THE SUFFOLK LAWYER

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Cohalan Truly Does Care For Kids

By Laura Lane

The Great Hall at the Suffolk County Bar Association was filled to capacity on March 20 when so many gathered to support the annual Cohalan Cares for Kids. The event benefits the EAC Network's Suffolk County Children's Center at Cohalan Court. SCBA member Cheryl Zimmer was honored this year, the eighth year that the SCBA has hosted Cohalan Cares.

SCBA President Justin Block described the event as great. "We are thrilled that so many people came out to honor Cheryl and support such a worthy cause," he said.

Andrea Ramos-Topper, the EAC division director, thanked the SCBA for its support and in particular, Jane LaCova, the Association's executive director.

"Children do not belong in the courtroom," Ms. Ramos-Topper said. "The EAC is providing a critical service."

The Children's Center offers a place for young children to go while their parents attend to their court business. The children, who are cared for by trained, professional childcare providers and volunteers, engage in supervised free play, arts and crafts, and age appropriate computer games. They have access to a library of children's books and are permitted to take one book home each day. They also receive healthy snacks.

About eight years ago funding was cut for this vital program. Cohalan Cares for Kids was subsequently created to support

COHALAN CARES (continued on page 16)

PHOTO BY BARRY SMOLOWITZ

SCBA member Cheryl Zimmer, center, was honored at Cohalan Cares for Kids, where she was thanked by Andrea Ramos-Topper, the EAC division director and Lance W. Elder, president and CEO, for her efforts. Cohalan Cares benefits EAC Network's Suffolk County Children's Center at Cohalan Court.

PHOTO BY ODE JEAN-CLAUDE

Celebrating Women at Cohalan Court Complex

District Administrative Judge Hon. C. Randall Hinrichs and the Suffolk County Judicial Committee on Women in the Courts presented a program to mark Women's History Monty on March 29 at the Cohalan Court Complex. ***See story on page 7.***

PRESIDENT'S MESSAGE

Spring is Here

JUSTIN BLOCK

By Justin Block

It's hard to believe, but spring is here. Look around and you'll see signs that winter is behind us, as are the associated doldrums. Time to take a deep breath (but try to avoid the pollen) and charge ahead.

The Bar Association has been doing just that. We continued to lead the way in attempting to get an increase for lawyers who agree to serve on the 18B panels, thereby providing legal services for children and the economically disadvantaged. We sent letters to Chief Judge Janet DeFiore, Governor Cuomo and the legislative leaders, unfortunately to no avail. I do believe, however, that our voice was heard, and, in the spirit of spring and the re-growth it brings with it, we will continue to press for this well-deserved increase for those who do the arduous work of representing the less fortunate and the children, all of whom might otherwise have no voice. A terrific job by President-Elect Lynn Poster-Zimmerman in carrying the banner. I'm sure she will continue to lead this charge next year during her presidency until the job is completed.

In connection with this effort, as well as many others, we have resurrected the Legislative Breakfast under the deft leadership of Treasurer and Chair of the Legislative Review Committee, Vincent J. Messina, Jr. This meeting, which we expect will become an annual event, will bring together the leaders of the bar with legislative leaders on the county and state level. While this year's breakfast will serve as a chance to get re-acquainted with our legislators, we will still have the opportunity to exchange ideas and to fill them in on our legislative priorities and goals on the local, county and state levels. Again, our voices will be heard by those whose actions affect our members. Kudos to Vinnie Messina whom I have had an opportunity to watch up close (since we are at the

PRESIDENT'S MESSAGE (continued on page 26)

BAR EVENTS

Annual Meeting
Monday, May 6 at 6 p.m.
Great Hall
Join your colleagues at the Annual Meeting for the elections of officers, directors and members of the Nominating Committee. It is also an evening to honor members with 50 and 60-year awards, awards of recognition, Academy awards, and the High School Scholarship Award presentation.

Annual Peter Sweisgood Dinner
Thursday, May 9, at 6 p.m.
Watermill Caterers, Smithtown
Hosted by the Lawyers Helping Lawyers Committee, the Peter Sweisgood Dinner will feature a number of distinguished guest speakers and will honor James M. Marrin. $75 per person.

111th Installation Dinner Dance
Friday, June 7, at 6 p.m.
Cold Spring Country Club, Cold Spring Harbor
Lynn Poster-Zimmerman will be installed as Suffolk County Bar Association President for the 2019-2020 administration, as well as the officers, directors and the Dean of the Academy of Law. John L. Juliano will receive the Lifetime Achievement Award and the Directors' Award will be presented to the members of the 2018-2019 Judicial Screening Committee for their dedication and exemplary service to the traditions of the legal profession. Celebrate the accomplishments of your colleagues. For further information, call Jane LaCova at the SCBA.

The Annual Tri-County Elder
Law Committee Dinner
Wednesday, June 12 at 6 p.m.
Jewel Restaurant, Melville
Call Jane LaCova at the SCBA for further information

Suffolk County Bar Association

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Our Mission

"The purposes and objects for which the Association is established shall be cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of the members."

Write for The Suffolk Lawyer

Did you ever wonder how you could get involved in your bar association's monthly newspaper? Do you have a great idea for an article or believe your colleagues would benefit from information you've recently learned? Or do you just enjoy writing?

You too can write for The Suffolk Lawyer. Writing for the paper is open to all members and doing so is encouraged. The Suffolk Lawyer is a reflection of the fine members that belong to the Suffolk County Bar Association. Why not get involved? For additional information please contact Editor-in- Chief Laura Lane at scbanews@optonline.net or call (516)376-2108. Look forward to hearing from you!

Important Information from the Lawyers Helping Lawyers Committee

THOMAS MORE GROUP TWELVE-STEP MEETING

Every Wednesday at 6 p.m.,
Parish Outreach House, Kings Road - Hauppauge
All who are associated with the legal profession welcome.

LAWYERS COMMITTEE HELP-LINE: 631-697-2499

SCBA Calendar

All meetings are held at the Suffolk County Bar Association Bar Center, unless otherwise specified. Please be aware that dates, times and locations may be changed because of conditions beyond our control. Please check the SCBA website (scba.org) for any changes/additions or deletions which may occur. For any questions call: 631-234-5511.

OF ASSOCIATION MEETINGS AND EVENTS

MAY 2019

2 Thursday Animal Law, 8:00 a.m., Board Room
6 Monday SCBA's Annual Meeting, Election of Officers, Directors and members of the Nominating Committee. Awards of Recognition, Golden Anniversary Awards and Annual SCBA High School Scholarship Awards. 6:00 p.m., Bar Center. $60 per person. Call Bar Center for reservations...
7 Tuesday Appellate Practice, 5:30 p.m., Board Room.
8 Wednesday Education Law, 12:30 p.m., Board Room.
9 Thursday Annual Peter Sweisgood Dinner, The Watermill Restaurant, 711 Smithtown Bypass, Smithtown. $75 per person. Honored Guest: James M. Marrin, Esq, Guest Speaker, Mark Murray Esq. Call Bar Center for Reservations.
Surrogate's Court, 6:00 p.m., Board Room.
13 Monday Executive Committee, 5:30 p.m. Board Room.
15 Wednesday Elder Law & Estate Planning, 12:15 p.m., Great Hall
16 Thursday Family Court/Matrimonial Law, 6:00 p.m., Bonwit Inn, Commack.
20 Monday Board of Directors, 5:30 p.m., Board Room.
23 Thursday Real Property, 6:00 p.m., Board Room.
28 Tuesday ADR, 5:30 P.M., Board Room.

