Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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NCBA COMMITTEE MEETING CALENDAR Page 20

SAVE THE DATE

WE CARE Virtual Comedy Night

TUESDAY, DECEMBER 15, 2020

7:30 PM via Zoom

See pg. 18

NCBA Dinner Gala

SATURDAY, MAY 8, 2021

6:00 PM

See pg. 6

WHAT'S INSIDE

OF NOTE

NCBA Member Benefit - I.D. Card Photo

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UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, January 7, 2021 at 12:45 PM

Thursday, February 4, 2021 at 12:45 PM

WE CARE Fund, A Beacon of Light for Those in Need

Photo by Hector Herrera

Bridget Ryan

With another holiday season upon us, many look to give back to their community but often struggle to find a place where they are confident that their contributions will make an actual difference. Thankfully, the WE CARE Fund does just that.

The WE CARE Fund is a part of the Nassau Bar Foundation, Inc., the charitable arm of the Nassau County Bar Association. The sole purpose of WE CARE is to give back to the local community through charitable grants, scholarships, volunteer opportunities, and events hosted year-round. WE CARE helps to improve the quality of life for children, seniors, and others in need throughout Nassau County.

While navigating the COVID-19 Pandemic, WE CARE continues to give back and be present and active in the community. Unfortunately, this year's traditional fundraising events like Dressed to a Tea, Vegas Night, Gingerbread University and the 2020 Golf Outing have been postponed. But quick to adapt to this "new normal," the WE CARE Advisory Board successfully created a new, socially-distant, pandemic-friendly event this fall—WE CARE's first ever virtual walk-a-thon, Walk for a Week with WE CARE. The event was incredibly successful and raised over $25,000 for the Fund.

WE CARE hosts events for the community throughout the year which spark joy in the lives of many Nassau County residents. Unfortunately, last month WE CARE had to cancel its annual Thanksgiving Luncheon which provides Thanksgiving meals to seniors at Domus—prepared gratis by NCBA caterer Esquire Fine Dining—with all the trimmings, entertainment, and other treats, all at no cost. However, WE CARE was able to continue its tradition of distributing 200 fully-prepared turkey meals on the day before Thanksgiving to eleven local organizations to deliver to local families in need.

WE CARE understands that COVID-19 has added an entirely new set of stressors to the everyday lives of Nassau County residents, and is re-thinking the ways the Fund gives back and provides assistance, while complying with health and safety procedures. It is the hope of the Advisory Board that though changes to in-person events and

See WE CARE, Page 21

Judicial Election Results

Supreme Court

Hon. Joseph R. Conway
Hon. Randy Sue Marber
Hon. Erica L. Prager
Hon. Gary F. Knobel

County Court

Hon. Caryn R. Fink
Hon. Chris E. Hoefenkrieg

Family Court

Hon. Lisa A. Cairo

District Court

Hon. Tricia M. Ferrell
Hon. Ignatius L. Muscarella
Hon. Darlene D. Harris
Hon. Robert E. Pipia
Hon. Lisa M. Petrocelli
Hon. Christopher J. Coschignano
Hon. David W. Wright

For additional information, contact Dan Bagnuola at (516) 493-3262.

Happy Holidays

The NCBA will be **closed**
December 25, 2020 through January 3, 2021.

HOFSTRA UNIVERSITY
Maurice A. Deane School of Law

St. John's University
School of Law

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The Diversity and Inclusion Committee of the Nassau County Bar Association
proudly recognizes and thanks the employers for their participation in and support of the

Summer 2020 Long Island Legal Diversity Fellowship Program

- Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP
- Cullen and Dykman LLP
- Farrell Fritz PC
- Lazer Aptheker Rosella & Yedid, P.C.
- Moritt Hock & Hamroff LLP
- Rivkin Radler LLP
- Ruskin Moscou Faltischek, P.C.

Diverse first-year law students from Hofstra, St. John's and Touro Law Schools received paid summer positions at these firms, where they gained practical legal experience, networked with and received mentoring from the firms' attorneys, and planted roots in the Nassau and Suffolk legal communities.

Employers who would like information regarding the Summer 2021 Program, please contact Vernadette Horne at Vernadette.Horne@hofstra.edu

Commercial/Bankruptcy/Tax Law

Eastern District Bankruptcy Roundup

Despite the upheaval of the COVID pandemic, the Bankruptcy Court in the Eastern District of New York has produced another set of interesting decisions this year. The following is a capsule summary of some of the highlights.

Plaza: Collateral Estoppel Effect of Criminal Case

In *Plaza v. Heilbron*, the debtor had a fist-fight with the plaintiff, which resulted in his criminal guilty plea to a misdemeanor assault charge, and a $125,000.00 default judgment in a personal injury case for assault and battery for causing a broken jaw.[1] In the debtor s bankruptcy case, the plaintiff brought an action objecting to the dischargeability of the default judgment. On a summary judgment motion, the Court analyzed the collateral estoppel effect of the debtor's guilty plea as establishing willful and malicious injury under 11 U.S.C. § 523(a)(6).

In applying New York's collateral estoppel doctrine, Judge Elizabeth S. Stong found that it affords preclusive effect to a criminal plea, which is the equivalent of a conviction after trial. She found that the debtor had a full and fair opportunity to litigate the issue in State court, that the voluntary plea constituted knowingly assaulting another and causing injury, and that the intent component of the plea was the equivalent of the willfulness element.

Judge Stong also found, however, that there was no identity of the issues between the default judgment for assault and battery (which did not require intent), and the willfulness element. She also found that by virtue of the plea, the element of willfulness was necessarily decided in the prior action; but by virtue of the default judgment, willfulness was not necessarily decided, therefore that issue was not decisive in the prior action.

Further, as to the element of malicious injury, Judge Stong found that the guilty plea resulted in an identity of issues with the malicious element, but the default judgment did not; the guilty plea resulted in the malicious element being necessarily decided and being decisive in the prior action; but the default judgment did not; and the guilty plea action caused injury to the plaintiff. Therefore, as a result of the guilty plea, there was no genuine issue of material fact to prevent the doctrine of collateral estoppel from applying.

Hlady: Dischargeability of Student Loans

Hlady v. Key Bank N.A. involved a debtor seeking to discharge student loans, with an analysis by Judge Louis A. Scarcella of the Second Circuit s Brunner test, where a debtor needs to show undue hardship.[2]

The main factors that Judge Scarcella took into account were that the debtor took about $40,000 in loans to earn a law degree at Hofstra University, which ballooned to $141,000 by 2016 when her bankruptcy was filed. She was married with no dependents, and had worked as an attorney and legal assistant before going into her own practice in 2011 from a home owned by her mother. The practice showed nominal earnings, and due to an injury in a car accident, the debtor claimed she could no longer wait tables or bartend to earn extra money. The debtor was also eligible for a government income-based repayment plan, which called for $0 to be paid for 25 years as long as she documented her income every year. She declined that option, however, and claimed that in any event, at age 48, she was only planning to work another ten years.

Jeff Morgenstern

In applying the Brunner test, Judge Scarcella found that:

(1) Based on her current finances, she could make some payment, and still maintain a minimal standard of living, especially since some of the expenses claimed in the schedules were paid through her business and taken as deductions on tax returns; further, cash reimbursements from family for living expenses were not recorded or evidenced at trial;

(2) Even if she did not have a present ability to repay the debt, there was no showing that that would persist for a significant portion of the repayment period since she did not demonstrate that she could not earn more, or that she lacked marketable or usable job skills; she also controlled how much business she could pursue and how long she would keep working; and

(3) Since she had claimed to have only paid back $5,000 of the loans, sought deferments and forbearances after law school, made an insufficient effort to minimize discretionary expenses, and displayed an unwillingness to provide the reporting of annual income, this did not equate to a good faith effort to repay.

Based on these factors, the Court ruled that the student loans were non-dischargeable.

In re Telles: Nunc Pro Tunc Orders Cannot Cure Jurisdictional Defects

In *In re Telles*, a mortgagee foreclosing on the debtor s home purchased the house at the foreclosure sale two days after the debtor s Chapter 13 filing, of which it was unaware.[3] Upon learning of the filing, the mortgagee moved to lift the automatic stay, nunc pro tunc to the day before the sale.

In relying on the Supreme Court's ruling in *Roman Catholic Archdiocese of San Juan v. Acevedo*, Judge Robert E. Grossman held that the Court could not grant nunc pro tunc relief to cure a defect in the State Court's jurisdiction, and here the State Court s foreclosure sale was void.[4] Upon the bankruptcy filing, the State Court was divested of jurisdiction and therefore the Bankruptcy Court could not change the outcome of a sale that was void.

In re Ventura: Small Business Debtor

In re Ventura is one of the first decisions to deal with the new Subchapter V to allow filings by Small Business Debtors as defined in 11 U.S.C. § 101(51D)(A),which became effective on February 19, 2020.[5] The purpose of the provisions is to streamline a reorganization for small businesses so as to avoid the time and expense of a Chapter 11 case. This case involved a debtor seeking to elect to become a small business debtor where the primary debt was a purchase money mortgage encumbering her bed and breakfast in which she lived and operated. The new Act also allowed for modification of a mortgage on a primary residence if the mortgage loan was not used primarily in connection with the acquisition of the property, and if the proceeds were primarily used for business activities.[6]

A Small Business Debtor is defined in Section 101(51D)(A) as a person engaged in commercial or business activities with aggregate debts of no more than $2,725,625, and not less than 50% of which arises from commercial or business activities.

Initially, Judge Grossman held that the debtor was not required to comply with procedural requirements and deadlines that expired before the new Act became effective. In addition, there was no statutory prohibition to applying the new Act to cases pending prior to its effective date, as the mortgagee still retained many of its rights that it had from inception.

As to the question of whether at least 50% of the debt arose from commercial or business activities, Judge Grossman held that even though the mortgage was originally a residential loan for the purchase as a primary residence, the substance of the transaction revealed the debtor s intention was to convert a historic mansion to a guest house, as she proceeded to invest in it as a bed and breakfast as the primary use, despite living there herself. Therefore, that mortgage was not a consumer debt and the debtor was allowed to amend her petition to declare herself as a "Small Business Debtor."

Finally, as to the debtor's request to modify and bifurcate the mortgage as being undersecured, Judge Grossman's interpretation of the new statute and its legislative intent called for an analysis of whether the primary purpose of the loan was to acquire her residence, and whether the loan proceeds were primarily used for business activities. While it appeared that the debtor purchased the property to run her business and offer rooms for rent, and that the loan proceeds were used to purchase the property that housed her business, an evidentiary hearing was still needed to determine if the mortgage could be bifurcated.

Stark: Trustee's Ability to Agree to Short Sale

In *In re Stark*, the Chapter 7 trustee entered into an agreement to sell the debtor's property that was "underwater" to the debtor's mortgagee in a "short sale"-type transaction.[7] The agreement provided for the mortgagee to carve out some of the sale proceeds for administrative expenses and for the unsecured creditors.

The debtor objected to the agreement, arguing that any such proceeds carved out for the estate should be covered by her homestead exemption. Since the debtor had no equity in the home, Judge Grossman ruled that the homestead exemption would not cover those proceeds. The Judge also ruled that upon the filing, a Chapter 7 debtor is divested of ownership of their property in favor of the trustee, and noted that prior to the filing, the debtor could have entered into a similar arrangement for a short sale, or a

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President's Column

We all have different gifts! Active members of this Association share their gifts of joy with others enthusiastically, 365 days a year. The WE CARE Fund donated 200 Thanksgiving dinner boxes to families in need in Nassau County. In past years, Florence Fass energetically lead the way with our WE Care Gingerbread University, a workshop for children of all ages to enjoy decorating their own gingerbread houses. Past Presidents Dean Andy Simons, Joe Ryan and Susan Katz Richman kick off the holiday season enthusiastically with music and song during our virtual Tale of Wassail Celebration. NCBA Member Alan Hodish reaches out to elementary and middle schools motivating mentors and mentees with our Student Mentoring Program. My challenge to you is to not leave your most precious gifts unopened.

FROM THE PRESIDENT

Dorian R. Glover

Personally, I find joy and peace in serving others. I know the same holds true for you. If this were not so, you would not have chosen a profession where your prosperity depends on service to others and yes, client satisfaction. In the coming year, where the sound of 2021 is music to all our ears, we welcome the promise of what it may bring. Let us recall, a "promise is to be distinguished…from a mere declaration of intention involving no engagement or assurance as to the future." It is not enough to declare our intention, but to become fully engaged to have assurance of our future.

NCBA Members have learned that engagement assures growth of your career (CLE included in membership, 50+ Committees, Ethics Hotline, Call to Colleague Program, Lawyers Assistance Program); your business (Arbitration and Mediation Panels, Lawyer Referral Service, meeting facilities, networking opportunities); and your community (Lawyer in the Classroom, Mock Trial, Mortgage Foreclosure Pro Bono Project, pro bono/volunteer opportunities, Speakers Bureau, Student Mentoring Program, WE CARE Fund). In 2021, commit to becoming an active Member of our Association, because the law is more than a profession, and only together can Domus be filled with the spirit of community.

Pause in Court Operations in Nassau County: What it means to your practice?

On November 18, District Administrative Judge, Hon. Norman St. George issued a memorandum pausing the court system's reintroduction of jury duty amid the COVID-19 Pandemic. All future bench trials and evidentiary hearings (excluding Family Court) will be conducted virtually, unless otherwise approved.

