any information on provided health care to anyone, including parents

The consequences of forgetting these simple forms can be tragic. If something should happen to your child while at college (such as an injury or illness), you do not want to be told by some doctor or hospital employee in a far-off state that they cannot even talk with you about your child's medical status.

This is especially true when the potential harm is so easily prevented. With a healthcare proxy, your child signs a document appointing you as their healthcare agent, who will be authorized to make healthcare decisions for them if they ever become unable to make their own decisions. In addition, your child can leave a living will, in which they can specify what kind of end-of-life medical treatments they want (or do not want).

With a HIPAA authorization, your child simply names the person or persons to whom medical personnel may release his or her medical information. This includes the person named as their healthcare agent, but may include others, such as siblings.

Lastly, your child should sign a Durable Power of Attorney. Just because you're the one actually paying the school's tuition does not automatically allow you to see his financial records. A Power of Attorney naming you as the Agent will allow you access to his bank accounts, along with his school loans and other financial documents. A Power of Attorney is a bit different from a Healthcare Proxy in the fact that you are given the power immediately after it is signed and you keep the power even if your child becomes incapacitated.

THE GREAT ADVANTAGE OF THE **DURABLE POWER-OF-ATTORNEY** IS THAT IT REMAINS EFFECTIVE AFTER THE PRINCIPAL'S INCAPACITY.

A few years later, my daughter's college has actually made this a bit easier. They have a form that they give to all incoming students where the student can name who is allowed to talk to the Bursar and Financial Aid Office. Unfortunately, that still can leave you with a problem should you need to speak with a bank regarding your child's loans.

These documents may seem trivial and typically are not looked at on the same level as a Last Will and Testament, but they should be. Actually, for a young adult with not a lot of "stuff" or assets, these documents can be more important, as they can have an immediate impact on a potentially critical situation.

The Demise of DOMA
by Martin S. Glass, Esq.

Awhile back I wrote about the difficulties for same-sex couples with respect to their estate planning. Well, if you haven't heard by now, things have gotten easier for those in New York. I don't normally write about case law, but when the Supreme Court of the United States

(SCOTUS) speaks, even I try to listen. In this instance the case was *U.S. v. Windsor*.

As a quick refresher, in 1996 President Bill Clinton signed into law the Defense of Marriage Act (DOMA). One of the things it said was that marriage is defined as being between a man and a woman. Thus all Federal statutes, rules and regulations were required to follow that concept.

In the Windsor case, Edith Windsor married Thea Spyer in New York. When Thea died, the federal government said that the estate could not use the unlimited marital deduction for federal estate taxes and had to pay over $360,000. Last month SCOTUS decreed that DOMA is unconstitutional as a deprivation of equal liberty and was in violation of the Fifth Amendment. As long as the couple were married in a state that legally recognizes such marriages, the federal government must also recognize the marriage. That now opens up over 1,100 federal benefits to those couples.

But here's the rub. They did not say that state laws not allowing gay marriages are unconstitutional or illegal. The Justices said only that the federal government could not make that distinction between the types of marriages.

In New York, that's OK because same-sex couples are allowed to get married. That means, for example, the married couple can now file both state and federal income tax returns the same way. On both of those they are a married couple and can file jointly and take advantage of all the marital deductions.

The couple would still have a problem if they tried that in Florida. Since Florida does not recognize same-sex marriages, they couldn't get married there. They would have to file separate state and federal tax returns as single people. It gets even more confusing (and troublesome) if they got married in New York and then moved to Florida. They would then file a joint federal return as a married couple, but still have to file the state's return as single people. The same would hold true for estate tax returns. The reverse of the Windsor case would now hold true. The estate could now take advantage of the marital deduction on the federal returns, but not on the state.

So, the bottom line is that it's getting better for same-sex couples, but it's still not the same as for opposite-sex couples. The best advice I can give is to see an Estate Planning attorney to discuss your particular situation. Making sure that all your wishes are in writing through a Will or a trust is always the best way of going.

Cleaning Out Your Parents' Home

by Martin S. Glass, Esq.