JUNE 2019

4 Tuesday Appellate Practice, 5:30 p.m., Board Room.
Professional Ethics & Civility, 6:00 p.m., Great Hall.
7 Friday 111th Annual Installation Dinner Dance, 6:00 p.m., $175 per person, installing Lynn Poster- Zimmerman as President, Cold Spring Harbor Country Club, 22 East Gate Drive, Huntington, NY 11743. Call Bar Center for reservations or to purchase an Installation Journal ad.
12 Wednesday **SAVE THE DATE:** Annual Tri-County Elder Law Dinner, Jewel Restaurant, 400 Broad hollow Road, Huntington. Further details forthcoming.
Education Law, 12:30 P.M., Board Room.
20 Thursday Board of Directors, 5:30 p.m., Board Room.
25 Tuesday ADR, 5:30 p.m., Board Room.

THE PRACTICE PAGE

Obtaining Out-of-State Witnesses and Documents

Hon. Mark C. Dillon

Subpoenas *duces tecum* and *ad testificandum* cannot be served upon non-parties who are out of state (Judiciary Law 2-b[1]). Doing so, where there is no jurisdictional predicate over the non-parties, renders such subpoenas void and unenforceable.[1] There are cases, conceivably, where out-of-state documents or witnesses are crucial to a party's claim or defense. What is an attorney to do if non-party materials or witnesses, which are out of reach under the normal subpoena processes, are needed to by a party to establish claims or defenses via summary judgment or at trial? The answer lies in either CPLR 3108 *or* the Uniform Interstate Deposition and Discovery Act ("UIDDA"), depending on the state where the non-party documents or witnesses are located.

CPLR 3108, which has been on the books since 1962, permits a New York court to execute a "commission" reflecting an official seal, requesting that it be honored by an out-of-state court. The commission, when presented to the out-of-state court, should result, as a matter of comity, in the execution by the foreign court of a subpoena that would be served and enforceable in the foreign state. If the subpoena seeks non-party documents, the responsive records may be transmitted directly to counsel in the normal course. If the subpoena is for either pre-trial deposition or trial testimony of a non-party witness, the testimony is to be taken within the foreign state. While CPLR 3117(a)(3)(ii) permits the reading the transcript at trial, Uniform Rule 202.15 and CPLR 3113(b) also permit its videotaping for use in accordance with that statute.

HON. MARK C. DILLON

New York courts will not issue commissions under CPLR 3108 merely upon request. The party seeking the commission must meet a two-part test. First, the party must show that the foreign state witness or document custodian will not cooperate with a discovery notice and will not otherwise voluntarily come to New York to participate in the pre-trial discovery or trial.[2] The second test is to show that the non-party document or testimony is material or necessary to the party's claim or defense.[3]

The commission procedure of CPLR 3108 can sometimes be too time-consuming, particularly when there is a fast-approaching trial date, as it is layered with two different courts, a process server, and a non-party responder. New York adopted the streamlined procedures of the UIDDA in 2011, as embodied in CPLR 3119. Under the UIDDA, the party seeking out-of-state documents or deposition testimony may present a validly-executed New York subpoena to the clerk of the county in the foreign state where the discovery or testimony is sought. The clerk is to ministerially and promptly issue a parallel foreign state subpoena for service upon the person to whom it is directed. The language of the UIDDA does not speak to trial testimony, but only to discovery. The subpoena is to be served, and any discovery issues resolved, under the laws of the foreign state.[4] While attorneys in out-of-state actions may utilize CPLR 3119 to obtain records or deposition testimony from non-party New Yorkers, New York attorneys may only use the UIDDA in the 38 other states that have adopted it so far.[5] Attorneys who wish to use the UIDDA must first determine that the foreign state has adopted it, and if so, carefully follow the language of the version adopted by that foreign state. Otherwise, attorneys must use the more cumbersome commission procedure of CPLR 3108.

CPLR 3108 and the UIDDA are not needed if out-of-state document custodians or witnesses are cooperative. But since the acquisition of documents or testimony is sometimes crucial from uncooperative sources, and the time elements of CPLR 3108 or the UIDDA are controlled by others, attorneys should utilize the available procedures as soon as practically possible in litigations.

Note: Mark C. Dillon is a Justice of the Appellate Division, Second Department, an Adjunct Professor of New York Practice at Fordham Law School, and an incoming author of the [6]CPLR Practice Commentaries in McKinney's.

1. Peterson v Spartan Industries, Inc., 40 AD2d 807, aff'd., 33 NY2d 463.
2. Susan A. v Steven J.A., 141 AD2d 790, 791.
III. Misfud v City of New York, 208 AD2d 701, 702.
3. CPLR 3119(a)(4), (b).
4. Uniform Law Commission, available at www.uniformlaws.org/Act.aspx?title=Interstate%20Depositions%20and%20Discovery%20Act.

Meet your SCBA Colleague

By Laura Lane

Paul Devlin, a personal injury attorney at Russo & Tambasco, was once a competitive wrestler. He even earned a bronze medal at the United States Olympic Team Trials competing on the Army's Greco-Roman Wrestling Team. Wrestling shaped who he is today.

You enlisted in the Army when you were 17 and after basic training, was pulled out of normal duties and stationed at an Olympic training center in Colorado. What happened next? The Army sponsored me to compete in the Olympics and I did wrestle for four years which was a great experience. There is one person chosen in each weight class to compete at the Olympics but you have to win a gold. I won the bronze.

Was there anything you brought to your career as an attorney from your experience on the Army's Greco-Roman Wrestling Team? Yes, for sure. It formed a lot of the philosophy I apply to everything. It instilled in me a strong work ethic, a desire to work through challenges, an ability to deal with adversity and it helped me to get used to being under pressure. I learned how to set lofty goals, even while encountering failure along the way.

Why did you stop wrestling? I hurt my back during a practice and it's never been the same. I had to leave the military and wrestling because of the injury. What I took away was that every hardship or failure has the seeds of something greater. I don't think I would have met my wife or gone to law school if I had continued wrestling.

You went to college after you left the Army. Yes, and I met my wife while I was an undergrad and she was in law school. I thought she was a very thoughtful, caring and bright person. I admired her and seeing the energy she brought to the world as a law student and then as a lawyer gave me the idea and motivation to pursue the same path.

What appealed to you about becoming a lawyer? The idea of being able to be the voice for someone who couldn't represent themselves. I like the idea of furthering someone's cause. And I like having a positive impact on the world. Lawyers in my experience are people of high character, work hard and are honest. They want to help the world be a better place. I wanted to be part of that.

What was it like to intern at the NYS Grievance Committee? Before I even started to practice I was given an inside look of what could go wrong, the things that could have easily been avoided if you are doing the right thing. A lot of times it's neglect or oversight that gets an attorney in trouble. We need to prioritize being there for our clients.

You joined Russo & Tambasco as GEICO staff counsel. What have you enjoyed about working there? The other attorneys here are very good, hard working and willing to help if I have any questions. I've taken quite a few jury verdicts since I've been here and being here has made me a much better attorney.

You work with Dan Tambasco, who is the second vice president of the SCBA. Yes, he is very involved in the bar association. Working with him in the same office and seeing his example as a leader at the bar is helpful.

Were you a SCBA member before you joined Russo &Tambasco? Yes. But in my first week at the firm I went to lunch with Dan and asked how I could be successful. He said to join the Negligence Committee and get involved at the Academy. I took his advice and I'm glad I did.