Justice St. George advised our Coronavirus Task Force prior to the issuance of the operating protocol that in recent weeks the metrics have changed, demonstrating an increased spread of the virus and that we may have to return to reduce foot traffic in the courthouses to protect the health and safety of litigants, lawyers, courts staff and judges.

As it relates to court proceedings, no new prospective trial jurors (criminal or civil) will be summoned for jury service until further notice. Pending criminal and civil jury trials will continue to conclusion. No new prospective grand jurors will be summoned for grand jury service until further notice. Existing grand juries, pursuant to Section 190.15 of the Criminal Procedure Law, may continue until completion of their term or work. The complete detailed memorandum may be found on our website. The Bar thanks Justice St. George for making sure that we are informed during this time.

While you open the many gifts you receive this holiday season, remember to open the gift that is you. Wishing you a vibrant holiday season and a new year filled with joy, peace, and prosperity.

ATTENTION NCBA MEMBERS!

Our November 2020 issue inadvertently used the term "transgendered" in the jump line for the article "Acknowledging the Realities of Transgender People in the Criminal-Legal System." The appropriate term, however, is "transgender." *Nassau Lawyer* regrets this error and has corrected the online version of the issue.

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Upcoming Focus Issues
January 2021
February 2021

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Commercial/Bankruptcy/Tax Law

If I Could Turn Back Time: Enter Rescission Doctrine

Most tax practitioners have conducted initial consultations with clients who need tax advisors because they received bad advice (or no advice at all) from their non-tax advisors and discovered a problem. Sometimes, the client will wish she had never structured a transaction the way she did. In these situations, one of the best remedies in a tax practitioner's medicine basket is rescission, a common law concept brought to life in court rulings and IRS guidance based on the idea that taxpayers should be able to undo mistakes as long as doing so would not prejudice the government. Rescission has its limits, but both tax and non-tax lawyers alike should be aware of what it is and how it works.

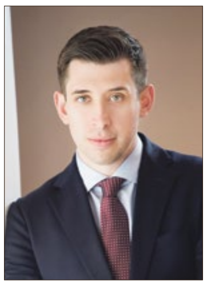
Background

When taxpayers successfully execute a rescission, the act will nullify the need to report federal income tax consequences that otherwise would have resulted from the rescinded transaction; the parties simply disregard the transaction and retract any income effects related to the transaction. In Rev. Rul. 80-58,[1] the IRS defined rescission as "the abrogation, canceling or voiding of a contract that has the legal effect of releasing the contracting parties from further obligations to each other and restoring the parties to the relative positions that they would have occupied had no contract been made."[2]

The Revenue Ruling clarifies that the following two conditions must be satisfied: (1) that the parties to the transaction are reverted to *status quo ante*; meaning, the parties return to "the relative positions they would have occupied had no contract been made" in the first place; and (2) that the restoration to the *status quo ante* is achieved within the same taxable year of the transaction.[3] The latter criterion is designed to avoid prejudicing the government; undoing transactions after filing a tax return would frustrate enforcement.

Rescission is often a straightforward process. Take the two situations laid out by Rev. Rul. 80-58 as examples. A sells land to B for cash, but B has the right to rescind the contract and receive all the purchase money back if B is unable to have the land rezoned for a specific business purpose within nine months. In Situation 1, B rescinds the contract in the same taxable year as the sale, and the parties return to *status quo ante*; the rescission is successful and A recognizes no gain or loss. In Situation 2, B reconveys the land back to A in the subsequent tax year and, consequently, the transactions are separate for federal income tax purposes. Person A must report the transaction as a sale in the year it took place and recognize any gain; when the property is reconveyed back to B the following tax year, A's basis in the property becomes the price paid to B for reconveyance.

Rev. Rul. 80-58 favorably cites the Fourth Circuit's opinion in *Penn v. Robertson*.[4] The case involved a 1929 employee compensation plan set up by company directors without the approval of shareholders. The Board of Directors subsequently abandoned the plan in December 1931. Per the compensation plan, the employer loaned money to the employee for the purpose of purchasing company stock. The expectation was for the employee to repay the loan with dividend income from the stock as it came in, which is what occurred in both 1930 and 1931. The court determined that the dividend income was a claim of right, free of restrictions as to its disposition, and it must be accounted for in the year received, "even though in a later year the taxpayer [became] obliged to refund" the money.[5] However, the court noted that when a transaction is rescinded within the *same* tax year, it cancels any income tax effects related to the transaction. Therefore, the taxpayer was permitted to rescind income tax consequences for 1931–the year the compensation plan was rescinded–but needed to report and pay taxes on the income constructively received in 1930.[6]



Matthew E. Rappaport

Louis Kesselbrenner

"Status Quo Ante" Requirement

The lack of clarity in Rev. Rul. 80-58 has produced inconsistencies between court opinions and IRS private letter rulings (PLRs). Although Rev. Rul. 80-58 attempts to provide guidance on how parties "maintain their relative positions they would have occupied had no contract been made," there remains open areas of interpretation on how exactly the condition is satisfied.[7]

For example, consider a situation in which a taxpayer does not rescind all of the steps in a series of transactions,[8] or whether the intent of the parties to truly rescind a transaction is in question. For example, in PLR 201008033, a corporation completed a transaction in which it sold all of its stock in one subsidiary ("A-Sub") to a different subsidiary ("B-Sub"). Unaware of certain tax consequences at execution, the transaction was rescinded to avoid the unintended federal income taxes. However, in the same year as the rescission—and pursuant to under a pre-arranged plan—the corporation then restructured A-Sub and again sold it to B-Sub in a transaction that did not result in adverse federal income tax consequences. The IRS disregarded the rescinded transaction and permitted the resulting reorganization.[9]

By contrast, in *Estate of Kechijian*,[10] the court found that the transaction failed to meet the conditions of rescission because the parties were not restored to their *status quo ante*. Here, an S-corporation, through a complex series of transactions, made an arrangement in which the two shareholders would lose at least 50% of their respective shares if either voluntarily terminated employment before the end of the five-year term. The vesting schedule created a substantial limitation on the shareholders' receipt of income, so their receipt of stock was purportedly not taxable income in the year of issuance. When the shares became fully vested after the five-year term, the shareholders attempted to rescind the transaction by entering into an identical employment/surrender arrangement, albeit through different means.[11] The court determined that "when a personal service contract has actually been performed, it is essentially impossible for the individual who rendered the services to be "returned" to his position ex ante" and "if you can't restore, you can't rescind."[12] Along these same lines, *Commissioner v. Court Holding Co.*[13] held that where a rescinded transaction is re-executed in a modified form—especially where the modification is intended to retroactively alter tax consequences and with no legitimate non-tax business purpose—the rescission should not be respected.

Interestingly, it appears that parties to a transaction can satisfy the *status quo ante* condition for the IRS when, as a result of a rescission, the parties represent that there are "no material changes in the legal or financial arrangements" as they existed before the parties undertook the transaction.[14] The IRS neither looks to the intentions of the parties rescinding the transaction, nor at the subsequent transactions post-rescission. On the other hand, courts will look to the intent of the parties for rescinding a transaction, forcing tax practitioners to speculate how a rescission might turn out if examined.

"Same Taxable Year" Requirement

The second condition precedent to Revenue Ruling 80-58—that a rescission be completed within the same taxable year for the transaction—acts as a bright-line rule for disregarding a transaction for federal income tax purposes.[15] While effective and consistently applied in the same manner, it can result in harsh consequences.

For example, in *Blagaich v. Commissioner*, a couple entered into a written agreement in October 2010 and "intended in part to confirm their commitment to each other and provide financial accommodation to [the woman]." The agreement required the boyfriend, Mr. Burns, to make an immediate payment of $400,000 to the girlfriend, Ms. Blagaich.[16] By March 2011, the relationship deteriorated, and Mr. Burns filed a civil suit resulting in a 2013 finding that Ms. Blagaich fraudulently induced Mr. Burns to enter the agreement. Ultimately, Ms. Blagaich was required to repay Mr. Burns' estate the $400,000. As a consequence of the civil suit, the Tax Court determined in 2016 that Ms. Blagaich "took possession of the whole amount in question, $400,000, without any substantial limitations or restrictions as to its disposition."[17] The court denied Ms. Blagaich's defense that the rescission doctrine should apply because no liability was recognized at the outset and there was no provision to repay that amount until nearly three years later. Because the conditions for rescission were not satisfied, the Tax Court required the taxpayer to recognize the original $400,000 grant as income.[18]

Conclusion

The rescission doctrine permits taxpayers to nullify transactions and the federal income tax consequences that would have otherwise resulted. While Rev. Rul. 80-58 lays out the general framework for effectuating a rescission for federal income tax purposes, uncertainty still exists as to how the parties must return to *status quo ante*. On the other hand, the same taxable year condition provides a bright-line rule consistent with the "cardinal principal of federal income taxation" that taxpayers determine their income at the close of each taxable year without regard to subsequent events.[19] Rescission is a handy rescue technique practitioners should know when confronted with tough situations by taxpayers who might benefit from its use.

Matthew E. Rappaport, LL.M. is the Vice Managing Partner of Falcon Rappaport & Berkman PLLC in Rockville Centre. He also chairs its taxation group.

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1. 1980-1 C.B. 181.
2. *See id.; see also N. Am. Oil Consol v. Burnet*, 286, U.S. 417 (1932).
3. Rev. Rul. 80-58.
4. 115 F.2d. 167 (4th Cir. 1940).
5. *Id.*
6. *See* Treas. Reg. § 1.451-2, defining the constructive receipt doctrine as income (even if it is not actually in a taxpayer's possession) that is credited to a taxpayer's account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. By contrast, a taxpayer has not constructively received income if its receipt is subject to substantial limitations or restrictions.
7. Rev. Rul. 80-58.
8. *See* PLR 200923010 (where a parent corporation contributed assets and liabilities to a new controlled corporation and distributed stock to a shareholder, but upon realizing disadvantages with the transaction, the corporation unwound the distribution of stock, but not the contribution of assets, and the IRS accepted the partial rescission).
9. *See* PLR 201140008 *and* PLR 201016048 (where, in both, corporations went through a series of transactions, caused those transactions to be rescinded, and proceeded with pre-arranged plans to reimplement very similar outcomes within the same tax year). *Compare with* P.L.R. 200752035 (where employee of an S-Corp purchases shares of the company with an IRA and the S-Corp effectuates a rescission after discovering the consequent termination of its Subchapter S election).
10. 962 F.3d 800 (4th Cir. 2020).
11. Shareholders returned the entirety of their newly vested shares and simultaneously repurchased identical shares in exchange for a promissory note that created income of $4.5 million reported under the installment method.
12. *Kechijian*, supra n.11.
13. 324 U.S. 331 (1945).
14. PLR 20114008.
15. There is no estate, gift, or generation-skipping transfer tax analog for the rescission doctrine.
16. *Blagaich v. Commissioner*, T.C. Memo 2016-2; *see Yoklic v. Commissioner*, T.C. Memo 2017-45 (where taxpayer received overpayment of unemployment compensation in 2012 and failed to report overpayment on his 2012 tax return; the court determined that although the obligation to repay became fixed in 2012, since no provisions for repayment were made in that same year and repayment was actually made in 2013, the doctrine of rescission was unavailable and 2012 unemployment compensation was includible in taxpayer's gross income).
17. *Id.*
18. *See Hope v. Commissioner,* 55 T.C. 1020 (rescission doctrine unavailable where taxpayer filed lawsuit within the same taxable year that sought stock sale to be rescinded, but rescission actually took place in subsequent taxable year).
19. *Penn*, supra n.4.

Commercial/Bankruptcy/Tax Law

Bankruptcy Judge Alan S. Trust Appointed Chief Judge of EDNY Bankruptcy Court

Matthew V. Spero

On October 1, 2020, Bankruptcy Judge Alan S. Trust was installed as Chief Bankruptcy Judge of the U.S. Bankruptcy Court for the Eastern District of New York. Judge Trust originally ascended to the bench on April 2, 2008, and, along with Bankruptcy Judge Robert Grossman, succeeded Bankruptcy Judges Dorothy Eisenberg and Stan Bernstein. Judge Trust now succeeds Hon. Carla E. Craig as Chief Judge of the Eastern District of New York Bankruptcy Court.

As an undergraduate, Judge Trust attended Syracuse University, where he was a member of Phi Beta Kappa and graduated *summa cum laude* in 1981. He then attended New York University School of Law, where he served on the Law Review from 1982-83 and graduated *cum laude* in 1984. After graduation, he interviewed in the Northeast, Southeast, and Southwest before settling on Dallas, Texas to begin his law practice.

"I tried it out and wound up staying twenty-four years," explained Judge Trust, who in 1984 started at a large firm of about 150 attorneys. In 1986 he helped start a seven-person firm that grew to twenty-two people, and in 1995 started his own firm with an associate. For several years, practiced on his own. When asked whether he missed his practice, the Judge laughed and said "Not really. I love being a Judge and I don't miss time sheets, billing invoices, and having to deal with my own IT issues."