Emptying out a house sounds easy until it's you who has to do it. Recently, my parents moved permanently to Florida after being snowbirds for many years. What that really meant is that, outside of clothes, they had two of everything and didn't really need (or want) to move anything. It was almost as if they had passed away since very little was actually going with them. I was told that I could take anything that I wanted.

We often hear older adults say "my children can have all this when I'm gone," without realizing that their styles and tastes are very different from ours. For the most part, we really don't have the desire (or storage space) to keep their household belongings. The duty to take care of all that "stuff" can be extremely overwhelming for their heirs. Perhaps they thought they were saving us from emotional or financial stress by not moving to a smaller home or retirement community, or not doing any of this themselves, when in reality it just delayed the inevitability of emptying the home of its contents.

The task of purging the home is much more manageable with helpful hands and a systematic approach. The first thing I learned was don't do it yourself. You need someone else there to help, both physically and emotionally. A technique I found helpful was to separate belongings by their next destination. Scan the home and separate according to the following categories:

Keepsakes -- things which have emotional value to you or another family member;
Resale -- items which have potential monetary value in resale or as scrap;
Donate -- items worthy of donation;
Trash -- items which have no ability to be re-purposed (i.e. everything else).

<u>Keepsakes</u>
Hardcopy photographs which were stored away in albums or boxes may not have been viewed in many years. Although not the cheapest, they can all be scanned and digitalized. Order and distribute copies of the resulting digital archive to family members to preserve memories. Then get rid of the boxes of photo albums. Books, hand crafted and hobby items, military mementos, or other keepsakes can be easily crated, stored and/or delivered to out of town family members. Dividing the boxed items up between family keeps the storage space reasonable.

<u>Resale</u>
With only a few exceptions, the market for used and even antique furnishings has become saturated. The Baby Boomer generation is beginning to sell off their accumulated possessions as they downsize and has flooded the market with furniture, china, porcelain collectibles, outdated electronics, and all kinds of household goods. Most of this stuff is in much better shape than the stuff my parents had. It is a buyer's market, but any monetary return is usually better than none. I found that many of the items that I thought were re-sellable ended up as donations or trash.

Time and potential return should factor into your selling decision. Auctioneers and liquidators can usually work quickly, but will sell for whatever they are offered. Good estate sale or tag sale companies should have a regular following of buyers, but on-site sales often need to be scheduled months in advance. You also need enough items for you to have these types of sales. Consignment shops will accept fine furnishings, collectibles, or clothing at their discretion for a set time period and split the proceeds with you if the items sell. Online sales such as eBay are a convenient option for smaller or lighter items.

Donation

It is natural for you to want someone to pay the emotional price of parting with these possessions by at least getting some money out of the deal. Although situations vary greatly, the sad reality is that you may only receive pennies on the dollar when compared to the original purchase price of many everyday items. Often a better, quicker and simpler method for this heartache is simply donating the items. Clergy members can make excellent referrals to organizations which will distribute your family's belongings to people in need. Some charities will haul away larger items at no cost. Call ahead, as charities are sometimes selective about items they accept. Also check with some of the senior move manager companies. They usually know which charities are still accepting donations and which have stockpiles up to the rooftops.

Trash

A word of warning: we "Sandwich Generation" children need to balance the pressure we feel from time and our own family and career responsibilities with the desire to honor our loved ones by finding a proper disposition for their belongings. Keeping something because someone may be able to use it in the future is not a good enough reason to keep it. When the grandkids get their own place, they can buy their own furniture or pots and pans. In simpler terms, if you can't keep and use it, get rid of it! If you can't sell or donate it, trash it! On top of that, often times the home's contents stand in the way of repairs needed to make it presentable and sellable. Of course this then raises the temptation to "dump and run," a decision family members may later regret. Nonetheless, household goods with no physical or intrinsic value can be, and should be, easily hauled away by local or national companies in their own trucks. Remember, there is typically a cost for this service.