You are a former co-chair of the Young Lawyers Committee. What were some of the challenges that you faced to get younger attorneys to join the bar association? If they don't understand the benefits of being a member of the Suffolk County Bar Association they may not pay for their membership. We did a lot of events outside the bar association in Huntington Village at restaurants. We had speakers come in and left time to mingle afterwards. But for some young lawyers the firm they work for requires them to be at the office and its hard from them to make events.

You are currently the co-chair of the Membership Services Committee. What have you been working on there? We've tried to enhance the membership experience by adding value to the membership so attorneys will renew and bring colleagues that may not be members. We had an event on how to deal with clients where English isn't the primary language at a Spanish restaurant. The place was packed. We had a craft table at the holiday party to encourage people with children to bring them to the party. We are working to encourage people to stay involved in the bar association.

What have you gained by being a member? That relationships are number one. I met and have developed relationships with so many attorneys from different practice areas. I have benefitted from their knowledge. The Suffolk County Bar Association definitely gives you an opportunity to forge meaningful relationship with your colleagues.

BENCH BRIEFS

By Elaine Colavito

Suffolk County Supreme Court

Honorable Paul J. Baisley, Jr.

Motion for Summary judgment granted language of the subject notice did not indicate any failure within the sewer system, so it failed to place the defendants on notice as to any alleged defective condition.

In *Laura Serrano v. County of Suffolk, Suffolk County Department of Public Works and Suffolk County Sewer District,* Index No.: 36305/2006, decided on Nov. 29, 2018, the court granted the defendants' motion for summary judgment dismissing plaintiff's complaint. In rendering its decision, the court noted that the defendants established their prima facie entitlement to summary judgment through the submission of affidavits, in which they contend that they conducted a search of the records and files maintained by their respective offices and found no records indicating that the defendant had received prior written notice of the alleged defective condition of the sewer system where this incident occurred.

In opposition, the plaintiff contended that the notice of claim served in February of 2006, after the October 2005 incident, established that the defendants had actual knowledge of the events. Plaintiff did not address that portion of the defendants' motion regarding the lack of written notice prior to the October 2005 incident. Thus, plaintiff's claims involving the October 2005 incident was dismissed. To the extent that plaintiff's opposition could be read to contend that the notice of claim served in February of 2006 served as prior written notice of an alleged defect in the interceptor at the intersection, the court found that it was without merit as the notice of claim stated that the claim arose due to the negligence of the defendants in failing to timely respond to the backup. Since the language of the subject notice did not indicate any failure within the sewer system, it failed to place the defendants on notice as to any alleged defective condition.

Elaine Colavito

Honorable Joseph Farneti

Court denied branch of motion which sought attorney disqualification; petitioner's application for attorney disqualification may not be brought in the context of this proceeding as motion practice in special proceedings is very limited.

In *In the Matter of the Application of Local 342, Long Island Public Service Employees, United Marine Division, International Longshoremen's Association, AFL-CIO (Grievant-William T. Perks) v. Town of Huntington, Huntington Town Attorney's Office, Huntington Town Attorney Cindy Elan-Mangano, Assistant Huntington Town Attorney/Records Access Officer Jacob Turner, Assistant Huntington Town Attorney/F.O.I.L. Officer Deidre Butterfield, Huntington Town Clerk's Office, Huntington Town Clerk Jo Ann Raia, Huntington Deputy Town Clerk Stacy H. Colamussi,* Index No.: 19688/2015, decided on Feb. 2, 2018, the court denied that branch of the motion which sought disqualification of the town's current attorneys from representing the town in connection with the order to proceed to arbitration.

The court noted that in a prior matter, under Index No. 10/23474, the court granted the town's motion for a preliminary injunction; in so ruling, the court effectively stayed arbitration on the issue of damages pending a judicial determination on the matter of attorney disqualification. Local 342, plaintiff-therein did not then proceed to seek a judicial ruling on the matter of attorney disqualification. This proceeding then followed, with Local 342 not only challenging the denial of FOIL requests under CPLR 78 but also seeking to place the unresolved issue of attorney disqualification before the court.

In rendering its decision, the court noted that the petitioner's application for attorney disqualification may not be brought in the context of this proceeding as motion practice in special proceedings is very limited. Article 4 of the CPLR, which governs special proceedings, does not envision any motion practice in such proceedings apart from motion to dismiss on objections in point of law, as here, and corrective motions. Here, the court stated that it could not sever the application and allow it to proceed as an action because the request for disqualification had no meaning or import outside the context of an already-pending or proceeding related to the arbitration. However, since such a proceeding existed and since CPLR permitted subsequent applications concerning an arbitration to be made by motion in the same proceeding in which the first application was made, the petitioner may, if it be so advised, renew its motion for disqualification in that proceeding.

(continued on page 22)

CONSTITUTIONAL/CIVIL RIGHTS

8th Amendment Excessive Fines Clause — Timbs v. Indiana

By Cory Morris

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Unlike other forms of punishment that impose costs on government, fines create revenue[1]. Until *Timbs v. Indiana*, 138 S. Ct. 2650 (2018) ("*Timbs*"), the Supreme Court of the United States ("Supreme Court") "never . . . decided whether . . . the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause."[2]

While all 50 states have a prohibition against the imposition of excessive fines, *Timbs* is characterized as "a sweeping ruling that strengthens property rights and could limit controversial police seizures, such as those done through civil forfeiture, nationwide."[3] Its application to the states in *Timbs*, like Supreme Court Decisions such as *Mapp v. Ohio* (4th Amendment) and *McDonald v. City of Chicago* (2nd Amendment), should reverberate the message that states cannot police for profit and unconstitutional governmental fines and seizures will be challenged.

Cory Morris

Petitioner Tyson Timbs was a first-time offender suspected of a drug sale. After "Timbs . . . pleaded guilty . . . Indiana moved to forfeit the car he was driving when he was arrested: a $42,000 Land Rover, which he had bought with money from his father's life insurance policy."[4] In addition to a punishment and the fines Tyson Timbs paid, Indiana utilized civil forfeiture after the guilty plea to obtain the car; however, as noted by others, "[v]ery often, law enforcement will seize assets of the accused without an actual conviction." The seizure of vehicles prior to conviction is nearly a daily occurrence in neighboring Nassau County, New York. Additionally, the Suffolk County District Attorney's Office was recently the subject of local news concerning the use of asset forfeiture money in awarding bonuses rather than compensating tax payers.

The Excessive Fines Clause was taken verbatim from the English Bill of Rights of 1689. "One of the main purposes of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtor's prison."[5] The Supreme Court in *Browning-Ferris* observed that "that the [Excessive Fines] Clause derives from limitations in English law on monetary penalties exacted in civil *and* criminal cases to punish and deter misconduct." The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, `as punishment for some offense.'"[6] This "notion of punishment . . . cuts across the division between the civil and the criminal law."[7]

The Cruel and Unusual Punishment Clause prevents the imposition of a punishment which is "grossly disproportionate" to the crime committed. Three factors are relevant to this inquiry: the inherent gravity of the offense; the sentences imposed for similarly grave offenses in the same jurisdiction; and sentences imposed for the same crime in other jurisdictions.[8] The Supreme Court in *Browning-Ferris* has recognized that the Excessive Fines Clause is an essential check on the government's tendency to "use the civil courts to extract large payments or forfeitures for the purpose of raising revenue." The Supreme Court in *Browning-Ferris* has explained that "the word 'fine' . . . mean[s] a payment to a sovereign as punishment for some offense." "The Excessive Fines Clause thus `limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.'"[9]

Therefore, the first question in an excessive fines case is whether the fine at issue is punishment. The second step of the excessive fine inquiry is whether the fine is in fact excessive. The Supreme Court in *Bajakajian* has explained that a fine imposed

(continued on page 27)

REAL PROPERTY

Ever-Evolving Statute of Limitations Analysis in Mortgage Foreclosure Actions

By Justin F. Pane

This is part 1 of a series.