Like many others, the Bankruptcy Court has been mostly remote since COVID struck in March. "We're been pretty efficient in light of everything," observed Judge Trust. "Some procedures have changed. We have an electronic drop box in addition to the physical night drop box, and have temporarily suspended the requirement for wet signatures for *pro se* parties. The Clerk's Office construction projects were planned pre-COVID, but we are also adding plexiglass and physical barriers in the Clerk's Offices and the courtrooms and will socially distance all seating in the Courtroom."

The Chief Judge also explained that when the Court eventually opens to the public, some things will be different. "Masks will be required in the buildings and the Courtrooms. We can't have 50 or 60 lawyers in the gallery anymore. Case management will have to change and we'll have to rethink calendars and dockets. There also might be more telephonic hearings going forward."

"The Eastern District Bankruptcy Court has traditionally been busy (it led the Nation in *pro se* consumer filings in 2019, for example) and will no doubt be busier soon. Consumer filings are down because of the foreclosure and eviction moratoriums. Filing isn't necessarily a need for a lot of individuals right now, but we expect there will be a large increase in filings once these moratoriums and mortgage forbearances end."

The Bankruptcy Court will be ready, however. After being quick to acknowledge the valuable assistance of Bob Gavin (the Clerk of Court), the Clerk's Office, and the Court's other personnel, as well as valuable input from the District Court, the Chief Judge opined that "It may be similar to what we saw numbers-wise in 2008 and 2009 during the Great Recession. However, while it may be a little more challenging to deal with those numbers during the COVID-era, the technological advances since then are better and will allow for more remote appearances. These may remain in place to some extent even after COVID ends."

The Court has also taken feedback from the bar's advisory committees and some cues from the Southern District of New York, in recently expanding the Court's standing orders and first day protocols for Chapter 11 proceedings and model plans for Chapter 13 proceedings.

The Chief Judge was also complimentary of the Eastern District's bankruptcy bar. "Some mornings we've had 25 "lift stay" hearings, all by phone. But counsel is ready and prepared, courteous to the Court and adversaries, and civil. The bar has pivoted just like the Court has had to and that's a credit to the bar. We have a really good bar. They cooperate."

That said, the Chief Judge was willing to share some practice pointers, which serve as good reminders for practitioners before the Court. "Check the Court's website to make sure you comply with the proper procedures. Filing a certificate of no objection may save you from having to appear at a hearing. In the era of working remotely, remember to comply with all service requirements. And during video hearings, remember that the camera is always on you. Be careful of your facial reaction and don't read too much into any Judge's facial reaction, which you might not even notice from a podium in a Courtroom, but which is magnified on video." The Chief Judge reminded counsel to mute their lines and consider stopping video when they are not arguing or examining witnesses.

When the Chief Judge is not hearing cases and authoring opinions, he keeps busy playing golf (though not much this year), authoring fiction novels (two written about 20 years ago, though they remain unpublished), and perhaps most importantly, "taking 20 to 30 minutes to walk each morning. "We all need mindfulness time right now. Look at the trees. Observe nature. It helps one to de-stress."

Great advice, and solely needed right now.

Judge Trust has been an adjunct professor at St. John's University School of Law since 2009. He served a two-year term as President of the Eastern District of New York Chapter of the Federal Bar Association and serves as CLE Committee co-chair. He is a past Chair of the Bankruptcy Law Section of the Federal Bar Association, a member of the Board of Directors of that Section and has served as the CLE Committee chair. He is also a member of the Editorial Board of the American Bankruptcy Institute Journal, is a coordinating editor for the Journal, and for several years has had responsibility for the Dicta column.

Judge Trust has been previously designated by the Second Circuit Court of Appeals to mediate cases in the Southern District of New York and to sit in the District of Connecticut Bankruptcy Court. Judge Trust has continued to serve as a mediator in the E.D.N.Y. and was instrumental in the cre-

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Commercial/Bankruptcy/Tax Law

Will COVID-19 Affect Your Clients' New York State Tax Residency?

The shelter-in-place rules imposed by many states, including New York, during the coronavirus pandemic, led many to leave their homes. In New York City, residents exchanged their cramped apartments for suburban summer homes in less densely populated areas with more living space and a backyard.

Others opted to leave New York altogether, moving to second homes owned or rented in other states. Months later, these individuals have grown fond of their new locations (and perhaps their reduced income tax exposure as well). They now do not wish to return to their pre-COVID lifestyles. Can these individuals establish the necessary intent so as to establish their new domicile?

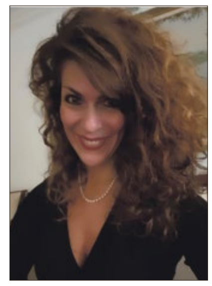
First, it is important to understand how New York taxes its residents. Residents are taxed on all their worldwide income, regardless of where it is sourced. Nonresidents pay tax only on income earned in New York, such as wages or rental income earned in the state.

To be considered a resident of New York for tax purposes, an individual must meet either the Domicile test or the Statutory Residency test. Note that New York City has its own distinct income tax which applies to city residents.

Domicile Test

A person can only have one domicile but many residences. Domicile is defined as the place the taxpayer considers their permanent home. It should be noted that the burden of proof is on the party asserting a change in domicile: in this case, the taxpayer. The domicile test is based on several factors, and looks to determine where the taxpayer's true home lies. How is this intent shown?

Karen J. Tenenbaum, LL.M.



Marisa Friedrich

A person's intent is objective and difficult to quantify. New York provides five primary factors which must be analyzed to determine a taxpayer's domicile. The five primary factors are home, business involvement, time, family connections, and items near and dear. These factors demonstrate through subjective means the person's objective intent. The phrase "actions speak louder than words" may come to mind. An analysis of all the facts and circumstances is necessary.

The "Home" factor involves a comparative analysis of the use, maintenance, value, and size of each home. Another relevant factor is whether the taxpayer has severed roots in the old community while establishing connections in the new community. However, establishing new ties may be more difficult to prove as a result of the COVID pandemic.

Active participation in the daily management of a business is strong evidence of one's domicile for the "Business Involvement" factor. The location of the taxpayer's primary office or the degree to which the taxpayer remains involved in the day-to-day operations of a New York business could be evidence of the place the taxpayer considers his domicile. As such, if the taxpayer has moved out of New York but is still heavily involved in the operations of a business in New York, the taxpayer may be considered a resident for tax purposes.

The "Time" factor considers the amount of time the taxpayer spends in New York State as against the amount of time spent in the new domicile. New York often focuses on whether there has been a significant shift in time between New York and the new domicile, or in the taxpayer's pattern of life when compared to years prior. If a taxpayer has left either New York City or New York State, the burden of proof falls on the taxpayer to establish that he is spending significantly more time in the new domicile. Producing this evidence can be onerous. It may require reviewing personal calendars, flight records, credit card statements, and cell phone records.

The "Family Connections" factor examines the taxpayer's family structure in order to help determine where he is domiciled. Historically, where the taxpayer's school-aged children were attending school was dispositive. During the shut down and shelter-at-home orders, however, most schools were closed, and remote learning was implemented. As a result, children may still be associated with the old domicile's school district even if the children were physically located elsewhere. Note that auditors will be looking at what taxpayers do once the COVID crisis has ended.

"Items Near and Dear," also referred to as the teddy bear test, examines where the taxpayer keeps sentimental and valuable possessions. Moving items to the new domicile may be indicative of the taxpayer's intention to change domicile. Similarly, leaving possessions in the old residence can be construed as having the intention to remain in, or return to, the old domicile. It may have been difficult during the shutdown to hire a moving company to transfer items to the new domicile. However, smaller items, such as photo albums, easy to transfer collectibles, even one's pets, can provide evidence of one's intent to establish a new domicile.

There are several less significant "other" factors which are also considered. They include obtaining a driver's license, registering to vote, registering one's vehicles, and making a domicile declaration at the new domicile, to name but a few. However, during

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Commercial/Bankruptcy/Tax Law

For Co-op Owners, SALT May or May Not Be a Four-Letter Word

On December 20, 2017, Congress passed the Tax Cuts and Jobs Act of 2017 ("TCJA"), amending the Internal Revenue Code of 1986. President Trump signed the bill into law on December 22, 2017. Among its major provisions, the bill limits deductions for state and local income taxes and property taxes ("SALT"). Specifically, the SALT deduction is capped at $10,000. That provision adversely affects taxpayers who either own more expensive property, live in higher-income areas, or live in states with higher state income tax rates.

The conventional wisdom is that the SALT cap necessarily applies to co-ops in the same way that it applies to condos and one-family homes. What is conventional wisdom today, however, may not seem so wise tomorrow. That is the arena whose dimensions, like those of the Twilight Zone, we are about to explore, the intersection between tax law and real property law.

But First, A Brief Look Back at Recent History

The last major reshaping of the tax code occurred almost 35 years ago, when President Reagan signed the Tax Reform Act of 1986 (P.L. 99-514). Possible repeal of the SALT deduction was one of the more controversial issues debated in that process. During the summer of 1985, the legislation began in the Democratic-controlled House of Representatives; drafting the bill behind closed doors avoided journalistic and lobbyist pressure. House Ways and Means Committee Chairman Dan Rostenkowski (D-IL) exercised his political power during the process to prevent the SALT deduction's repeal. In November 1985, before moving the bill to a floor vote, Rostenkowski and House Speaker Tip O'Neill (D-MA) agreed that no vote on the draft bill would proceed if it included a SALT deduction repeal. The Ways and Means Committee approved the bill in early December 1985; the House passed the bill two weeks later.

The Senate version of the bill almost sank. Senate Finance Committee Chairman Bob Packwood (R-OR) was reluctant to take up the bill partly due to his (and other Finance Committee's members') receipt of political contributions before the 1986 midterm election. A compromise was reached, repealing the SALT deduction for sales tax while keeping it for income and property taxes. It was reported that Senator Daniel Patrick Moynihan (D-NY) was willing to let the SALT deduction for sales tax lapse, preferring to preserve the deduction for income and property taxes which provided a greater benefit to New York residents.[1] After passage in the Finance Committee and the full Senate, Chairmen Rostenkowski and Packwood negotiated the final bill behind closed doors, reporting it in August 1986. President Reagan strongly pushed Senators for their support, and the House passed the bill by a wide bipartisan margin (292 to 136), followed by the Senate's September passage by 74 to 23. President Reagan signed the bill into law on October 22, 1986.

Mark S. Borten

Fast forward to 2017. When Congress released its framework for tax reform in the fall of 2017, allowable itemized deductions were limited to interest paid on home mortgages and charitable contributions, suggesting a repeal of the SALT deduction. On December 15, 2017, Congress released its conference agreement bill, the Tax Cut and Jobs Act (H.R. 1) (TCJA), which did not entirely repeal the SALT deduction, but instead limited the deduction to $10,000 for state and local income, sales and property taxes paid, applying to tax years beginning after December 31, 2017, and scheduled to sunset after December 31, 2025.

Relevant Code Sections

For the purpose of this review, our focus is on Internal Revenue Code Sections 164 and 216, more specifically Sections 164(a)(1) and 216(a)(1). Section 164(a) allows a deduction for certain kinds of "state and local taxes," one type of which is "State and local…real property taxes." The TCJA added this new limitation to Section 164(a) for individual personal-use taxpayers and taxable years beginning before 2026: "the aggregate amount of taxes taken into account under [Section 164(a)(1) and certain other portions of Section 164] shall not exceed $10,000…."[2]

Section 216 is in effect a special rule permitting a co-op owner to deduct taxes and interest despite owning an interest consisting of a proprietary leasehold and stock certificate, while not directly owning real property. Section 216(a) begins by providing that a "tenant-stockholder" can deduct "amounts (not otherwise deductible) paid…to a cooperative housing corporation…." That subsection then imposes this limit: such payments are deductible "only to the extent that such amounts represent the tenant-stockholder's proportionate share of…the real estate taxes allowable as a deduction to the corporation under section 164 which are paid or incurred by the corporation on the…apartment building and on the land…."

Again, for the purpose of this review, let us assume that the phrase "real property taxes" used in Section 164(a) is the same concept as the phrase "real estate taxes" used in Section 216(a).

A Hypothetical to Ponder

Assume that John Smith is a "tenant-stockholder" in 123 Realty Corp., the apartment corporation owning the building. Further assume that John's proportionate ownership share in the corporation is 10%, that John is unmarried, uses his apartment solely for personal purposes, and does not *directly* pay any tax. In 2020, John pays $50,000 to 123 Realty Corp. pursuant to his proprietary lease (whether characterized as maintenance, carrying charges or otherwise), but the corporation pays $150,000 of *real estate taxes* to the municipality and correctly deducts those taxes on its corporate tax return. Since John owns a 10% proportionate share in the co-op, pre-TCJA he could legitimately deduct 10% of $150,000, or $15,000, on his personal income tax return. The TCJA, however, on its face limits John's deduction to $10,000. John now faces a challenging decision.

The Crux of the Issue

Does the TCJA prevent John from deducting the full $15,000 and thus cap his deduction at $10,000, or can John make a credible argument to the contrary? The issue is whether the $10,000 SALT cap applies to the special deduction under Section 216 for a tenant-shareholder's portion of taxes paid by a housing cooperative. While Section 164(b)(B) contains several internal references and limits the restriction to *individuals*, the Section 164(b)(B) tax is taken into account under Section 216, based on amounts paid by *the apartment corporation* which are *deductible to the corporation under Section 164.* Thus, arguably the tax taken into account under Section 216 does not appear to be subject to the $10,000 SALT cap at the individual level.