Although many of the decisions you need to make in a home clean-out are very personal and require family consensus, the help of a compassionate yet unbiased third party can keep your project moving and give you the advice and physical and emotional support you need during a tough time. Asking for help is difficult, but well worth it. My best advice is don't put it off and don't put items to the side to decide later. Whether the item is an old can opener or a full bedroom set, put them into a category and move on to the next item.

Will Challenges and How to Avoid One

by Martin S. Glass, Esq.

When beneficiaries or anyone interested in an estate question the validity of a Will, he or she may make a Will Challenge. A Will Challenge is made through the Surrogate's Court when the Will is offered for probate. The person questioning the validity of the Will must file a claim, or their objections, in court stating why they believe the Will is invalid. The person making the claim is the Objectant. The Objectant must have some evidence or will most likely lose the case.

There are only a certain number of ways that the Objectant can object to the Will. The first is if they are claiming that another Will is in existence that was created after the Will that is being offered for probate. Typically the new Will would revoke the prior Will, and therefore invalidate it.

The other ways is to attack the offered Will itself. There are three ways to do this. The first is to claim that the Will was not executed properly and therefore invalid. When the Will execution is supervised by an attorney, it is presumed to be executed validly and the Objectant must then rebut this presumption. This is an uphill battle. The second way is to claim that the testator, i.e., the person who executed the Will, did not have the prerequisite mental capacity to execute the Will. The third way to object to the Will is to claim that the testator was under undue influence and/or duress at the time the Will was signed.

An estate cannot be settled while a challenge to the Will is being heard in court. All the beneficiaries of the estate must wait to receive the inheritance being passed in the Will until the court decides whether the challenge is justified or the challenge is thrown out of court.

There are three typical ways to minimize, if not avoid, a challenge to your Will. The simplest way is to talk to loved ones and relatives about your intentions. When people know what to expect, they are less likely to question the Will when it is finally disclosed. Those discussions also make it much more difficult for anyone to claim that you did not have capacity to execute your Will or that you were under any undue influence or duress at the time.

The second way is to make sure that the drafting attorney adds a No Contest Clause in your Will. This Clause states that if a person challenges your Will and they lose the challenge, they are deemed to have pre-deceased you and therefore will lose whatever inheritance they were getting under the Will. It works fairly well to dissuade many potential Objectants. Of course, if the Objectant wins, the No Contest Clause along with the rest of the Will is invalid and thrown out.

The third way is a bit more complex but more effective if you are planning on having unequal distributions in your Will or disinheriting an heir altogether. This is by not using a Will as your main method of distributing your assets to your heirs. The simpler method of this can be done by making sure all of your assets have another name attached to the asset. This can be either joint, via a beneficiary designation or with an "in trust for" designation.

A more sophisticated method is used if there are multiple beneficiaries or varying assets. This would be to set up a revocable trust and re-title all of your assets into the name of the trust. Then the trust controls the assets, not the court. You don't have to worry about which asset is going to whom, just how much or what percent of your total assets are going to each individual. If there is no Will being offered in court, there can be no challenge to it. Challenging a trust in court is much more difficult.

Also keep in mind that when a Will is challenged, it is the named Executor's job to defend it. The estate typically pays the attorney fees associated with defending the Will, which means the value of the estate can be diminished by a long court process. Using a revocable trust virtually eliminates this cost as there is no longer a Will to be challenged.

Should You Talk to Your Heirs?
by Martin S. Glass, Esq.

Last month I discussed how to avoid a Will contest. I noted that one way to at least minimize that risk is to talk to your heirs about your estate plan. It sounds simple, but the subject of inheritance is one that most people arduously avoid for a number of different reasons: superstition, fear, lack of knowledge, or a misguided desire for secrecy.

Many adults, such as my parents, were raised to believe that money was a private affair, and that talking about it was inappropriate. But beyond that, many people simply fear that if they talk about their estate plan with their heirs, they will meet with resistance, disagreement or, in a worst-case scenario, their heirs will try to counter the estate plan with legal action of their own. If that scenario exists, then a revocable trust should probably be part of your plan. But that's a topic for another time.