Pursuant to CPLR 213 (4), an action to foreclose a mortgage is subject to a six-year statute of limitations period. While the statute has remained unchanged since 1962, the Great Recession of 2008 produced a flood of residential mortgage foreclosure actions which now, 10 years later, forces the statute to be analyzed and reanalyzed so often that nearly every month New York's appellate divisions issue new opinions and interpretations concerning the statute — with each new opinion invariably adding novel (and sometimes diverging) twists to the statute's application.

On the basic fundamental principles underlying the statute of limitations applicable to mortgage foreclosure actions, all four appellate divisions agree that its purpose is fairness to a defendant and that "[w]ith respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid, and the statute of limitations begins to run on the date each installment becomes due. However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt."[1]

Outside of the foregoing agreed upon fundamentals, each new appellate opinion issued concerning the statute of limitations period applicable to mortgage foreclosure actions can generally be characterized one of two ways — i.e., as either providing "more clarity" or "less clarity" to the issue.

The focus of part one of this two-part series concerning the ever-evolving statute of limitations analysis applied to mortgage foreclosure actions is upon recent appellate opinions having fostered uniformity of the law and bringing more clarity to the complex and nuanced nature of these type of cases. In turn, part two of this series will cover several splits currently existing between the appellate divisions on critical mortgage foreclosure statute of limitations issues which, of course, without resolution of these issues by the Court of Appeals, leaves the lower courts and its practitioners with "less clarity" on the issues.

Justin F. Pane

More clarity

Starting on a positive note, on March 13, 2019, in the matter of *Bank of N.Y. Mellon v Dieudonne*,[2] the Second Department finally addressed (and answered) a statute of limitations question of law that has nagged and divided lower courts throughout the state since April 3, 2017 — i.e., the date Honorable Thomas F. Whelan, J.S.C., rendered his scholarly, but controversial, *Nationstar Mtge., LLC v MacPherson* opinion.[3] By way of background, in *MacPherson*, Justice Whelan held that when paragraphs 19 and 22 of the standard Fannie Mae/Freddie Mac form mortgage (uniform instrument form 3033) are read together, they collectively establish that a lender is effectively precluded from accelerating the maturity of the mortgage and calling the entire sum secured thereby immediately due and payable in full, until/unless a judgment is entered.[4] Justice Whelan's well formulated and persuasive theory regarding a lender's inability to accelerate a mortgage loan (even through the filing of a foreclosure action) before the entry of a judgment created a rift of diverging and inconsistent case law throughout the lower courts of New York.[5] Thankfully, this rift was mended the unanimous opinion penned by Associate Justice Robert J. Miller in the matter of *Bank of N.Y. Mellon v Dieudonne*, wherein the Second Department declared, under no uncertain terms, that (i) entry of a judgment is not a condition precedent to the acceleration of a standard Fannie Mae/Freddie Mac form mortgage, (ii) acceleration of the same form mortgage may very well be accomplished by commencement of a foreclosure action, and (iii) *MacPherson* and its progeny are to no longer be followed.[6]

Additionally, in *Milone v US Bank N.A.*[7], the Second Department was able to not only resolve the pivotal, but previously unanswered, question of what is required of a lender to effectively "de-accelerate" a previously accelerated mortgage (i.e., standing and unequivocal notice), but the Court also outlined a general rubric for the lower courts to follow in determining the sufficiency and effectiveness of a lender's efforts to decelerate a mortgage loan, going so far as to provide specific examples of what kind of language and types of evidence the courts may accept or should be wary of when assessing the validity of an alleged deceleration event.[8]

Rounding out the frequently litigated issues concerning the "de-acceleration" of a mortgage loan, the Second Department has now also established through a series of opinions that a lender's voluntary discontinuance of a mortgage foreclosure action cannot be deemed an affirmative act revoking the loan's acceleration of the entirety of the sum due thereunder, as set forth and demanded in the underlying foreclosure complaint, unless the discontinuance papers (e.g., stipulation or motion) explicitly express (i) the lender's revocation of the acceleration, (ii) that the loan is being reinstated to a monthly installment contract, and (iii) the lender's agreement to accept regular installment payments from the borrower.[9]

Note: Justin F. Pane is a litigation attorney at Young Law Group, PLLC, where he provides advice and representation to individuals and businesses in connection with residential and commercial foreclosure actions. His effectiveness as a trial and appellate court litigator is due, in part, to his 10+ years of professional experience in the real estate and mortgage banking industries, as well as to his passion and pursuit to continually better his knowledge and understanding of the law.

1 Freedom Mtge. Corp. v Engel, 163 AD3d 631, 632 (2d Dept 2018) (internal quotations marks & citations omitted); accord CDR Creances S.A. v Euro-American Lodging Corp., 43 AD3d 45, 51 (1st Dept 2007); Lavin v Elmakiss, 302 AD2d 638, 639 (3d Dept 2003); Wilmington Sav. Fund Socy., FSB v Gustafson, 160 AD3d 1409, 1410 (4th Dept 2018).

2 Bank of N.Y. Mellon v Dieudonne,___AD3d___, 2019 NY Slip Op 01732 (2d Dept 2019).

3 Nationstar Mtge., LLC v MacPherson, 56 Misc 3d 339 (Sup Ct, Suffolk County 2017).

4 See, MacPherson, 56 Misc 3d at 348-351.

*5 See e.g., Cypers v US Bank N.A., 2019 NY Slip Op 30549(U), *4 (Sup Ct, Westchester County 2019); Wells Fargo Bank, N.A. v Rodriguez, 62 Misc 3d 1211(A), 2019 NY Slip Op 50104(U), *2 (Sup Ct, Queens County 2019); HSBC Bank, USA, NA v Margineanu, 61 Misc 3d 973, 982-987 (Sup Ct, Suffolk County 2018) (all following MacPherson); contra e.g., Your New Home, LLC v JP Morgan Chase Bank, N.A.,___Misc 3d___, 2019 NY Slip Op 29014, *2 (Sup Ct, Westchester County 2019); Sharova v Wells Fargo Bank, N.A.,___Misc 3d___, 2019 NY Slip Op 29001, *7 (Sup Ct, Kings County 2019); U.S. Bank N.A. v Janes, 2018 NY Slip Op 33393(U), *3 (Sup Ct, NY County 2018) (all rejecting MacPherson).*

*6 Dieudonne, 2019 NY Slip Op 01732 at *3.*

7 Milone v US Bank N.A., 164 AD3d 145 (2d Dept 2018).

8 See, Milone, 164 AD3d at 153-155.

*9 See, Engel, 163 AD3d at 633; accord Bank of NY Mellon v Craig,___AD3d___, 2019 NY Slip Op 00846, *1 (2d Dept 2019); Deutsche Bank Trust Co. Ams. v Smith,___AD3d___, 2019 NY Slip Op 01562, *1 (2d Dept 2019); U.S. Bank Trust, N.A. v Aorta, 167 AD3d 807, 809 (2d Dept 2018).*

WOMEN'S HISTORY MONTH

Women's History Month Celebration at Cohalan Court Complex

By Sarah Jane LaCova

Keeping with the theme Visionary Women of Suffolk County, Champions of Peace and Non-Violence, District Administrative Judge Hon. C. Randall Hinrichs and the Suffolk County Judicial Committee on Women in the Courts presented a marvelous program on March 29 at the Cohalan Court Complex recognizing the amazing efforts of pioneer advocates of social change in the mission to prevent family violence in Suffolk County.