Did Congress Create an Issue By Drafting Error in TCJA?

The Joint Committee on Taxation, in their *General Explanation of Public Law 115-97* (the Blue Book) stated that the law's intent was to subject such payments to the $10,000 limit. "It is intended that the limitation apply to the deduction for amounts paid or accrued to a cooperative housing corporation by a tenant-stockholder under section 216(a)(1) (relating to real estate taxes) in the same manner as the limitation applies to real estate taxes under section 164."[3]

This footnote to that sentence, however, indicates that although such may have been the law's intent, the law itself does not appear to accomplish that result: "A technical correction may be needed to achieve this result."[4]

The IRS Chimes In

In an information letter dated July 29, 2020 but only released on September 25, 2020, the IRS informally addressed the issue.[5] Responding to a February 14, 2020 email from Congressman Jerrold Nadler (D-NY), the IRS stated this position: The SALT limitation under section 164(b)(6) applies to the deduction taken into account by a tenant-stockholder under section 216 for the tenant-stockholder's proportionate share of the real estate taxes paid or incurred by a cooperative housing corporation.

After providing an analysis of its position, the IRS cited Section 216's legislative history dating from 1942: "[t]he general purpose of this provision is to place the tenant stockholders of a cooperative apartment in the same position as the owner of a dwelling house so far as deductions for interest and taxes is concerned."

Why Mr. Nadler waited until early 2020 to email the IRS is anyone's guess. So is why the IRS information letter is barely more than one page in length and does not mention the Joint Committee's footnote that a technical correction to the TCJA may be needed. If a technical correction was required, why didn't Congress simply state in the TCJA that "the limitation of the deduction for amounts paid or accrued to a cooperative housing corporation by a tenant-stockholder under section 216(a)(1) shall apply in the same manner as the limitation applies to real estate taxes under section 164"?

Conclusion

It is plausible to anticipate co-op owners claiming full Section 216(a)(1) deductions despite Form 1040 containing no such line to do so, IRS opposition to such claims, and ultimate resolution of that dispute in the courts. Taxpayers and tax advisers pondering taking this position should recognize that, while it seems to meet the "reasonable basis" standard for so doing with adequate disclosure on Form 8275, a large deduction on Schedule A, line 6 (taxes not limited by the $10,000 cap) may be a red flag. The IRS position taken in their 2020 information letter could be challenged by an assertion that the statute contains unambiguous language.

Given the sheer number of co-op apartments and tenant-shareholders in New York City, and the amounts of dollars arguably not subject to the SALT cap, it is quite plausible to envision multiple situations in which claimed deductions under Section 216(a)(1) considerably exceed the $10,000 cap.[6] Moreover, in today's supercharged political environment, it is extremely difficult to envision a sufficiently bipartisan Congressional consensus to implement the suggested technical correction, whether applied prospectively or retroactively.

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1. Jeffrey Birnbaum and Alan Murray, *Showdown at the Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform*, Vintage Books, 1987.
2. Section 164(b)(6)(B), added by Pub. L. No. 115-97
3. Joint Committee on Taxation, *General Explanation of Public Law 115-97*, JCS-1-18, 2018 at 68.
4. Joint Committee on Taxation, *General Explanation of Public Law 115-97*, JCS-1-18, 2018 at 68.
5. Information Letter 2020-0010, September 25, 2020.
6. According to the "The New York Property Tax FY 2012 Annual Report", as of that fiscal year there were 364,720 residential units on 4,875 parcels owned in a cooperative corporation in buildings greater than 10 units and 1,932 parcels with 12,664 residential units in cooperatives in 2-10 unit buildings, and there were 7,065 private residential co-op buildings. (Source: Page on nyc.gov)

Commercial/Bankruptcy/Tax Law

Bankruptcy Update, United States Supreme Court

The United States Supreme Court decided three bankruptcy cases this year that all bankruptcy practitioners should be aware of. The Court is also scheduled to hear arguments in one additional bankruptcy case.

Acevedo Feliciano: Jurisdiction Over Bankrupt After Removal

In *Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano*, the principal issue brought before the Supreme Court was whether the defendant, Roman Catholic and Apostolic Church in Puerto Rico, (the "Church"), as well as other defendants, possessed legal personhood to be subject to a preliminary injunction requiring the payment of pension benefits.[1] The Court did not reach this issue, however, because it determined that the case suffered from a jurisdictional impediment—upon filing of the notice of removal to the federal district court, the Puerto Rico Court of First Instance lacked jurisdiction to issue orders regarding the payment of pension benefits and seizure of assets.

Active and retired employees of three academies filed complaints in the Puerto Rico Court of First Instance, alleging that their employees' pension benefits were eliminated by a certain trust (the "Trust"). The employees named as a defendant, among others, the Church, claiming that it was a legal entity with supervisory authority over all Catholic institutions in Puerto Rico. In an order affirmed by the Puerto Rico Court of Appeals, the Court of First Instance denied a preliminary injunction requiring the payment of benefits, but the Puerto Rico Supreme Court reversed and remanded. The Archdiocese of San Juan removed the case to federal district court, based on the Trust having filed a Chapter 11 bankruptcy proceeding.

After removal to the District Court, the Court of First Instance issued three orders, which directed the Church to make payments in accordance with the pension plan and required the seizure of Church assets. In the interim, the bankruptcy court dismissed the Trust's bankruptcy proceeding. On appeal of the Court of First Instance's three orders, the Puerto Rico Court of Appeals reversed. The Puerto Rico Supreme Court again reversed and reinstated the preliminary injunction issued by the Court of First Instance. The District Court later remanded the case to the Court of First Instance by way of a nunc pro tunc judgment, stating that the order "shall be effective as of March 13, 2018," the date that the bankruptcy proceeding was dismissed.

In a per curiam decision, the Supreme Court concluded that the Court of First Instance lacked jurisdiction to issue the payment and seizure orders. The payment and seizure orders were void because they were made after removal to the District Court and before that court remanded the case. The Archdiocese's motions made in the Court of First Instance while the case was removed did not restore jurisdiction to the Court of First Instance. The District Court's nunc pro tunc order also failed to revive jurisdiction because on March 13, 2018, the effective date of the nunc pro tunc order, the case was still in the District Court.

Ritzen: Time to Appeal from Denial of Relief from Automatic Stay

In *Ritzen Group Inc. v. Jackson Masonry LLC*, the question presented to the Supreme Court concerned the finality of, and therefore the time allowed for appeal from, a bankruptcy court's order denying a creditor's request for relief from the automatic stay pursuant to 11 U.S.C. § 362(a).[2] The Supreme Court ruled that a bankruptcy court's order unreservedly denying relief from the automatic stay constitutes a final, immediately appealable order under 28 U.S.C. § 158(a).


J'Naia L. Boyd

Prior to Jackson Masonry filing for bankruptcy, it was a defendant in a breach of contract suit brought by Ritzen Group, Inc., which suit was stayed due to Jackson's bankruptcy filing. Ritzen filed a motion seeking relief from the automatic stay, which was denied, and Ritzen did not appeal.[3] Subsequently, Ritzen and Jackson filed adversary proceedings against each other, resulting in a bench trial. The bankruptcy court found that it was Ritzen, and not Jackson, that had breached the contract. Ritzen filed two appeals to the district court, one as to the order denying relief from the automatic stay, and the other as to the court's determination on the merits of the breach of contract claim. The District Court found that the appeal from the order denying relief from the automatic stay was untimely as Ritzen was required to file its appeal of that order within fourteen days of the ruling pursuant to Bankruptcy Rule 8002(a). The Sixth Circuit affirmed.[4]

In a unanimous decision written by the late Justice Ginsburg, the Supreme Court held that a bankruptcy court's order denying relief from the automatic stay is a final order that is immediately appealable. The Supreme Court's application of Bankruptcy Code § 158(a)'s finality requirement was guided by the opinion in *Bullard v. Blue Hills Bank*, which held that a bankruptcy court's order rejecting a proposed plan was not final because it did not conclusively resolve the relevant "proceeding."[5] The Supreme Court applied *Bullard*'s analysis to a bankruptcy court's order denying relief from the automatic stay and explained that the adjudication of a stay-relief motion is a discrete "proceeding." Therefore, the bankruptcy court's order ruling on a stay-relief motion disposes of a procedural unit anterior to, and separate from, claim-resolution proceedings.[6]

This decision will certainly have implications for all bankruptcy matters. Under *Ritzen*, a creditor will lose its right to challenge the denial of a stay-relief motion if it fails to timely appeal the order within fourteen days after entry of the order.

Rodriguez: Ownership of Refund Under Bob Richards Rule

In *Rodriguez v. Federal Deposit Insurance Corp.*, the Supreme Court resolved a circuit split by addressing whether courts should determine ownership of a tax refund paid to an affiliated group based on the federal common law "Bob Richards rule,"[7] which was derived from the Ninth Circuit's decision in In re Bob Richards Chrysler-Plymouth Corp.[8]

In *Rodriguez* the Internal Revenue Service had issued a tax refund to United Western Bancorp, Inc. ("UWBI"), a holding company whose principal subsidiary was United Western Bank.[9] UWBI had a tax allocation agreement with United Western Bank and its other subsidiaries, which provided that UWBI would file consolidated tax returns on behalf of itself and all subsidiaries.[10] The tax refund at issue was the result of operating losses incurred by United Western Bank. Since UWBI filed the tax return under its tax allocation agreement, the Internal Revenue Service issued the tax refund to UWBI. UWBI subsequently filed for Chapter 7 relief. The Chapter 7 Trustee commenced an adversary proceeding against the FDIC, as receiver for United Western Bank, alleging that the tax refund belonged to UWBI, and thus, was part of the bankruptcy estate. The bankruptcy court entered summary judgment in the Trustee's favor. The District Court reversed the bankruptcy court's decision. On appeal, the Tenth Circuit affirmed.[11]

In a unanimous opinion delivered by Justice Gorsuch, the Supreme Court determined that the *Bob Richards* rule is not a legitimate exercise of federal common lawmaking.[12] The Supreme Court explained that limited areas exist where federal judges may appropriately craft the rule of decision and claiming a new area is subject to strict conditions. One of the most basic conditions is that federal common lawmaking must be "necessary to protect uniquely federal interests, which the *Bob Richards* rule fails to satisfy."[13] The Supreme Court questioned what unique interest the federal government had in determining how a consolidated corporate tax refund, once paid to a designated agent, is distributed among group members. Neither the *Bob Richards* rule nor the federal courts applying and extending that rule have offered an answer to this question. The Supreme Court explained that state law is well-equipped to handle disputes involving corporate property rights, even in cases, like this one, that involve federal bankruptcy and a tax dispute. The Supreme Court remanded the case for a determination consistent with its opinion.

Fulton: Does Returning A Vehicle Violate an Automatic Stay?

This term, the Court is scheduled to hear oral argument in a bankruptcy case that will significantly impact the practice. In *City of Chicago v. Fulton*, the Supreme Court will decide whether a creditor's failure to return a debtor's vehicle upon the filing of a Chapter 13 bankruptcy petition violates the automatic stay pursuant to Section 362(a)(3) of the Bankruptcy Code.

The Chicago Municipal Code permits the City of Chicago to immobilize and then impound a vehicle based on a certain parking and traffic violations.[14] Based on a 2016 amendment to the Code, which provided that an impounded vehicle was subject to a possessory lien in favor of the City, the City began refusing to release impounded vehicles to debtors who had filed Chapter 13 petitions.[15] In the *City of Chicago* matter, each of four debtors had filed Chapter 13 petitions. Prior to filing for bankruptcy, the City had impounded the debtors' vehicles for failure to pay multiple traffic fines. After the bankruptcy filings, the City refused to return their vehicles.[16] In each of the four bankruptcy cases, the bankruptcy court found that the City violated the stay and was required to return the vehicles pursuant to Seventh Circuit precedent, *Thompson v. General Motors Acceptance Corp.*[17] The City appealed those orders, and the cases were consolidated.

Relying on *Thompson*, the Seventh Circuit held that the City violated the automatic stay pursuant to Section 362(a)(3) by retaining possession of the debtors' vehicles after they declared bankruptcy.18 The court first explained that a debtor has an equitable interest in his or her vehicle, and "'as such, it is property of his bankruptcy estate.'"[19] Second, Section 362(a)(3) becomes effective immediately upon filing the petition and is not dependent on the debtor first bringing a turnover action.[20] Therefore, the court concluded that the City was required to return the debtors' vehicles and seek enforcement of their rights within the framework of the Bankruptcy Code rather than through "the nonbankruptcy remedy of possession.'[21] The court also rejected the City's position that it was excepted from the automatic stay under Section 362(b)(3) and (b)(4). The court concluded that Section 362(b)(3) does not apply because the City does not lose its perfected lien via the involuntary loss of possession of the debtors' vehicles to the bankruptcy estates.[22] Section 362(b)(4) is similarly inapplicable, the Court held, because the City's impoundment of vehicles is an exercise of revenue collection more so than police power to protect public safety.[23]

There is a split among the circuit courts on this issue. As noted by the Seventh Circuit, some have held that a creditor violates the automatic stay by retaining possession of seized property after the filing of the Chapter 13 petition, while others conclude that creditors do not violate the automatic stay merely by maintaining the status quo. It will be interesting to see on which side of the fence the Supreme Court falls.