While in some families and circumstances these fears are justified, in most circumstances being silent about your estate plan can have more disastrous consequences. If nothing else, a refusal to talk about money or your estate plans with your children means that they will have a difficult time following your wishes in regards to your medical treatment or protection of your assets should disaster strike. Most adult children are actually eager to fulfill their parents' last wishes, regardless of how it may or may not impact their own inheritance, especially if they understand why their parents are doing what they're doing.

Furthermore, your plans for leaving a legacy for your children or grandchildren may clash with their own needs or plans. For example, you may want to leave extra money to a grandchild with special needs, but if that child is receiving government benefits, leaving a significant inheritance in their own name could cause a loss of those benefits. Or one child may be doing very well and has no need to add to their estate. They may, in fact, prefer if you gave their share to their siblings. Discussing your plans with your children ahead of time can prevent situations like these from occurring.

So the answer to the question above is yes -- you should talk to your children or heirs about your estate plan. Talking about it will not only make it easier for them to follow your wishes, but it may even help you determine how you want to make the best difference in their lives.

The Most Important Part of an Estate Plan is the Memories
by Martin S. Glass, Esq.

This month I completed the sale of my parents' co-op in Queens. This is the apartment that I grew up in. The process of emptying the apartment (which I discussed back over the summer) has finally been completed. Most people, when they design their estate plan, think primarily about the large financial assets: real property, bank accounts, investment accounts, family businesses, etc. But let me tell you from personal experience, the most heart-wrenching decisions are who gets the "stuff." I've found in my practice that family rifts and disputes are not over money, but over the little things that end up having little or no monetary value at all. The family bible, the photo album, Mom and Dad's wedding bands, Grandma's heirloom hope-chest. These are the items that end up costing families more in harsh words, hurt feelings, and legal fees than any expensive property or valuable bank account. This is because these are the items that, although they may have a low financial value, have a high emotional value for families -- a fact that many parents or grandparents do not consider when they are making out their Wills or Trusts. Luckily for me, living in an apartment didn't give us the luxury of saving a lot of "memories." If it wasn't used, it didn't stay.

Even though the Executor may be in charge, typically the heirs get to decide among themselves (or more commonly: fight among themselves) after your death as to who gets the crystal vase, jewelry, dining room furniture and handmade artwork. Instead, consider talking to the kids and grandkids about these memorabilia and emotional heirlooms right now. Keep in mind that this might not be an easy conversation to initiate. Most kids are reluctant to talk about, or even think about, their parents' eventual passing. Believe it or not, many parents have found that they have to broach the subject more than once before their kids are willing to talk about it.

If you're planning on giving your personal items to people other than your children, it is best to privately make up your own list of which heirlooms you'd like to go to which heir. After the list is written and signed, show it to your heirs ahead of time. This gives them the opportunity to voice their preferences or concerns while you're still alive. In many cases simply knowing that you put time and thought into the giving of each heirloom makes heirs more likely to accept and appreciate your gifts when the time comes to receive them.

But know your heirs. If letting them know beforehand will cause arguments and them putting pressure on you, don't show it to them. Who gets what should be your decision, not theirs. Although this list does not have the same legal significance as a Trust or Will, few heirs will not abide by it after your death. If it is that important that someone gets a particular item, then maybe that should go into your other estate planning documents such as your Trust or Will. If it's an item that you no longer use, then maybe think about giving that item to that heir while you're alive. I've seen it more than once where two (or more) people are claiming that Aunt So-And-So promised them the china. It's not always easy to remember what you promised to whom. Remember, though, if there may be any hint of a disagreement, write it all down.

Now That You Have A Will, Where Should You Put It?
by Martin S. Glass, Esq.

Well, it's about that time for New Year's resolutions. Hopefully one of them is to do a Will. But once you do the Will, where do you put it? A safe deposit box seems like the perfectly logical place to store a Will and other estate planning documents. They are probably the most important documents you will ever have, so shouldn't they be kept in the safest place?

But is it a safety deposit box the best place? Or should you keep it in a fireproof safe in your home? With your lawyer? The court? Or somewhere else altogether?