This year's theme, chosen by the National Women's History Project, was a perfect way to recognize the unsung heroes in Suffolk County who have pioneered the use of non-violence to change society.

The committee, chaired by Hon. Isabel E. Buse and Sheryl L. Randazzo, and its members, are to be extoled for their selection identifying early service providers and future visionaries. The keynote speaker the Honorable Mary Margaret Werner, former Chief of the Suffolk County District Attorney's Family Crime Bureau, whose professional contributions to the legal system have had a tremendous impact on the lives of not only the legal community, but litigants and children in Suffolk County as well, shared her remarkable life's journey.

Assistant District Attorney Keri M. Heroz, Deputy Bureau Chief of the Child Abuse and Domestic Violence Bureau was the special honoree. She is an unsung hero who for more than 30 years has dedicated her life to the pursuit of justice in domestic violence cases. ADA Herzog is a respected member of the Suffolk County Executive's Task Force to Prevent Family Violence. As a recognized expert in the field of domestic violence, she is frequently called upon to lecture members of the Suffolk County Police Department, the Suffolk County Sheriff's Department, the Probation Department, health care providers and other advocacy organizations, to mention, but a few, including aiding victims as well as pursuing counseling and monitoring programs for convicted batterers.

Assistant District Attorney Keri M. Herzog was honored by Hon. Laurette D. Mulry and Hon. Karen Kerr, and District Administrative Judge, Hon. C. Randall Hinrichs who presented her with a plaque.

There were suggestions from the Girl Scouts of Suffolk County, the future visionaries, on how to combat bullying in all forms and we were entrained by the Central Islip High School Sweet Adelines, under the direction of Theresa O'Connor. Congratulations and thank you for another outstanding Women's History Month Program to: Hon. Karen Kerr and Laurette D. Mulry, Esq., committee co-chairs; Hon. Isabel E. Buse and Sheryl L. Randazzo, program co-chairs; Elizabeth A. Justesen, Esq.; Kaitlyn Pickford; Martha M. Rogers, Esq.; Cynthia S. Vargas, Esq. and Carrie Vasiluth, Esq.

Note: Sarah Jane LaCova is the executive director of the Suffolk County Bar Association.

FAMILY

You Can't Fix Crazy . . . But Can You Divorce It?

By Vesselin Mitev

Wife sues husband for divorce; husband answers and counterclaims. At some point, husband becomes declared judicially incompetent and is appointed a guardian ad litem (GAL) under CPLR 1201, which provides for such an appointment, if the court finds that, *inter alia*, the party (husband) became an "adult incapable of adequately prosecuting or defending his rights" including, obviously, defending the current divorce proceeding against him.

What now. DRL 170 is explicit. An action for divorce may *only* be maintained "by a husband or wife." In 1943, long before the adoption of the "no-fault" (DRL 170.7) and currently most commonly used ground for divorce, the Court of Appeals held that an incompetent person could not maintain an action for divorce absent contrary statutory authority, see *Mohrmann v. Kob*, 291 NY 181, in refusing to extend the power to the committee of a man deemed insane against his wife, in the context of a separation agreement where a counterclaim for divorce was asserted.

Twelve years prior, in a case out of Seneca County, the court held expressly that such an action could not be maintained to its conclusion, but had to be dismissed without prejudice to renew should the incompetent party regain competency, because

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"The contract of marriage and the state of matrimony is a relationship so sacred and so intimate in its character that a special guardian cannot be called upon to exercise the judgment or choice which a normally minded spouse would have a right to exercise," see *Gould v Gould*, 141 Misc 766, 769 [Sup Ct 1931].

In 1964, in *McRae v. McRae*, 43 Misc.2d 252 (Sup. Ct. Queens County) a Queens Supreme Court judge declined to follow the Court of Appeals in *Mohrmann* and held in a (strained, dissent-citing) opinion relying heavily on that heavy yet threadbare cloak of the "interests of justice:" that the Legislature could never have intended to leave a mentally infirm spouse to the double whammy of either prosecuting or defending a divorce case while being unable to complete it, and linger in legal purgatorium instead. Notably, that case was limited to a divorce action brought on the grounds of adultery, and the *McRae* Court seemed expressly sympathetic to the fact-based circumstances before it.

MHL Article 81, enacted in 1992, and its progeny of subsequent case law have established a marriage where one of the parties lacked capacity can be void, voidable, and annulled even retroactively, with a disposition of the marital property subject to the strictures of DRL 236B. and, it is well settled that an action for a separation may be maintained by a personal representative or a guardian for a party.

But the question is far from settled on whether a divorce action can be commenced or maintained by a person judicially declared incompetent, even with the enactment of the no-fault divorce ground. The only Court of Appeals precedent on the issues seems to indicate that a guardian cannot maintain an action for divorce against the incompetent person's spouse. Given the *McRae* case, in fact, one could compellingly argue that since no-fault necessarily extracts "fault" from the issue of grounds, that is even more reason not to allow the commencement, continuation, or conclusion of a matrimonial matter.

In at least one case, the court denied the motion to dismiss (after one of the parties became incompetent) because it was not timely raised, nor asserted in the answer. Under CPLR 3211(a)(3), a motion to dismiss may be based on the ground that "the party asserting the cause of action has not legal capacity to sue" but that defense is waived if not preserved, see CPLR 3211(e), but reiterated that the *Mohrmann* decision remains controlling, *D.E. v. P.A.*, 52 Misc. 1220(A) (Sup. Ct. Westchester County).

Best practices, then? If you have any inkling that capacity may become an issue, assert lack of capacity to sue as an affirmative defense, or as a reply to a counterclaim, even in a divorce action. It may sound crazy . . . but then again, depending on who you represent, it just may be the basis between obtaining a dismissal or circling around in legal limbo, in perpetuity.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, LLP, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 % devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.

Nineteen Ways to Promote Your Real Estate Practice in 2019

By Andrew Lieb

We have a terrific issue for you in 2019! *The Suffolk Lawyer's* Focus on Real Property Special Edition is a time for us to explore the interplay of real property law with your personal focus as an attorney at law. In a way, every practitioner is a real estate attorney because we always exist on real estate, except for when we are flying and those guys have to land eventually. So, all attorneys should be interested to learn a little about real estate law, but is a little knowledge good or dangerous?

In this edition, Kenneth J. Landau gets the ball rolling by discussing "19 Ways to Promote Your Real Estate Practice in 2019." As only he can do, Mr. Landau reminds us that we need to self-promote in order to stay relevant. Then, Dennis C. Valet demonstrates how to properly self-promote; as the professor, in his article on banking law, "Federal Preemption of State Banking Laws — Are Mortgages and Foreclosures Ripe for Federal Regulation?" Mr. Valet not only share information about our nation's dual charter banking system, he also shows all practitioners what it means to be a substance-first attorney through leveraging the law in client-representation. Next, Jordan Fensterman, of Abrams, Fensterman, Fensterman, shows us what it means to be a healthcare attorney. Beyond navigating licensing, malpractice and the like, Mr. Fensterman explains the ins and outs of the facilities aspect of healthcare in his article, "Preparing Medical and Health Buildings and Facilities for Inspections and Investigations." By reviewing Mr. Fensterman's work, counsel will understand that it is imperative to bring him into any medical facility purchase/sale transaction, as co-counsel, so that the purchaser isn't immediately put out of business by a long list of regulators the day after they open.

Andrew Lieb

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Between studying the pieces by Landau, Valet and Fensterman, we are reminded, as practitioners, of just how large the real estate field is in the law. Yet, going to the bounds of the field is not the only way to promote with substance.