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1 140 S.Ct. 696 (2020).
2 140 S.Ct. 582 (2020).
3 *Id.*
4 *In re Jackson Masonry*, 906 F.3d 494 (6th Cir. 2018).
5 135 S.Ct. 1686 (2015).
6 140 S.Ct. at 589.
7 140 S.Ct. 713 (2020).
8 473 F.2d 262 (9thCir. 1973).
9 *In re United Western Bancorp, Inc.*, 914 F.3d 1262, 1264 (10th Cir. 2019).
10 914 F.3d at 1264.
11 *Id.*
12 140 S.Ct. 713, 717–18.
13 *Id.* at 717 (quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981))
14 In re Fulton, 926 F.3d 916, 920 (7th Cir. 2019).
15 *Id.*
16 *Id.* at 921–22.
17 566 F.3d 699 (7th Cir. 2009).
18 926 F.3d at 924.
19 *Id.* at 923 (quoting *Thompson*, 566 F.3d at 701).
20 *Id.* at 924.
21 *Id.* at 925 (quoting *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983)).
22 *Id.* at 929.
23 *Id.* at 930.

FDR and the Courts: Ambiguous Legal Legacy of Franklin Delano Roosevelt

The current pandemic has done much to blight the present. It has also done a great deal to obscure the past. That's unfortunate, because the past provides insight for the here and now and often offers clues to the future.

Lost in the shuffle has been any commemoration marking the 75th anniversary of the passing of President Franklin Roosevelt. Franklin Delano Roosevelt was one of the giants of the 20th century and his presidency was a watershed in American history. As 2020 closes, perhaps it is time to take a look back at the man and his impact on American law.

FDR and the Law

FDR, as he was known, takes his place among the upper echelon of American Presidents. During his twelve years in the White House, he led the country through economic calamity and global war. His impact in nearly every aspect of American life, be it the role of the state in people's lives or the primacy of the United States in world affairs, is profoundly felt to this day.

It can also be argued that no President made a more dramatic or more lasting contribution to the nation's jurisprudence. Interestingly, FDR had briefly practiced law in Manhattan after passing the New York Bar. Prior to that, he attended Columbia Law School. But lacking any real zest for his studies, he left after two years without graduating.

Years later, the imperious Nicholas Murray Butler, the long-serving President of Columbia University, chided Roosevelt, noting he could never be a true intellectual until he completed his degree.[1] FDR's response was telling: "That shows how unimportant the law really is."[2] Both the study and the practice of law paled in comparison to his real passions: people and politics.

FDR and the U.S. Supreme Court

However upon assuming office in a landslide that ushered in a compliant Congress, it would be the United States Supreme Court that would serve as the President's principal obstacle. This was not a new phenomenon, for historically there has always been an inherent conflict between presidential power and an independent judiciary.

Presidents have often found themselves at odds with the Court, and every chief executive has tried, with varying degrees of success, to shape the federal judiciary. Indeed, the most important part of any President's legacy concerns his judicial appointments. In his regard, FDR would prove to be consequential as well as controversial.

Rudy Carmenaty

Roosevelt vigorously championed a greater role for the government in the economy. His New Deal programs ushered in an enormous expansion of federal authority. FDR, in effect, midwifed the modern administrative state. The NRA—the National Recovery Administration—was one of the many alphabet agencies Roosevelt created and the locus of his initial efforts for economic renewal. The Supreme Court declared the NRA unconstitutional in 1935.[3]

This was the fate rendered by the Supreme Court to various New Deal measures. It was both an activist and conservative court, a court whose right-leaning bloc was known colloquially as the "Four Horsemen."[4] Infuriated by numerous unfavorable decisions, FDR unveiled his Court Packing Plan in 1937. Article III of the Constitution is silent as to the number of justices that can sit on the Supreme Court at any one time.

FDR and Court Packing

The President's plan, formally known as the Judiciary Reorganization Bill, would have empowered him to name a new justice (or in the case of the lower federal courts a new judge) for every member of the given bench over the age of 70.[5] Further aggravating the situation, FDR had not made a single Supreme Court appointment during the whole of his first term.

Launched at the height of his powers following his overwhelming 1936 reelection, FDR's Court Packing Plan would turn out to be the worst political miscalculation of his presidency. It was seen for what it was: a naked power grab. Chief Justice Charles Evans Hughes skillfully played his hand behind the scenes[6] as the Senate Judiciary Committee, dominated by members of the President's own party, adversely reported the bill out of committee.[7]

Two additional factors would prove to be a death knell for the plan. The first was that the Supreme Court ruled to uphold a Washington State minimum wage law for women and children in *West Coast Hotel v Parrish*.[8] This was the famous "switch in time that saved nine," wherein Justice Owen Roberts reversed his position in a 5 to 4 decision.[9]

This case overruled a precedent the court had rendered just a year earlier which saw Roberts in the majority.[10] In the span of less than a year, a Herbert Hoover appointed justice had done a complete 180 degree turn. It effectively marked the end of Lochner era substantive due process. The Supreme Court would no longer declare economic measures by the Congress or the states unconstitutional.

The West Coast Hotel decision would also herald a new direction for the Court. In his majority opinion, Chief Justice Hughes stated that "The Constitution does not speak of freedom of contract."[11] These words were a dramatic departure from past practice, and coming from a conservative Republican they carried even more weight.

With the coming of Harlan Fiske Stone's famous footnote number four in "Carolene Products",[12] a new era in Constitutional adjudication was born. The Supreme Court would no longer reflectively overturn economic regulations by government. The Court's focus shifted instead to questions of individual rights. FDR would later elevate Stone to the center chair, naming him Chief Justice in 1941.

The other factor was the resignation of Justice Willis Van Deventer, one of the Four Horsemen. This opened the way for FDR's nomination of Alabama Senator Hugo Black. He would be the first of nine Roosevelt appointments, the most of any President save George Washington. Black would be followed by Stanley Foreman Reed (1938), Felix Frankfurter (1939),William O. Douglas (1939), Frank Murphy (1940), James F. Byrnes (1941), Robert Jackson (1941), and Wiley Rutledge (1943).[13]

FDR was not necessarily an ideologue. His appointments were men who shared his views on New Deal legislation and who, in one capacity or another, had served his political interests. As the nature of the cases before the court changed, away from state action in the economy in favor of questions of social and racial justice, they reflected the diverse elements of the New Deal coalition that brought the President to power.

With the exception of Byrnes, who served for little over a year, FDR's appointments were numerous, they were varied, and they were substantive. These men set the tone at the Court as an institution and shaped the divergent directions of Constitutional interpretation for more than a generation. Black served until 1971 and held the position of senior Justice for more than twenty-five years. He was a major proponent of the incorporation of the Bill of Rights as applied to the states.[14]

Frankfurter, on the other hand, was an advocate of judicial restraint in the tradition of Oliver Wendell Holmes. Black and Frankfurter would become the Court's competing intellectual leaders. Black was a proponent of the activist dynamic that animated the Warren Court. Frankfurter embodied a countervailing impulse against a more expansive use of the Court's powers. *Brown. v Board of Education* represented a rare instance of unanimity.

Of all of FDR's appointments, William O. Douglas served the longest, more than 36 years in total. In so doing, he set the record for length of service, a record which still stands. He finally stepped down in 1975, more than 30 years after Roosevelt's death. His successor, John Paul Stevens, was nominated by President Ford. Ironically, as a member of Congress, Ford had tried to impeach Douglas five years earlier.

FDR and Discrimination

While African Americans benefitted from New Deal programs, Roosevelt, lacking the political will to alienate his Southern base, shied away from promoting civil rights or anti-lynching legislation. During World War II, FDR signed Executive Order 8802 prohibiting discrimination by the government, including the armed forces. In practice, the services found ways to evade the order. It was left to his successor, Harry S. Truman, to desegregate the military in 1948.

One would be remiss not to mention that FDR was responsible for the single most egregious violation of civil rights during wartime. It was Roosevelt who signed Executive Order 9066 mandating the internment of Japanese Americans. This resulted in over 100,000 people being forcibly relocated from the west coast to internment camps. This action was upheld by the Supreme Court in 1944.[15] In the 1980s, the United States government acknowledged the error, offering a formal apology and reparations to those affected.

FDR's Ambiguous Legacy

Franklin Delano Roosevelt is widely admired for his leadership during the Great Depression and World War II. He also has legions of detractors who, then and since, have voiced their fear that he exercised "More power than any good man should want, and more power than any other kind of man ought to have."[16] Much of his legacy is rightfully subject to debate and argument.

This holds true not only for his achievements but also for his failures. Even the issue of 'packing the Supreme Court' has once again become fashionable among certain circles within the nation's political class. For good or ill, what takes place in politics often precedes what eventually happens in law. There is little doubt however that Franklin Roosevelt profoundly altered the direction of jurisprudence and the administration of justice in this country.

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1 Jean Edward Smith, *FDR* (1st 2d. 2007) at 56.
2 *Id.*
3 *A.L.A. Schechter Poultry v United States*, 295 US 495 (1935).
4 The Four Horsemen were Willis Van Devanter, James C. McReynolds, George Sutherland, and Pierce Butler.
5 Alan Brinkley, *Franklin Delano Roosevelt* at 56.
6 Jeff Shesol, Supreme Power (1st ed. 2010) at 394.
7 *Id.* at 467.
8 300 U.S. 379 (1937).
9 T*he Switch in Time that Saved Nine: How FDR Almost Packed the Supreme Court* (May 17, 2017), www.sporcle.com.
10 *Moorhead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).
11 300 U.S. 379 (1937).
12 *United States v. Carolene Products Company*, 304 U.S. 144 (1938). Justice Stone affirmed "the Court would exercise a stricter standard of review when a law appears on its face to violate a provision of the United States Constitution, restricts the political process in a way that could impede the repeal of an undesirable law, or discriminates against 'discrete and insular' minorities."
13 Jonathan Nathan Kane, *Facts About the Presidents* (3rd ed. 1974) at 352.
14 Roger K. Newman, *The Yale Biographical Dictionary of American Law* (1st ed. 2009) at 50.
15 *Korematsu v United States*, 323 U.S. 214 (1944).
16 Daniel O. Hastings, Senator from Delaware, statement in opposition to FDR's relief program March 23, 1935.

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MLMIC Buyout Dispute Update: All Eyes Return to First Department

In recent months, unanimous decisions rendered by five-judge Appellate Division panels in both the Third and Fourth Departments have shifted the momentum in the battle over who is entitled to the proceeds from the sale and demutualization of New York's largest medical malpractice carrier, the Medical Liability Mutual Insurance Company ("MLMIC"). Both of these recent appellate decisions determined that the sale proceeds belong to the insured policyholders rather than to their employers who may have paid their malpractice premiums and/or acted as their Policy Administrator. These two rulings rejected the rationale underlying an earlier appellate decision in the First Department[1] ("*Schaffer*") which determined that whichever party paid the malpractice premiums was entitled to the sale proceeds.

Even though the precedential value of the *Schaffer* decision has been questioned,[2] many healthcare employers who paid the premiums for their employees' malpractice policies with MLMIC and/or acted as their employees' Policy Administrator, have nevertheless cited *Schaffer* in numerous lawsuits throughout New York State (in an effort to force their employees to assign over to them their MLMIC sale proceeds). A number of courts have ruled against the insured policyholders in reliance on *Schaffer* because it was the only appellate court decision on the subject at the time. That situation has now changed with these two recent appellate court decisions.

Joel M. Greenberg

The Appellate Division in the Fourth Department issued its unanimous decision on April 24, 2020 in *Maple-Gate Anesthesiologists, P.C. v. Nasrin*[3] ("*Maple-Gate*"). In its ruling, the court stated that the documentary evidence established as a matter of law that the plaintiff [employer] "had no legal or equitable right of ownership to the demutualization payments"; that "the MLMIC plan of conversion, in accordance with [Section 7307(e)(3) of] the Insurance Law, provided that cash distributions were required to be made to those policyholders who had coverage during the relevant period prior to demutualization in exchange for the 'extinguishment of their Policyholder Membership Interests'"; and that "The mere fact that the plaintiff [employer] paid the annual premiums on the policies on the defendant [employee]'s behalf does not entitle it to the demutualization payments (cf. *Schaffer*)."

More recently, on June 18, 2020, the Appellate Division in the Third Department issued its unanimous decision in *Schoch v. Lake Champlain OB-GYN, P.C.*[4] ("*Schoch*"). It agreed with the Fourth Department's conclusion that the sale proceeds belong to the insured policyholder, regardless of who paid the malpractice premiums or acted as the Policy Administrator. In so doing, the Court expressly rejected the First Department's holding in *Schaffer*. In its decision, the court stated that "Insurance Law Section 7307 does not confer an ownership interest…to anyone other than the policyholder" and that "pursuant to the language of the statute, [MLMIC's] conversion plan and the NYS Department of Financial Services' decision, MLMIC should pay the cash consideration to the plaintiff [employee]." The court went on to reject the unjust enrichment argument that was the sole basis of the *Schaffer* decision by stating:

> Defendant [employer] asserts that the cash consideration would be a windfall to plaintiff [employee]. While true, the converse is also true; the consideration would be a windfall to defendant [employer] if defendant were to receive it…The reality is that neither party bargained for the demutualization proceeds. Moreover, neither party actually paid for them, because membership interests in a mutual insurance company are not paid for by policy premiums; such rights are 'acquired…at no cost…and as an incident of the structure of mutual insurance policies' through operation of law and the company's charter and bylaws…. Thus, the demutualization proceeds were unexpected and will be a windfall to whichever party receives them.
>
> The fact that one party will receive these benefits does not mean that such party has unjustly enriched itself at the other's expense…. Based on our analysis, we decline to follow *Schaffer*, which summarily held, without any analysis, that awarding an employee a cash consideration related to MLMIC's demutualization would constitute unjust enrichment where the employer had paid the policy premiums.