One thing that I state now, and I'll state it again (because it's just that important): Whatever option you choose, make sure your executor knows what you did!

Although clients often instinctively want to put Wills in a safe deposit box, I personally prefer not to have my clients put their important estate planning documents there.

The problem arises with the fact that most banks seal a safe deposit box when informed of the death of the owner, and a court order must be issued to request that the box be opened to search for the Will. The banks will do this even if there's a joint owner on the box. Although probate courts will generally issue this order "immediately," in practice there is still a delay until the request is made to the court and the order is actually granted.

In New York, documents that are allowed to be released from the box are the original Will, any deed to a cemetery or burial plot and any life insurance policy for the named beneficiary. Everything else is inventoried (by the attorney and a bank official) and returned to the box.

The bank will typically then require Letters Testamentary or Letters of Administration (each being a letter allowing an executor or administrator to act on behalf of the decedent's estate) before allowing access to the safe deposit box to remove all the other items. So, even if it turns out that there is no probate estate, you get to go to court anyway.

As you can see, there are administrative hassles involved with storing a Will or other estate planning documents in a safe deposit box. That said, for individuals who do not have another safe place to store a Will or prefer the safety of a safe deposit box, it may be the best choice.

Another option is to keep a Will with the attorney who drafted it. Again, this may or may not prove as easy as it sounds. For example, what happens if the attorney retires or dies? You also now have to remember to tell the attorney every time you or your executor moves. In addition, offices may move or close, and if you do not keep careful records, it may be difficult for your heirs to locate an original Will when the time comes.

The Internet does help in this regard, but it is not foolproof. What would happen if the attorney with your Will was nowhere to be found? Your heirs would have only a copy (if that) to submit to the court versus the original. That is more open to being contested and requires additional proof to be probated.

Finally, if the lawyer is not responsive for whatever reason, executors or others seeking to obtain estate planning documents from the attorney may also need to obtain a court order to compel production.

On the other hand, a lawyer's office may be the best place to store a Will, depending on your circumstances. As long as the attorney has the Will and not you, it can never get "lost" or "destroyed" by a disinherited or disgruntled heir. You should weigh all factors for and against before making a decision.

Another option is you can file your Will with the court, which is also a safe option, but means that your Will becomes an official document, not a private one. If you decide to change the terms of your Will, you cannot get it back, so beneficiaries and former beneficiaries can see how their respective inheritances have changed (or been removed) during successive revisions. On the contrary, if a Will is a private document, you can destroy the original and all copies, and would be heirs who have fallen out of favor are none the wiser.

In addition, if you move out of the jurisdiction of the court, out of state or even out of the country, your court filed Will does not come with you. There can only be one original of your Will. That means if you drafted a Will while living in Westchester County, New York, and filed it with the Surrogate's Court in White Plains, your executor and beneficiaries would need to obtain it from that court, even if you or they have since moved to Denver, Denmark or beyond.

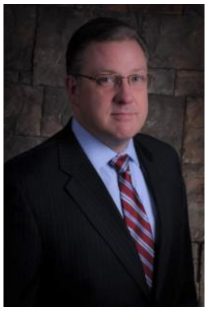
It may be, after considering other options that you decide to keep your Last Will and Testament in a fireproof safe in your home. This is often a good option and normally the one I recommend, especially if you have a safe that cannot easily be removed from the premises by anyone seeking to tote off valuables. In that case, if you also have a safe deposit box,

I would recommend keeping a copy of the Will in there (clearly marked COPY, with instructions on where to find the original), in the unfortunate circumstance that the original can't be readily found. Be careful not to create too many copies, since you may later revise important provisions of your Will and do not want multiple prior copies floating around that a beneficiary with a reduced share tries to "prove" is your correct and valid last Will. This can happen even among otherwise friendly parties, such as children and grandchildren.

What I don't suggest you do is to put your Will in a shoebox or the freezer or in that special place that only your spouse would know. It almost shouldn't need to be said but, those are not safe places. You don't want to have your executor or heirs tearing apart your house looking for your estate planning documents.