In a basic buy/sell residential deal, clients need attorneys who know what they are doing. Sabine K. Franco and Mark S. Borten are just those attorneys. First, Ms. Franco tackles the often misunderstood Property Condition Disclosure Act in her article, "Understanding the Property Condition Disclosure Statement – why $500 is a Deal." Then, Mr. Borten addresses property tax adjustments incident to estate sales in his article, "The Restored Factor: What it is and How it can Bite Your Purchaser Client Post-Closing." Taken together, these articles are important reminders that transactional counsel should sell through having substance, not by a race to the bottom as a cost-leader. We need to reclaim our field and remind the public that a real estate deal is so much more than busy paperwork and a closing. Both Ms. Franco and Mr. Borten offer so much more than serving as scriveners. They are practitioners who stand out from the crowd by offering value through true legal knowhow and understanding.

Speaking of standing out from the crowd, our final article, by Irwin Izen not only stands out, but it challenges the crowd over at town hall. As you may know Mr. Izen has never been shy about challenging anything and in his article, "Airbnb, You, me & Constitutionality," he asks whether municipal codes, as to transient rentals, are constitutional. We should all learn from Mr. Izen that no one ever remembers the silent conformists, but only those bold enough to take a position and back it up with substance will ever matter. Here is to all of our readers mattering in 2019.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Smithtown and Manhasset. He is a past co-chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for years.

2019 Real Estate Beyond the Closing

By Kenneth J. Landau

One of the reasons it is easier to promote a real estate practice is that there are always new legal developments and the public is always interested in learning about this area of the law. They also need to know how attorneys can be of help to them in real estate related matters.

One simple way to promote a real estate practice is to advertise your concentration in this field and to promote your availability to give useful information, online, at seminars or even over the phone, about buying or selling a house. Other related topics you can educate about can include:

- How to finance a real estate purchaseTypes of loans available to refinance a purchase
- The pros and cons of reverse mortgages
- Reducing your real estate taxes (including types of exemptions)
- Real estate terms you should know
- What you need to know about title searches
- Preventing identity and title theft
- What happens to your property in the event of your death or divorce
- The rights of landlords and tenants
- Tax consequences of buying, selling or owning real estate
- Buying or selling commercial property
- Renting an office, store or commercial property

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You can also target your marketing program to real estate professionals by offering real estate updates for real estate brokers, bankers or others involved in the field.

Once you find one or more topics that you would like to discuss or write about, you can seek out a group or publication interested in carrying your message. Public libraries, community or religious groups and even banks or brokers are interested in offering educational programs for the community. Trade groups are also interested in more sophisticated and focused presentations. Many of these groups have publications or websites where articles on the topics, including a favorable mention of you and your firm, can be included. At all times, it is important to mention how you can help as a real estate attorney and the value of your services.

As part of any program, the information you can include on your website, or discuss at a seminar, can include such topics as:

- Anatomy or chronology of a real estate transaction
- Time table of a real estate transaction
- Glossary of real estate terms
- A description of the parties to a real estate transaction
- The role of each party at a closing
- Types of loans and ways to finance a real estate purchase
- Types of deeds for owning homes
- Protecting your property with proper insurance
- Tips for buyers
- Tips for sellers
- Choosing and using a real estate broker
- Choosing and using a real estate attorney
- Tips for real estate investors
- Understanding short sales and buying foreclosed properties
- Special loan programs available to home purchasers
- How to determine the value of your property

Kenneth J. Landau

Whenever you speak to a potential real estate client, along with your credentials, it is important to emphasize how you "help" them to complete the transaction, your "excellent" customer service and the "value" of the services you provide. You need to convey the message that it doesn't cost but, rather, it can save them money and headaches with your expert representation. You should consider making it easier for them to become your clients by offering a limited free or low cost consultation over the telephone or in person. Remember too (and remind your clients) that you advocate zealously only for them and you will at all times advocate for their interests rather than those of another party in the real estate transaction.

Helping to reduce the knowledge gap in the world of real estate, while also helping to promote your real estate practice, will lead to a satisfied client who will tell others about your wonderful service (and results) and who will contact you when they have other legal problems. It is also important to let a satisfied client know the other related areas of law you also can help them with. Periodically keep in touch with them so they remember you as their go-to real estate lawyer.

Note: Kenneth J. Landau is a partner in the Mineola law firm of Shayne, Dachs, Sauer & Dachs, LLP and concentrates in the areas of negligence, medical malpractice and insurance law. He is a past dean of the Nassau Academy of Law and hosts the weekly radio show, "Law You Should Know," broadcast every Wednesday at 3 p.m. on WHPC 90.3 F.M. (Podcasts or voice stream at www.NCCRadio.org.)

SIDNEY SIBEN'S AMONG US

On the Move…

Richard L. Stern has moved his office to 38 New Street, Huntington, N.Y. 11743. He can be reached at (631) 470-6265 or by email at rstern@rsternlaw.com.

Melissa Scarabino has joined Tenenbaum Law, P.C as a law clerk.

Announcements, Achievements, & Accolades…

James F. Gesualdi, an attorney in Islip, recently spoke before an audience at the Aquarium of the Pacific in Long Beach, California. On Feb. 13, as part of the Aquarium Lecture Series, Gesualdi presented "Shifting from Being Right to Doing Right for Animals," which was also livestreamed. The lecture is available for viewing at http://www.aquariumofpacific.org/multimedia/player/lecture_archive_james_gesualdi. A video aquacast is also available at http://www.aquariumofpacific.org/multimedia/player/james_gesualdi.

SCBA member **Ed Nitkewicz**, the chairperson of the 2019 Laugh Now for Autism Speaks Dinner and Comedy Gala, will hold its annual fundraising event on May 2 at 6:30 p.m. The event is dedicated to raising funds for Autism Speaks on Long Island. It will be held at "The Space" located at 250 Post Avenue, Westbury. The program starts with a dinner reception at 6:30 p.m. For those attending only the comedy show only, general admission tickets are available and the doors at 8:30 p.m.

The Space, http://thespaceatwestbury.com

Karen Tenenbaum and **Leo Gabovich** will speak at the New York State Society CPAs on IRS and NYS Tax Collection. Karen was published in "Long Island Weekly," "Didn't File Your New York Tax Return? 'Fess Up and Avoid Penalties." Ms. Tenenbaum also spoke about residency to a wealth management firm, "Protecting Snowbirds from a New York Residency Audit." And Ms. Tenenbaum and Mr. Gabovich hosted a webinar on NYS Tax Collection and Sales Tax Audits.

Ms. Tenenbaum was published on another occasion in "Long Island Weekly" with the article, "What to Do If You Can't Pay The IRS." She was also quoted in "Bloomberg Quint," "High-Tax States Make It Hard for the Rich to Leave." The Melville-based firm, Tenenbaum Law, P.C., represents taxpayers in IRS & NYS tax matters.

Regina Brandow, Denise Snow, Robert Heppenheimer and Gary Richard, were invited by Stony Brook University, School of Nursing to present on elder care issues to nurses, nursing students, social workers and other medical professionals on April 4. The title of the conference was "Caring for the Elderly: Essential tools to advocate effectively for those in our care and in our community." The conference included topics regarding advance directives, home care benefits, care outside the home, an update on VA benefits and disaster planning for the elderly client.