In light of these unanimous appellate decisions from the Third and Fourth Departments, healthcare attorneys are now watching whether the First Department will reverse its decision in Schaffer when it rules on an appeal of a decision by the Supreme Court, New York County in *Mid-Manhattan Physician Services, P.C. v. Dworkin*[5] ("*Dworkin*"). (In that case, the lower court granted a summary judgment motion by Dr. Dworkin's former employer and in doing so, relied on *Schaffer*).

The appeal in *Dworkin* is scheduled to be argued during the First Department's November 2020 term. A successful appeal in this case would eliminate the conflict that currently exists between the Departments of the Appellate Division and firmly establish the rights of insured policyholders throughout New York State to receive the MLMIC sale proceeds. Stakeholders throughout the healthcare industry in New York State (especially large provider organizations) will closely watch how their competitors respond if the First Department concurs with the Third and Fourth Departments that the MLMIC Buyout Proceeds belong to the insured policyholder, regardless of who paid the malpractice premiums.

Joel M. Greenberg is a partner in the Long Island office of Frier Levitt, LLC. He has been practicing healthcare law for over 40 years and serves as Co-Editor in Chief of "The Legal Manual for New York Physicians," a joint publication by the NYS Bar Association and the Medical Society of the State of N.Y.

1. *Matter of Schaffer, Schonholz & Drossman, LLP v. Title*, 171 A.D. 3d 465 (1st Dept. 2019).
2. The First Department's decision in *Schaffer* summarily held, in just four sentences, that the doctor/policyholder would be unjustly enriched by receiving the cash consideration because her employer had paid her policy premiums. The case was brought to the First Department in an unusual manner, bypassing the lower court via an "Action on Submitted Facts" (under CPLR 3222), in which the appellate court's review is limited to the parties' submissions. The parties' submissions in *Schaffer* did not discuss, and the First Department did not reference, New York's Insurance Law, the MLMIC Plan of Conversion, the Decision of the New York State Department of Financial Services approving the Plan, or applicable New York unjust enrichment law, and the Court did not provide any reasoning for its conclusion.
3. *Maple-Gate Anesthesiologists, P.C. v. Nasrin* 182 A.D.3d 984 (4th Dep't 2020).
4. *Schoch v. Lake Champlain OB-GYN, P.C*, 184 A.D. 3d 338 (3rd Dep't 2020).
5. *Mid-Manhattan Physician Services, P.C. v. Dworkin*, 2019 WL 4261348 (Sup. Ct., New York Co. 2019)

Arbitrating in a Virtual World: Litigator's Guide to Zoom Arbitration

In our post-COVID world, arbitration hearings are still being scheduled. In the past, the evidentiary hearing would be set, usually during the initial conference call between counsel and the arbitrator (i.e., the "preliminary hearing" conference call). Discovery and motion practice also would be scheduled, along with deadlines for serving non-party subpoenas, exchanging witness lists, hearing exhibits, pre-hearing briefs, and stipulations of fact. The parties would agree to the location of the arbitration. Although in-person evidentiary hearings now may not be feasible, arbitrations are still being heard, but now are held on a virtual platform, such as Zoom. I recently presided over the first Zoom arbitration conducted in the court-annexed arbitrations held under the local rules for the U.S. District Court for the Eastern District of New York.

In many ways, the virtual hearing is similar to an in-person hearing. The same elements exist: witness lists, exhibit lists, stipulations of fact, pre-hearing briefs, opening statements, testimony, and closing statements, and post-hearing briefs. Preparing for the virtual hearing, however, requires counsel to do more advance work, however, as well as to discuss various parameters with opposing counsel and the arbitrator. Taking these steps will ensure a smooth-running evidentiary hearing.

For many years, it has not been unusual for arbitrators in domestic arbitrations to hear some witness remotely, at first using telephonic means and then by video conferencing. Now, however, everyone is remote. The transition to a virtual hearing platform requires some attention to detail—even if counsel, clients, and witnesses have experience with using Zoom for meetings. This article gives pointers to litigators who may be participating in a Zoom arbitration for the first time (and, of course, many apply to both Zoom and in-person arbitrations).

Hearing Subpoenas and Remote Testimony

Since all witnesses are appearing "virtually," the hearing subpoena that is served on the witness needs to explain that attendance is required via Zoom, rather than in person. You will need the Zoom invitation information at the time you are drafting the subpoena, including the hearing password, and it can be inserted where the "location" of the hearing normally would be entered. Remember that the arbitrator will likely be setting up a "waiting room" for attendees. The witness needs to know that this, along with the likely time that the witness will be called to the stand (and that the witness should dial into the hearing about 15 minutes earlier, or when you telephone or email the witness to do so). The arbitrator needs to know the names of the witnesses who are testifying so that the witnesses can be admitted to the hearing from that waiting room at the appropriate time. As the "host" of the Zoom arbitration, the arbitrator will get an alert on his or her screen advising that a person has entered the waiting room and can admit the witness at the appropriate time. Those in the waiting room cannot hear what is happening in the main room.

Using Exhibits During Remote Hearing

Importantly, the hearing exhibits need to be made available to the witnesses and the arbitrator for use during the hearing. Counsel should cooperate with opposing counsel to ensure that all exhibits, including those being used for cross-examination, are sent to the witness. Exhibits can be sent electronically or by hard copy. Realize, however, that some witnesses may either not have the capacity to look at the electronic file at the same time as he is testifying at the hearing. Many witnesses will not have two screens or may be using a phone to appear via Zoom. Sending a hard copy set of the exhibits may be necessary, therefore, so that they are available for examination and cross-examination. Therefore, you need to make sure you have adequate time to have the exhibits arrive. If there is a confidentiality order in place, remember that the witness may have to sign an agreement to maintain the confidentiality of exhibits. Keep this in mind, too, when you send the set of exhibits, as some may have more restrictive confidentiality designations (i.e., "attorneys' eyes only") that a particular witness cannot see. Thus, pre-hearing preparation is important.

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Ask the arbitrator how he wants his copies of the exhibits. Some may prefer electronic copies (including being sent on a thumb drive or via a drop-box) and others may prefer hard copies. Make sure that the exhibits are sent so that they arrive several days before the hearing starts.

Using exhibits via a "screen share" on Zoom may be difficult for a witness, too. If you screen share, counsel should be aware that it is possible for all open items on your computer to be visible (i.e., your calendar, emails, word documents, etc.). It is important to be mindful of this.

Privacy

It is also important to advise the remote witness (and your client) that he must be in a private location and not use a virtual background when testifying (as use of such may prevent others from detecting that a "stranger" is in the room). If a witness has counsel present, you need to make sure you have set ground rules for that attorney, as the attorney should not be interfering with the testimony and may have no standing for objecting. Remember that this is a hearing and not a deposition. Addressing these matters ahead of time—both with opposing counsel and with the arbitrator—is important. One way to do this is to cover this topic (subpoenas and non-party witnesses) during the initial, preliminary hearing conference call or, at the very least, at a pre-hearing status call. Deadlines may be set for providing draft subpoenas to the arbitrator, for service of the subpoenas and objections, and to address the need for the attorneys to cooperate in connection with the exhibits used in those examinations. (If you have not done so, then you can address this with the arbitrator before the witness's testimony begins.)

Non-Party Subpoenas Duces Tecum

It is not uncommon for litigators to serve subpoenas duces tecum on non-parties that require the production of documents at the hearing, since arbitration generally does not permit non-party discovery (absent agreement of the parties). Since the witness is remote, however, such a production is not feasible or useful (as there is no easy means to circulate the produced materials to all counsel and the arbitrator) if first produced at that time. Therefore, along with the subpoena (or by communication with the witness or witness's counsel in advance) counsel can provide a letter that explains that the documents should be produced in advance (including at a hearing date that will be adjourned immediately after the production). In many instances counsel may only be interested in receiving the non-party's documents. The documents that are produced can then be supplied to opposing counsel before the hearing and can be marked as exhibits prior to their insertion in the exhibit binders. Pre-hearing planning is very important, as the production of materials by a witness at the Zoom hearing is not an efficient use of hearing time, since all counsel need access to these materials and the documents that are to be used during the hearing need to be marked for identification, and the ones being offered as exhibits need to be provided to the arbitrator and all counsel.

Hearing Protocol

As with the non-party witnesses, the arbitrator must receive all the pre-marked exhibits in advance, whether the set is electronic or hard copy. Ask the arbitrator what her preference is.

Consider where your client and your witnesses are going to be during the hearing itself. If they are all remote, you need to make sure—as with non-party witnesses—that they have access to all exhibits. In addition, remind your client of the need for privacy during the hearing.

Those who are not testifying should be muted. However, the attorney who is the counsel who would be raising objections should not be muted, so that he can be heard by the arbitrator. Remember that there may be a delay between the question and answer, or during objections. The attorney who is making objections, however, needs to have the microphone "on."

Using exhibits on a screen share may only be feasible if the arbitrator has two screens. If the arbitrator does not use multiple screens, the screenshare takes away the "speaker" view provided by Zoom. It is important for the arbitrator to be able to see the testifying witness.

Consider a dress rehearsal with your client—using Zoom—so that your client is comfortable.

Court Reporters/Interpreter

If a court reporter is being used, remember to provide the reporter with the Zoom invitation and to let the arbitrator know the name of reporter so that he can be admitted from the waiting room.

Because the reporter is remote, the hearing is likely to take a bit longer, so that the reporter can ask persons to repeat what they've said, to ask for spellings, etc. Similarly, if an interpreter is being used, be mindful of the delays involved in translation. While court reporter and translator issues exist in in-person hearings, such delays seem to be extended in virtual arbitrations because of the delay. Being mindful of this, however, should help counsel be prepared and develop a rhythm.

Chat and Record Features

It is likely that the arbitrator—as host—will disable the "chat" and "record" features. If this is not done, caution is the word. First, it is very easy to send a chat to the wrong person (or "everyone"), and thus the attorney-client communication may not be private and therefore not privileged.

Similarly, remind all participants that they should not "record" the hearing using that Zoom feature (or by using any other device). Only the court reporter's transcript is the official record of the arbitration, if the parties choose to use one at all.

Technical Difficulties

Counsel should give their phone numbers to the arbitrator so that if there is a problem, such as a lack of audio, they can speak with the arbitrator. Counsel should also exchange numbers with the remote witnesses for the same reason. For this reason, all participants should "dial" into the meeting at least 15 minutes before the start time, so as to address any technical difficulties that may be encountered.

Breakout Rooms and Breaks

Because the participants are not together, discuss in advance as to what breaks will be taken and how one can ask the arbitrator for one. When on a break—whether a meal break or a "comfort" break—ask the arbitrator if he can put the parties and counsel into break-out rooms.

While breakout rooms are used for caucus sessions in mediation, it can be essential to use them during the arbitration, too. In Zoom, the arbitrator moves the participants into the designated break-out rooms. Optimally, you would have a room for each party. The arbitrator should set this up in advance, although it is feasible for break-out rooms to be added during the Zoom arbitration. Besides having a breakout room for each side (or party), the arbitrator should also set up a room for all counsel (to use for side-bars with the arbitrator outside the earshot of witnesses), or where counsel can speak outside the earshot of the arbitrator. The arbitrator will likely set up a break-out room just for the arbitrator to be used during breaks. Discuss with the arbitrator if a breakout room will be needed for sequestered or for witnesses during breaks.

Conclusion

Zoom arbitrations mimic the in-person hearing to a great extent. While preparation is always important to the success of any evidentiary hearing, when it is being conducted via Zoom, early preparation and discussion with opposing counsel and the arbitrator is essential to ensuring a successful and smooth-running virtual hearing.

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Overview of Experts in New York State Court Practice

David A. Loglisci Brenna R. Strype

This article discusses important considerations, practices, and procedures with respect to the retention and disclosure of experts in New York state court litigation.[1]

At the outset, it is essential to consider whether the expert will be a consulting or testifying expert. A consulting expert does not testify at trial, but instead, is retained to assist the attorney in interpreting the case, evaluating the evidence, and/or preparing the case for trial. A testifying expert, on the other hand, is retained to give opinion testimony at trial, which will aid the fact finder in its evaluation of the evidence.

That distinction is critical because the obligation to disclose to the opposing party information concerning an expert applies only to a testifying expert. In New York state courts, CPLR 3101(d)(1) governs expert disclosure and requires that:

> Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. (Emphasis added)

Unlike testifying experts, consulting experts "are generally seen as an adjunct to the lawyer's strategic thought processes thus qualifying for complete exemption from disclosure."[2]

Accordingly, a consulting expert's reports, conclusions, and conversations with the attorney generally are not required to be disclosed, since they are considered attorney work product and/or material prepared in preparation for litigation. However, parties should take careful note that if they later decide to have a consulting expert testify at trial, then the previously undiscoverable material will become discoverable.