As said earlier, regardless of the option you choose for storing your Will, make sure that your executors know what you did. The best estate plans only work if the right people know how to follow them and where to locate essential documents when the time comes.

CLIENT ADVISORIES



Cuomo Signs Notice of Claim Legislation
by Scott D. Middleton, Esq.

Governor Andrew Cuomo has approved legislation designed to streamline the process of filing lawsuits against municipalities and other government entities in New York, providing the groundwork for uniform, fair, cost-effective and straightforward statewide procedures for filing a Notice of Claim.

State law requires individuals intending to sue government entities for any tort -- such as a slip-and-fall or a malpractice at a public hospital -- to file a Notice of Claim to alert a potential defendant of an impending lawsuit. Currently, they must be filed in the county in which an alleged incident occurred.

The bill will allow plaintiffs to file notices of claim with the secretary of state in Albany, who would then notify defendants. Most of the bill's provisions take effect in 180 days.

The legislature will also amend the bill to ensure that local governments and public authorities will not face shortened time periods within which to investigate claims if the secretary of state faces delays in notifying potential defendants.

The legislation also provides for a uniform 90-day filing deadline for all notices of claim, regardless of the type of government entity involved.

Important Information Regarding Additional Insured Status
By Scott D. Middleton, Esq.

So you think you've done the right thing by requiring your tenant or a company performing services for you to name your company as an additional insured on its policy. You are then given only a certificate of insurance. You're on the right track but there's more to be done. Don't be satisfied with only this document – you need to see the policy itself. Most certificates of insurance expressly state that the certificate does not alter the terms and conditions of the underlying policy. In order for your company to be afforded coverage under the policy, it must be listed in the policy, usually in a policy endorsement. Therefore, it is imperative that you obtain not only a certificate of insurance but the policy itself. Be sure that once you get the policy, you read it or pass it on to your attorney or insurance professional. If the policy does not name your company within the body of the policy or in an endorsement to the policy, you are not an additional insured. If your company were then to be named in a lawsuit you would have to rely on your own insurance coverage and sue the vendor, tenant or company providing services for breach of contract. This is not the most enviable position to be in. So don't be satisfied if you're provided with only a certificate of insurance. Request and read the policy and then you can rest easy.

SBA Proposes Reducing Requirements to Exhaust Other Resources before Obtaining SBA Loans

by David Hoeppner, Esq.

The U.S. Small Business Association (SBA) has proposed to revise its lending rules for loan programs. The goal of these regulation changes is to expand the accessibility of SBA loan programs and to increase the number of businesses taking advantage of government-guaranteed loans by giving borrowers greater access to capital. The proposed changes are an attempt by both Congress and the administration to expand the SBA's reach by making more existing businesses eligible for the agency's programs, to streamline the loan application process and to strengthen the oversight of the agency.

The proposed changes will affect 7(a) and 504 loans, two of the SBA's most popular loan programs. The 7(a) loan program helps startup and existing small businesses acquire financing for a variety of general business purposes. The 504 loan program provides access to long-term, fixed asset financing for land, buildings or equipment.

Most significantly, the SBA is considering eliminating the agency's "personal resources test" for borrowers. This rule requires investors with at least a 20 percent stake in a loan applicant to obtain a maximum level of personal finance resources before the company can get a 7(a) or 504 loan. Previously, borrowers have had to show they cannot obtain credit elsewhere before getting a government-backed loan. If this rule change is enacted, company owners will not have to exhaust their personal resources to the same extent as previously required before obtaining an SBA Loan.

Although the SBA maintains that personal resources will still play a role in the SBA lending process, and the SBA's stated goal is to streamline the loan process by eliminating complicated regulations used to determine the amount of personal resources a company's owners must first put towards obtaining other financing.

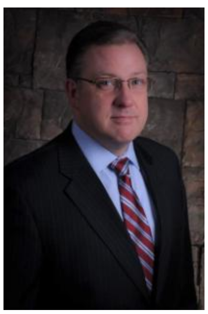
In a second big change, the revised rules would eliminate the "Nine-Month Rule" for the 504 lending program which now requires borrowers to include in a capital project only those expenses incurred nine months prior to submitting a loan application. SBA proposes to eliminate this nine month limitation and permit financings of expenses toward a project regardless of when they were incurred.