SCBA Editor-in-Chief **Laura Lane** won at the New York Press Association's 2018 Better Newspaper Contest, in the category of Best Obituary. Some 163 newspapers took part in the 2018 New York Press Association Better Newspaper Contest, submitting a total of 2,743 entries. Ms. Lane also won for In-Depth Reporting, one of NYPA's top honors, as a participant in the yearlong series on guns in Nassau County, called "Safety and the Second," which examined the issue of guns from a variety of perspectives, including those of gun-control advocates, gun owners, student activists, parents, school officials and lawmakers. The series also received the Sharon R. Fulmer Award for Community Leadership.

Congratulations…

To **James F. Gesualdi**, an attorney in Islip, who will receive the American Bar Association 2019 Excellence in the Advancement of Animal Law Leadership Award, which recognizes exceptional work by an Animal Law Committee member who, through commitment and leadership, has advanced the humane treatment of animals through the law. The award will be presented at the TIPS Section Conference Animal Law Awards Reception on Friday, May 3. Jim works extensively with the U.S. Animal Welfare Act and champions ways to improve its administration and enforcement.

Condolences…

To **Lisa Borsella** and her family on the recent passing of her husband, Raymond Borsella.

New Members…

The Suffolk County Bar Association extends a warm welcome to its newest members: **Ronald T. Alber, Edward D. Baker, Pierre Bazile, Harriette N. Boxer, Tina M. Chenery, Catherine Creighton, Matthew J. DeLuca, Hon. Sandra J. Feuerstein, Kevin J. Foreman, Daniel J. Fox, Kyle H. Gruder, Matthew C. Hettrich, Theresa A. Kelly, Brian Kennedy, Danielle H. Lamberg, Chad H. Lennon, Teresa D. Phin, Hon. Lisa R. Rana, Barbara Schwartz, Marguerite A. Smith, Hon. Carmen V. St. George, Jessica St. Germaine, Alexandra J. Struzzieri and Beth C. Zweig.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law: **Kenneth Aube and Robert Pope.**

Preparing Medical and Health Buildings and Facilities for Inspections and Investigations

By Jordan Fensterman

Proper planning by preparing your space prior to inspection, by investigators and auditors, is often the key factor in shutting down further inquiry or investigation. Practitioners do not go into the medical and health fields anticipating having to be prepared for non-medical/health related inspections and inquiries, but in today's environment these issues arise routinely and counsel should be well versed in addressing these inspections and inquiries. There are many reasons why medical or health offices might be visited for an inspection by varying entities. Some of the most common entities who conduct inspections are set forth below as well as tips for preparing for these inspections.

Common entities conducting inspections and investigations

- The New York State Department of Health Office of Professional Medical Conduct.
- The New York State Education Department Office of Professional Discipline.
- Undercover police.
- The Centers for Medicare and Medicaid Services.
- Insurance companies.
- Occupational Safety and Health Administration.
- The Department of Veterans Affairs, Office of Inspector General, Office of Audits and Evaluations.
- U.S. Department of Health and Human Services, Office for Civil Rights.
- The NYSDOH is responsible for the ongoing surveillance and investigation of complaints related to the care provided by hospitals and diagnostic and treatment centers, including ambulatory surgical centers, dialysis centers and primary care clinics.
- The Centers for Disease Control and Prevention.
- Various entities conduct medical records, charts audits, and financial statement audits.
- HIPAA Privacy, Security and Breach Notification inspections involving technological, physical and administrative components.

JORDAN FENSTERMAN

Tips for preparing for an inspection and investigation

Have policies and procedures in place

For providers in charge of a medical practice, clinic, or other health facility, it is imperative to have policies and procedures in place for staff. Following through to confirm compliance with those policies and procedures is a must. This is particularly true when it comes to training medical office or clinic staff.

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Training medical office or clinic staff

Many tough situations could have largely been avoided by having appropriately trained staff on hand. One of the most common mistakes is that a provider has not trained office staff in what to do when an investigator shows up unannounced. Often the provider is not in the office. Providers must train each staff member for this situation. Staff allowing an investigator entry into an office while providing such investigator with information about the office outside of the presence of the provider's counsel are two key mistakes. Staff must be trained to be cordial without providing information to investigators/inspectors. Staff must be trained to request the inspector's or investigator's name, title and contact information and then to kindly ask them to leave the office. If the medical facility or clinic is represented by counsel, it's imperative to have the counsel's business card on hand so that investigators can be handed that information incident to their departure.

Conduct mock investigations and/or inspections:

There are many types of mock investigations and inspections that can be done proactively and prophylactically to protect medical offices. Legal professionals experienced in the health space can conduct investigations of all documents, manuals and paperwork utilized in each individual practice. Health care attorneys can provide assistance and guidance relating to corporate documents, compliance, and up to date laws, rules and regulations. Lawyers experienced in defending clients in front of insurance investigators, OPMC coordinators, and OPD investigators should come to offices to do a mock inspection in anticipation of insurance investigators, the Department of Health, or the Department of Education investigators presenting to an office for an inspection. Billing and coding professionals and/or accountants experienced in the health space can conduct mock financial statement audits to ensure that all billing procedures are meeting current compliance guidelines, laws, rules and regulations.

Make adjustments now to avoid future problems

Below are recommendations relating to the physical condition of the premises:

- Electrical and lighting. Loose cords and wiring should not be visible. All light bulbs should be working. All equipment requiring electricity must be functional or otherwise should be removed from the office.
- Plumbing. All plumbing should be functional, leaks fixed and hand washing sinks should not be the same sink that is utilized for cleaning medical equipment. Bathrooms must be clean. Sprinkler heads should be clean and functional.
- Hazardous materials. Hazardous materials must all be labeled on the individual containers. Sharps containers must be present and labeled in each individual room where any injection is given and must be tamper proof. Soiled linens must be in closed containers and should be removed from treatment areas on a daily basis. All germicide disinfectant bottles must be labeled with content, strength, and the date the solution was mixed. EPA approved germicide must be maintained and utilized between each visit. Hazardous waste containers must be in each individual space and must be

(continued on page 27)

Federal Preemption of State Banking Laws — Are Mortgages and Foreclosures Ripe for Federal Regulation?

By Dennis C. Valet

The United States famously employs a dual charter bank system in which banks may be chartered accordingly with the Federal Office of the Comptroller of the Currency or a state banking authority. Historically, the authority to charter banks on the federal level derives from the National Bank Act of 1864, which created the OCC and gave national banks several enumerated powers together with "all incidental powers as shall be necessary to carry on the business of banking."[1] Congress also gave the OCC the exclusive power to regulate and oversee national banks, but refrained from granting full field preemption, thus requiring national banks to comply with state laws and regulations which are not preempted. Naturally, numerous legal challenges followed to define the preemptory power of the OCC. These challenges accelerated after 2004 when the OCC promulgated rules identifying broad areas of banking regulation subject to preemption.[2] By February of 2004, federal preemption had expanded to include the areas of adjustable rate mortgages, usury laws, credit card fees, escrow accounts, and more. The effect of these regulations left little room for state regulation of national banks and it is no small coincidence that in 2004 JPMorgan Chase & Company and HSBC Bank converted from New York charters to federal charters.