To preserve the privileges and protections against disclosure, the consulting expert should be hired by counsel, not the client, and should undertake his/her work at the direction and request of counsel.[3]

To obtain expert witness disclosure, a formal demand must be made through a discovery demand, not simply as a part of a demand for a bill of particulars, since the latter is not a disclosure device.[4] A failure to comply with expert disclosure requirements could result in the preclusion of the expert's testimony, which may be fatal to the client's case.

Notably, the CPLR does not contain a deadline for the retention of an expert or compliance with a demand for expert disclosure. Instead, CPLR 3101(d)(1)(i) provides, in relevant part:

> [W]here a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just.

Despite the requirement that a party show "good cause" for the late retention and disclosure of an expert, the Appellate Division, Second Department, in *People v. Rowan*, has held that "CPLR 3101(d)(1)(i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party."[5] The Second Department noted in *Rowan* that "disclosure of the expert information was not made on the eve of trial since the plaintiff had two weeks within which to review the material prior to the date when the trial was scheduled to begin… [and] any potential prejudice to the plaintiffs could have been eliminated by an adjournment of the trial."[6] However, in *Caccioppoli v. City of New York*, the Second Department held that the trial court should have precluded an expert from testifying, where the defendants provided disclosures one day before trial and failed to show good cause for the late retention of the expert, and the expert's testimony raised "a new theory not previously disclosed."[7] Moreover, an "inference of an intentional withholding" of expert disclosure may be found where there is a long delay between the retention and disclosure of the expert.[8] When seeking to preclude an opposing party's expert, it is important to try to show actual prejudice resulting from the late disclosure.[9]

Although CPLR 3101(d) does not have a time requirement for the retention or disclosure of an expert, a deadline may be imposed by a preliminary conference order or court rule. For cases in the Commercial Division, Rule 13(c) of the Rules of the Commercial Division states that expert disclosure must be "completed no later than four months after the completion of fact discovery."[10]

The scope of expert disclosure is far more limited in New York state court than in federal court. Most importantly, unlike in federal court, New York state court practice generally does not require disclosure of experts' reports or depositions of experts, absent a court order based on special circumstances. There are exceptions, however. Rule 13(c) of the

See EXPERTS, Page 21

To Our Fall 2020 COVID Help Law Student Volunteers, Mentors, and NCBA Volunteer Attorneys.

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WE CARE Thanksgiving Drive

Although WE CARE was unable to hold its traditional Thanksgiving Day luncheon at Domus due to the Pandemic, the Advisory Board made certain that families in need in Nassau County would still receive a Thanksgiving meal with all the trimmings.

Thanks to NCBA caterer, Esquires Fine Dining, and with the help of NCBA staff, 200 Thanksgiving boxed dinners were prepared and distributed to 11 local non-profit organizations who serve our community.

Special thanks to all who donated to the WE CARE Thanksgiving Drive this year. It is thanks to your kindness and generosity that we were able to make Thanksgiving special for community members in need.

Photos by Hector Herrera

WE CARE Wishes to Thank

Hon. Andrea Phoenix, Chair • Esquire Fine Dining

Bridget Ryan, WE CARE Coordinator

Special thanks to those who volunteered their time:

Jayson J.R. Choi
Joseph Gentile
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Special thanks to the generous donors who contributed to the WE CARE Thanksgiving Meal Drive:

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2020-2021

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NCBA Committee Meeting Calendar
Dec. 8, 2020 -Jan. 13, 2021

Please Note: Committee Meetings are for NCBA Members. Dates and times are subject to change. Check www.nassaubar.org for updated information.

CIVIL RIGHTS
Bernadette K. Ford
Tuesday, December 8
12:30 p.m.

LABOR & EMPLOYMENT LAW
Matthew B. Weinick
Tuesday, December 8
12:30 p.m.

ACCESS TO JUSTICE
Rosalia Baiamonte/Kevin P. McDonough
Wednesday, December 9
12:30 p.m.

WOMEN IN THE LAW
Edith Reinhardt
Wednesday, December 9
12:30 p.m

MATRIMONIAL LAW
Samuel J. Ferrara
Wednesday, December 9
5:00 p.m

GENERAL SOLO SMALL PRACTICE MANAGEMENT
Scott J. Limmer
Monday, December 14
12:30 p.m.

ALTERNATIVE DISPUTE RESOLUTION
Marilyn K. Genoa/Jess Bunshaft
Tuesday, December 15
12:30 p.m.

LGBTQ
Charile Arrowood/Byron Chou
Wednesday, December 16
9:00 a.m.

BUSINESS LAW, TAX AND ACCOUNTING/SURROGATES COURT ESTATES & TRUSTS
Jennifer A. Koo/Scott L. Kestenbaum-Business Brian P. Corrigan-Surrogates Court
Wednesday, December 16
12:30 p.m.

APPELLATE PRACTICE
Jackie L. Gross
Thursday, December 17
12:30 p.m.

INTELLECTUAL PROPERTY
Frederick J. Dorchak
Thursday, December 17
12:30 p.m.

EDUCATION LAW
John P. Sheahan/Rebecca Sassouni
Thursday, December 17
12:30 p.m.

DISTRICT COURT
Roberta D. Scoll/S. Robert Kroll
Friday, December 18
12:30 p.m.

REAL PROPERTY LAW
Alan J. Schwartz
Wedneaday, January 6, 2021
12:30 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Joshua D. Brookstein
Thursday, January 7
12:45 p.m.

PUBLICATIONS
Christopher J. DelliCarpini/Andrea M. DiGregorio
Thursday, January 7
12:45 p.m..

SURROGATE'S COURT ESTATES & TRUSTS
Brian P. Corrigan
Monday, January 11
5:30 p.m.

CIVIL RIGHTS
Bernadette K. Ford
Tuesday, January 12
12:30 p.m.

LABOR & EMPLOYMENT LAW
Matthew B. Weinick
Tuesday, January 12
12:30 p.m.

MATRIMONIAL LAW
Samuel J. Ferrara
Wednesday, January 13
5:00 p.m.

In Brief

Forchelli Deegan Terrana LLP ("FDT") Co-Managing Partner Jeffrey D. Forchelli announces the following nineteen attorneys for being selected to the 2020 New York Metro Super Lawyers list: **Joseph P. Asselta** (Construction Litigation); **William F. Bonesso** (Land Use & Zoning); **Frank W. Brennan** (Employment & Labor); **Joseph V. Cuomo** (Mergers & Acquisitions); **Andrew E. Curto** (Business Litigation); **Daniel P. Deegan** (Real Estate); **Kathleen Deegan Dickson** (Land Use & Zoning); **Jeffrey D. Forchelli** (Land Use & Zoning); **Gregory S. Lisi** (Employment & Labor); **Gerard R. Luckman** (Bankruptcy: Business); **Mary E. Mongioi** (Estate & Trust Litigation); **Elbert F. Nasis** (Civil Litigation: Defense); **James C. Ricca** (Banking); **Brian R. Sahn** (Real Estate); **Judy L. Simoncic** (Land Use & Zoning); **Peter B. Skelos** (Appellate); **John V. Terrana** (Real Estate); **Russell G. Tisman** (Business Litigation) and **Andrea Tsoukalas Curto** (Land Use & Zoning). FDT warmly congratulates partner and friend, **Daniel P. Deegan**, on being selected as a *Long Island Business News* 2020 Long Island Business Hall of Fame inductee. FDT is also pleased to announce that, in addition to the *Jeffrey D. Forchelli Endowed Scholarship*, awarded to an entering student who is civic-minded and has demonstrated an obligation to the larger community, the firm has established the *Forchelli Deegan Terrana LLP Annual Scholarship*, awarded to an entering law student on the basis of demonstrated academic achievement.

Jerome Wisselman, Founder and Senior Law Partner of the firm Wisselman, Harounian & Associates, P.C. was honored as a Best Lawyer by *U.S. News & World Report* consecutively from 2019 to 2021. The firm was also selected as Best Law Firm by *U.S. News & World Report* all three years as well. **Jacqueline Harounian**, a partner in Wisselman, Harounian & Associates, has co-authored a book, *#Networked: How 20 Women Lawyers Overcame the Confines of COVID-19 Social Distancing to Create Connections, Cultivate Community, & Build Businesses in the Midst of a Global Pandemic.*

Bond, Schoeneck & King's Garden City office has been recognized by the 2021 *U.S. News-Best Lawyers®* "Best Law Firms" in four categories: Education Law; Employment Law – Management; Labor Law – Management; and Litigation – Labor & Employment

Partners **Justin C. Frankel** and **Jason A. Newfield**, founders of the national disability insurance law firm Frankel & Newfield, have been named to the New York Metro Super Lawyers list as two of the top New York metro area lawyers for 2020.

Jennifer B. Cona, Founder and Managing Partner of Genser Cona Elder Law announces that the firm has been ranked among "Best Law Firms" in the 2021 edition of *U.S. News and World Reports*.

Marian C. Rice

Bart Resnicoff of Law Office of Barton R. Resnicoff has been designated on the Super Lawyers for NY Metro area list for the 11th time this year in the areas of matrimonial and family law.

For the ninth consecutive year, **Richard N. Tannenbaum** pf Richard N. Tannenbaum Law Firm has been named to the 2020 Super Lawyers List in the areas of matrimonial and family law.

In collaboration with AARP New York and Schneps Media, **Ronald Fatoullah** of Ronald Fatoullah & Associates will be presenting a three-part virtual series of legal and financial workshops during the month of December. Topics will include the five most important planning documents (especially essential during the pandemic), the new Community Medicaid laws and estate planning. In addition, Mr. Fatoullah will be presenting an educational seminar for the New York ALS Association on the upcoming changes to Community Medicaid Home Care applications and asset preservation techniques.

Weltman & Moskowitz, LLP, founding partner, **Michael L. Moskowitz**, has been named a 2020 Metro New York Super Lawyer in the Creditor-Debtor Rights category.

Steven E. Pegalis, Founder of Pegalis Law Group announces that seven attorneys have been recognized by Super Lawyers for 2020. Every year since 2007, Company Founder Steven E. Pegalis and Managing Partner **Annamarie Bondi-Stoddard** have also been selected by Super Lawyers. Partner **James B. Baydar** has been named to the list for his third year, attorney **Gary M. Nielsen** has been named for seven years, and attorney **Robert V. Fallarino** has been named for nine years. Additionally, Partner **Sanford S. Nagrotsky** has been named a 2020 Super Lawyer and Attorney **Isabel C. Mira** has been named a 2020 Rising Star.

Edward J. Nitkewicz, an 11-year member of the South Huntington Board of Education on Long Island has been named the 2020 winner of NYSSBA President's Award.

Karen Tenenbaum LL.M. (Tax), CPA, tax attorney, has recently been inducted into the *LIBN* Business Hall of Fame. She recently participated in the 2020 Accounting & Tax Symposium and presented webinars on NYS Residency Issues and IRS Collection Issues. Karen and Tenenbaum Law have also both nominated for best attorney and best law firm on Long Island by the Bethpage Best of Long Island 2021 program.

David S. Feather of Feather Law Firm, P.C. has been named a 2020 New York Metro Super Lawyer.

Stephen J. Silverberg of the Law Office of Stephen J. Silverberg, PC, has been selected to the New York Metro Super Lawyers list as one of the top New York metro area lawyers for 2020.

Alan E. Weiner published an article in the October/November 2020 New York State Society of Certified Public Accountants magazine, *The CPA Journal*. entitled "Becoming Successful in Today's Professional World, A Personal Reminiscence," written to give back to new professionals' ideas, based upon his history, that can help them grow and prosper in today's business world.

Joseph A. Quatela, Managing Partner of Quatela Chimeri PLLC welcomes **Robert "Bobby" Preston** to the firm, concentrating in matrimonial and family law.

Bernard Vishnick of Vishnick McGovern Milizio LLP (VMM) congratulates attorneys **Constantina S. Papageorgiou**, **John P. Gordon**, and **Meredith Chesler** for their inclusion in the *Best Lawyers 2021* edition, published December 11. VMM further congratulates Ms. Papageorgiou, a partner in the firm's wills, trusts, and estates and elder law practices, for her recognition in the *LI Herald* "2020 Premier Businesswomen" list, featured in *Herald* community newspapers on December 10. The firm also applauds partner **Andrew A. Kimler**, head of the employment law, commercial litigation, and alternative dispute resolution practices and key member of the LGBTQ Representation Practice, for being named a "2020 Top Rated Lawyer" by *Martindale-Hubbell*, featured in the *New York Law Journal* on December 21. Partner **James F. Burdi**, head of VMM's Special Needs Planning Practice and key member of the Wills, Trusts, and Estates and Elder Law practices, published an article titled "Five Things You Must Include in Your Will" in *LI Herald* newspapers on November 19. Mr. Burdi also conducted a live webinar for CUNY's Queens College titled "Adulting 101: Legal Rights, Responsibilities, and Life Preparedness for Students and Families" on December 2. Partner Constantina S. Papageorgiou announced an ongoing bimonthly webinar series for patients, caregivers, and staff of Parker Jewish Institute for Health Care and Rehabilitation, focusing on Medicaid and estate planning matters. The first is scheduled for January 2021. Meredith Chesler, an associate in VMM's Trust and Estate Administration and Surrogacy, Adoption, and Assisted Reproduction practices, served as a Planning Committee member for the Island Harvest Food Bank Taste of the Harvest annual fundraiser, held on December 9. VMM was a Five Star Sponsor.