Additionally, the SBA will relax its affiliation rules, which are meant to ensure that a small-business loan applicant is not in fact controlled by a larger company which is ineligible for SBA financing. According to the SBA, revising this rule will open access to SBA loans to businesses that, under current rules, would not qualify as a small business under SBA's size standards by virtue of their association with other companies. In proposing this series of rules changes the SBA is trying to save both lenders and borrowers time and money in the attempt to increase lending activity. For comprehensive information on the new rules and their benefits, *visit http://www.sba.gov/content/revised-oca-regulations-504-and-7a-loan-program.*

FIRM PARTNERS

Joe Campolo
Managing Partner

Joe Campolo is the Managing Partner of Campolo, Middleton & McCormick. He specializes in representing individuals and businesses involved in complex legal matters. Having broad experience in both commercial litigation and transactions, Joe's practice today focuses on advising business owners, executives and Board members on legal and business strategies. He is also an accomplished trial lawyer, having tried business litigation cases in New York State and Federal Courts, as well as the Delaware Chancery Court (including RICO, antitrust, securities, shareholder/member breakups, Intellectual Property, employment, contracts, UCC, non-compete and breach of fiduciary duty claims). Joe also represents companies and individuals being investigated or charged with white-collar violations, and has conducted internal investigations, implemented compliance programs, and successfully defended individuals before many State and Federal agencies including the SEC and New York State Attorney General's Office.



Scott Middleton
Partner

Scott Middleton is head of the Negligence and Matrimonial Departments at Campolo, Middleton & McCormick. He has focused on representing clients in personal injury matters for nearly 25 years. His education included graduating from Stony Brook University followed by Brooklyn Law School. After graduating from law school he began practicing law at a well-known and respected New York City defense firm. Scott's experience has included representing individuals and defending small and large corporations, as well as municipalities in a wide array of personal injury matters including general negligence cases, motor vehicle (including bus and truck cases), wrongful death, labor law, civil rights, product liability and architect and engineer cases.

Patrick McCormick
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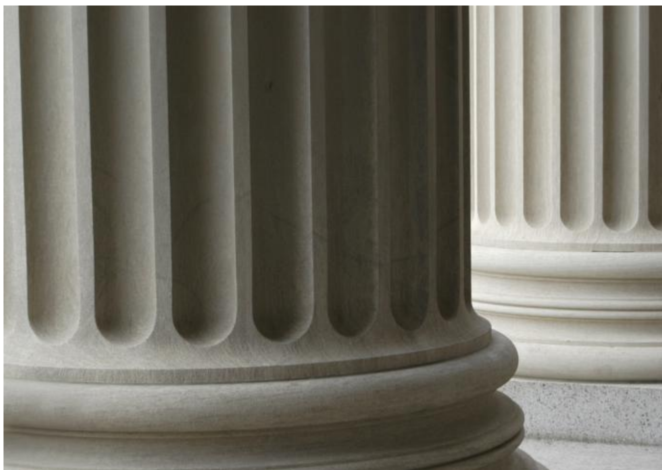
Patrick McCormick is a partner at Campolo, Middleton & McCormick, LLP and heads up the firm's Commercial Litigation, Appellate and Landlord-Tenant Departments. He specializes in litigating all types of complex commercial and real estate matters. He provides legal counsel to clients on issues including: business disputes related to contract claims; disputes over employment agreements and restrictive and non-compete covenants; corporate and partnership dissolutions; mechanics liens; trade secrets; insurance claims; real estate title claims; complex mortgage foreclosure cases and lease disputes.

Patrick also handles high level criminal appeals, as well as civil appeals for the firm. Representing clients in both federal and state courts at trial and appellate levels, McCormick has argued numerous appeals, including two arguments at the New York Court of Appeals - New York State's highest court.

Firm PRINCIPLES & VALUES



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We hold ourselves accountable for our actions.

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