Capell Barnett Matalon & Schoenfeld LLP Partners **Robert Barnett**, **Gregory Matalon, and Yvonne Cort** all spoke at the 68th Annual Tax and Estate Conference: Tax Updates Post COVID, held by the Foundation for Accounting Education, on the topics of business losses, estate tax planning, and NYS residency. Partner Gregory Matalon also spoke at the Hispanic Bar Association Su Negocio's virtual program Helping You Get Back to Business. And congratulations to partner Yvonne Cort, who was recognized as a Top 50 Women in Business *by Long Island Business News*.

The In Brief column is compiled by Marian C. Rice, a partner at the Garden City law firm L'Abbate Balkan Colavita & Contini, LLP, where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for 35 years, Ms. Rice is a Past President of NCBA.

Please email your submissions to nassaulawyer@nassaubar.org with subject line: IN BRIEF

The *Nassau Lawyer* welcomes submissions to the IN BRIEF column announcing news, events, and recent accomplishments of its current members. Due to space limitations, submissions may be edited for length and content.

PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.

We Welcome the following New Members

Attorneys	Students
J'Naia L. Boyd	Janelle Marie Eng
Kimberly DeMaro	Margaret Goodman
Jeanine Renee Diehl	Nicholas Romero
Jared S. Kaplan	
Barbara A. Roesch	

WE CARE ...

Continued From Page 1

procedures have to be made for the safety of everyone involved, the WE CARE Fund can still remain a beacon of light for those in need.

Looking at the time, effort, and work that go into all that WE CARE does, it would be difficult to find another group of individuals whose passion, dedication, and generosity rivals that of the members involved with WE CARE. Mister Rogers once said, "We live in a world in which we need to share responsibility. It's easy to say 'It's not my child, not my community, not my world, not my problem.' Then there are those who see the need and respond. I consider those people my heroes." The members of WE CARE see the need, and respond. They share the responsibility, put in the extra work, and help, in any way they can.

If you're looking to stay up to date with WE CARE throughout the year, follow "Nassau Bar Foundation, Inc." on Facebook. If you're interested in giving to the WE CARE Fund, visit nassaubar.org/donate-now, or shop with Amazon Smile. Visit smile.amazon.com and choose Nassau Bar Foundation, Inc. as your charity of choice; Amazon will donate 0.5% of your eligible purchases back to WE CARE!

Residency ...

Continued From Page 7

the shelter-in-place timeframe, and depending on the executive orders in place at the new domicile, establishing any of the "other" factors may have been difficult due to government agencies being closed indefinitely.

Statutory Residency Test

An individual who is not domiciled in New York can still be a resident under the Statutory Residency test. It applies when a taxpayer maintains a *Permanent Place of Abode* in New York for substantially all of the year and spends more than 183 days in the state. Snowbirds, who successfully change their domicile to another state but keep a place in New York, can fall into this category. If they spend too many days in New York, they end up being treated as statutory residents and taxed accordingly. It should be noted that statutory residency is only important for income tax purposes, while domicile is relevant to both income and estate taxes.

COVID-19 Problems

The COVID-19 crisis may have led some taxpayers to change their activities in such a way as to affect their residency for tax purposes. Starting in 2021, state auditors are likely to examine the following issues to ascertain residency:

- **How much time was spent in the state?** Many with multiple homes made decisions about where to shelter based on the severity of COVID-19 in the respective areas, which could cause problems under both the domicile and statutory residency tests.
- **Did the taxpayer become more involved in out-of-state business interests?** As businesses struggled, a part-owner may have taken a more active role in a business located outside the state in which he or she resides, which could impact their residency status.
- **Was a move out of state subsequently negated?** When New York was hard hit by COVID-19, people moved elsewhere. However, auditors will examine the taxpayer's move months or years later. They will be on the lookout for taxpayers claiming a move was a permanent change in domicile, but subsequently the taxpayer took actions that indicated it was really a temporary move to get through the COVID-19 crisis. As a result, they will be judged as a state resident retroactively and get hit with a commensurate tax bill.
- **Did the taxpayer work from home out of convenience or necessity?** Where a taxpayer lives and works in different states, he or she may be subject to taxation in more than one state. However, various rules affect when someone is considered to have worked "in-state," such as whether it was for convenience or necessity.

Recently, New York State has quietly issued guidance on telecommuting outside of the state as a result of the COVID-19 pandemic. Essentially, New York State has confirmed its existing rules that if you are a nonresident and your primary business office is located in New York, those telecommuting days are still considered "days worked in the state unless your employer has established a bona fide employer office at your telecommuting location." The usual factors must be applied to determine if the telecommuting location constitutes a bona fide employer office.

Also note that while the taxpayer may be entitled to a tax credit on earned income, there is no tax credit on intangible income such as interest and dividends. State rules vary so it is important for clients to speak with a tax professional. These and other actions can be problematic for many taxpayers who may have inadvertently put themselves at risk of an audit and significant tax liability.

Advising Clients

Attorneys often are in a position to know a great deal about their clients' lives. Therefore, they are able to anticipate when their clients could face a potential tax residency issue. Informing clients about a potential tax problem is an invaluable service that could prevent or limit exposure.

A client with multiple homes should consult a tax professional (tax attorney and/or accountant) as soon as possible to specifically evaluate the risks of a residency audit. While it may be too late in some instances to fix an existing problem, in most cases there are steps which can be taken to minimize the damage or at least prepare for it financially. If an audit does result, a tax professional is essential to help ensure the client puts the strongest case forward to avoid or minimize liability.

New York State is also facing mounting financial pressures due to the pandemic and lost revenue from closed businesses and unemployment. It appears likely that New York will be more assertive than usual in finding sources of tax revenue. Increasing the number of residency audits can satisfy the need for lost revenue in that audits usually target higher income individuals. As a result, clients need to be properly prepared.

Conclusion

In weighing all of the factors involved, asserting a change of domicile involves more than physically moving out of New York City or New York State or obtaining a driver's license at the new domicile. Given the constraints imposed by the shelter-in-place rules as well as the congruent shutdown of many businesses and government agencies, it may be harder to prove a change of domicile than usual.

While a change of domicile may not be shown to have been established at the time the taxpayer left either New York City or New York State in response to the shelter-in-place orders, it may still be shown, perhaps at a later date. The burden that must be met is substantiating the primary factors by clear and convincing evidence. Consulting a tax professional for assistance is the first step in this process.

Karen Tenenbaum, LL.M. (Tax), CPA is Founder and Managing Partner of Tenenbaum Law, P.C. (www.litaxattorney.com), a tax law firm in Melville which focuses its practice on the resolution of IRS and N.Y.S. tax controversies. Karen can be reached at ktenenbaum@litaxattorney.com and (631) 465-5000.

Marisa Friedrich is a senior managing attorney at Tenenbaum Law, P.C. and is licensed to practice law in New York. She concentrates on resolving federal and N.Y.S. tax controversies, including issues involving income tax, residency audits, responsible person assessments, and tax collections. Marisa can be reached at mfriedrich@litaxattorney.com and at 631-465-5000.

Roundup ...

Continued From Page 3

"cash for keys" deal to vacate the house in exchange for a cash payment.

However, the Judge did not decide the separate and ultimate question of whether the actual sale transaction would be approved under 11 U.S.C. § 363(b) as being in the best interests of the estate.

Patrusky: Attachment of Judicial Liens to Debtor's Property

In *In re Patrusky*, the debtor owned a home worth about $800,000.[8] After incurring significant debt, she transferred the house to her daughter and son-in-law for about $500,000. After that transfer, a creditor entered a judgment for about $480,000 in the county where the home was located.

In an attempt to enforce the judgment, the creditor brought an action to avoid the transfer as a fraudulent conveyance. The house was then transferred back to the debtor for no consideration, and then she filed bankruptcy. The debtor filed a motion to avoid the judicial lien as impairing her homestead exemption under 11 U.S.C. § 522(f), claiming that the total of the judgment, the mortgages on the house, and the homestead exemption exceeded the value of the house.

Judge Trust denied the motion and was affirmed by the District Court. On appeal to the Second Circuit, the ruling was affirmed again, relying on the U.S. Supreme Court ruling in *Farrey v. Sanderfoot*[9] and the Second Circuit's ruling in *In re Scarpino*[10] The Court found that a judicial lien can be avoided under Section 522(f) only if the lien attached to property the debtor already owned. Here, the judgment lien became fixed simultaneously upon the debtor's reacquiring title to the home.

Finally, the debtor argued that by virtue of the fraudulent transfer being void (as opposed to voidable) she still retained an equitable interest in the property. The Second Circuit concluded that since such transfers are voidable, and not void, the judicial lien in question attached simultaneously with the debtor's acquisition.

Jeff Morgenstern maintains an office in Carle Place, where he concentrates in bankruptcy, creditors rights, and commercial and real estate transactions and litigation.

1. *Plaza v. Heilbron*, No. 1-18-01055-ess, 2020 Bankr. LEXIS 106 (Bankr. E.D.N.Y. Jan. 15, 2020).
2. *Hlady v. Key Bank N.A.*, 616 B.R. 257 (Bankr. E.D.N.Y. 2020); *see also Brunner v. New York State Higher Educ. Svcs. Corp.*, 831 F.2d 395 (2d Cir. 1987).
3. *In re Telles*, 2020 Bankr. LEXIS 1167 (Apr. 30, 2020).
4. *Id.* (citing *Roman Catholic Archdiocese of San Juan v. Acevedo*, 140 S. Ct. 696 (2020)).
5. *In re Ventura*, 615 B.R. 1 (Bankr. E.D.N.Y. 2020).
6. 11 U.S.C. § 1190(3).
7. Case No. 20-10948 (Bankr. E.D.N.Y. Sept. 25, 2020).
8. 8-16-75552-ast (Bankr. E.D.N.Y. Apr. 25, 2018), *aff'd, Patrusky v. Jungle Treats, Inc.*, 599 B.R. 202 (E.D.N.Y. 2019), *aff'd, In re Patrusky*, 797 Fed.Appx. 653 (2d Cir. 2020).
9. *Farrey v. Sanderfoot*, 500 U.S. 291 (1991).
10. *In re Scarpino*, 113 F. 3d 338 (2d Cir. 1997).

Experts ...

Continued From Page 16

Rules of the Commercial Division expressly provides for the "identification of experts, exchange of reports, and depositions of testifying experts."[11]

While expert disclosure under the CPLR is limited, the disclosure should identify the documents the expert relied on in forming his/her opinion, the theories of liability that will be relied upon, and the nature and relevance of the expert's testimony.[12]

It is essential to comply with all applicable expert disclosure requirements and procedures to avoid the preclusion of expert testimony. Further, even if not required, an early, meaningful exchange of expert information, including reports, may lead to a favorable settlement.

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1. This article does not discuss the rules and procedures that are specific to experts in medical malpractice cases.
2. *Santariga v. McCann*, 161 A.D.2d 320, 321 (1st Dept. 1990); *see also Oakwood Realty Corp. v. HRH Const. Corp.*, 51 A.D.3d 747 (2d Dept. 2008).
3. 2 N.Y. Practice, Com. Litig. in New York State Courts § 5:19 (5th ed.).
4. *Coleman v. Richards*, 138 A.D.2d 556 (2d Dept. 1988).
5. *Rowan v. Cross Cty. Ski & Skate, Inc.*, 42 A.D.3d 563, 564 (2d Dept. 2007) (trial court properly denied motion to preclude expert from testifying, where defendant served expert disclosure two weeks before trial).
6 .*Id.*
7. *Caccioppoli v. City of New York*, 50 A.D.3d 1079, 1080 (2d Dept. 2008),
8. *See Kassis v. Teacher's Ins. & Annuity Ass'n*, 258 A.D.2d 271, 272 (1st Dept. 1999).
9. *See Cela v. Goodyear Tire & Rubber Co.*, 286 A.D.2d 640, 640 (1st Dept. 2001) (despite evidence of intentional withholding of expert disclosure until after note of issue was filed, it was appropriate to give plaintiff "a final opportunity to comply" with CPLR 3101(d)(1) demand, "in view of [defendant's] failure to demonstrate any actual prejudice").
10. 22 NYCRR §202.70.
11. *Id.*
12. *Inwood Sec. Alarm, Inc v. 606 Rest., Inc.*, 35 A.D.3d 194 (1st Dept. 2006); *Durant v. Shuren*, 33 A.D.3d 843 (2d Dept. 2006).

Judge ...

Continued From Page 6

ation of the Pro Bono Mediation Program and the formation of the E.D.N.Y. Consumer Lawyer Advisory Committee.

The bankruptcy bar of the Eastern District of New York congratulates Judge Trust in being appointed to Chief Judge and has no doubt that the Court will continue to flourish under his stewardship.

Matt Spero is a partner in the Bankruptcy Department at Rivkin Radler LLP, handling creditors' rights, business reorganizations, restructurings, acquisitions, and liquidations before the bankruptcy courts in the eastern and southern districts of New York.

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