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In 2010, to prevent or mitigate another foreclosure crisis which some lawmakers perceived to be caused by a lack of regulation and oversight, Congress passed the Dodd-Frank Act with the intended goal of returning at least some banking regulatory authority to the states, that they believed were better situated to enact consumer protection laws. Dodd-Frank enumerated the legal standard for determining when a state regulation is preempted — if it "prevents or significantly interferes with the exercise by the national bank of its powers" — and required the OCC to make preemption determinations on a case-by-case basis.[3]


DENNIS C. VALET

The result of over 150 years of incremental changes to federal banking laws is a mix of federal statutes and regulations — some expressly preempting state law by statute (e.g. interest rate exportation which allows a national bank to follow its' home state's usury laws instead of the usury laws from the borrower's state of residence[4]) and some preempting only through regulatory interpretation by the OCC (e.g. a broad preemption on state regulation of escrow accounts). In 2018, the Ninth Circuit Court of Appeals in *Lusnak v. Bank of America*[5] examined whether regulations promulgated by the OCC preempted a California law requiring every bank to pay at least two percent interest on escrow account funds. The Ninth Circuit held that because Dodd-Frank specifically envisioned the creation of state regulations regarding interest on escrow accounts, the OCC's regulations erroneously preempted the state law which did "not prevent or significantly interfere with Bank of America's exercise of its powers."[6] The dicta was more interesting and far reaching, however, as the court opined that (1) under a *Skidmore* analysis, the OCC's regulation would be entitled to "little, if any, deference," [7] (2) a bank has the burden of proving its preemption defense,[8] and (3) that the burden requires "compelling evidence of an intention to preempt." [9]

As a result of *Lusak* and the Supreme Court's refusal to grant *certiorari*, national banks arguably cannot blindly rely upon the OCC's list of preempted areas. Dodd-Frank requires an evaluation on a case-by-case basis and the OCC's interpretation may be given little, if any, deference by the courts in a legal challenge. The field of mortgage lending is left in a particularly precarious position as mortgage and foreclosure laws vary wildly amongst the individual states. For example, in New York, residential foreclosure law requires a judicial proceeding, but many states do not. In New York, deficiency judgments are permissible, but in some states, they are not. In New York, there is no post-sale right to redemption, but in some states, there is. Congress has declined to enact legislation specifically preempting these differing laws, leaving national banks with a hodgepodge of banking regulations which may or may not be preempted through the OCC's regulations.

To add more confusion to the mix, Dodd-Frank also created the Consumer Financial Protection Bureau[10] for the purpose of regulating lending and mortgage-servicing operations, but declined to preempt state regulation by including a savings clause which preserved state laws and regulations that do not directly conflict with federal consumer protection laws.[11] Dodd-Frank empowers the CFPB to make preemption determinations on a case-by-case basis, splitting regulatory guidance between the OCC and the CFPB.

The current implementation of the dual charter banking system has left national banks in the uncomfortable position where federal preemption is a "sometimes, maybe, but not always" proposition. A national bank left wondering whether a state law is preempted must seek guidance from the OCC, the CFPB, or both, guidance which increasingly may not withstand legal challenge. It is likely that Congress will turn its eye once again to financial regulations, as evidenced by the passage of the Economic Growth, Regulatory Relief, and Consumer Protection Act[12] in 2018, which reformed portions of Dodd-Frank. When they do, the question is whether Congress will commit to full federal regulation of a system that increasingly operates almost exclusively on a national and international scale.

Note: Dennis C. Valet is a senior associate at Lieb at Law, P.C. and the firm's trial attorney. Mr. Valet concentrates his practice on real estate litigation. For more information about Mr. Valet or the topic discussed in this article you may contact him at (646) 216-8009 or dennis.valet@libatlaw.com.

1 12 USC §24.
2 12 CFR Parts 7 & 34.
3 12 USC §§25b(b)(1) & (3).
4 12 USC 25b(f).
5 883 F.3d 1185.
6 Id. at 1194.
7 Id. at 1193.
8 Id. at 1191.
9 Id.
10 12 USC §53, Subchapter V.
11 12 USC §5551.
12 Public Law No: 115-174 (05/24/2018).

The Restored Factor: What it is and How it Can Bite Your Purchaser Client Post-Closing

By Mark S. Borten

The concept of a restored factor refers to a taxing authority's ability to take a fresh look at and retroactively increase real estate taxes on residential real property benefitting from one or more exemptions. For example, John Smith owned a one-family house in Suffolk County for 20 years. John had a veteran's exemption and a senior exemption. Assume that John's *general* tax bill, covering calendar year 2019, was $2,500. Now assume that John died Jan. 1, 2019 with no surviving spouse. Both exemptions technically disappear immediately upon John's death, which is logical. Further assume that John's executor decides to sell John's house, and the sale occurs six months later, on July 2, 2019.

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Unfortunately, prior to and at the closing, the purchasers' attorney was unaware of the possible involvement of the restored factor and the need to alert the purchasers to its implications. The county assessor, however, does not learn of John's death until later in 2019 after a new deed is recorded. In January 2020, the purchasers are shocked to receive a tax bill retroactively imposing *upon them* an increased *general* tax bill restored as of John's Jan. 1, 2019 date of death, covering all of calendar year 2019. Rather than the general tax being $2,500, it is now $3,500. The distressed purchasers immediately complain to their attorney, who in frustration complains to the title company. The title company rightly notes that this is not a title issue; the tax search prepared by an independent third party disclosed both the existence of and the amount of the restored factor; and the title policy specifically excluded from coverage any title company liability for restored taxes [see ALTA Owner's Policy Exclusion 3(d) regarding liens attaching or created subsequent to the policy date].


MARK. S. BORTEN

An emotional plea from the purchaser's attorney to the seller's attorney is quickly rebuffed as not being that attorney's or the seller's problem. To avoid either being sued for malpractice or possibly facing a grievance, the purchasers' attorney reluctantly concludes that the only practical solution is for that attorney to write a check to the purchasers for the additional $1,000. Chastened, the purchaser's attorney is now privy to one of the "dirty little secrets" of transactional residential real estate, and is unfortunately far from alone in that lack of awareness.

When residential real property is sold to a person ineligible for one or more of the existing exemptions, those exemptions (perhaps excluding any Basic or Enhanced STAR exemption to which the prior owner was properly entitled) are subject to being removed by the assessor upon notice of such conveyance. This procedure is covered by Real Property Tax Law Section 520, subsection 2 of which in part directs the assessor to "forthwith assess such property at its value as of the date of transfer . . . and shall notify the new owner of the assessment." Any legitimately existing STAR exemption stays with the property for the remainder of the current assessment roll year. While there does not appear to be any "statute of limitations" precluding an assessor from theoretically going back years to restore taxes, practical limitations on that ability appear to exist. The Nassau County Department of Assessment has issued correspondence stating that such department's policy is to restore back only to the date of the deed, not the date of death. Anecdotal reports suggest bureaucratic randomness in imposing restored taxes.

How to avoid this unpleasant scenario from occurring in the future? Four options present themselves for consideration. The first and most obvious is for the purchaser's attorney to be aware of the involvement of the restored factor before closing. Checking the title report's certification page for the last conveyance date may be instructive. The second option is for the seller's attorney to hold an agreed amount (100 percent of the calculated difference, since 50 percent won't fully reimburse the purchasers) in escrow for an agreed period (say 12-18 months post-closing, until new tax bills are mailed

(continued on page 27)

Understanding the Property Condition Disclosure Statement — Why $500 is a Deal

By Sabine K. Franco

You are a happy seller of New York real property. You receive a market value offer for the sale of your property and you gladly accept. You are required under the New York Code, Article 14, the Property Condition Disclosure Act §462, to complete a Property Condition Disclosure Statement detailing your actual knowledge of the condition of the property from environmental to structural and mechanical. You answer to the best of your actual knowledge. You close on your sale and move on with your life. Six years later you are served with legal papers for breach of contract, fraud and intentional misrepresentation, negligent misrepresentation and for failing to disclose water damage in providing the PCDS in violation of Article 14 of the Real Property Law.

The above summarizes the experience of defendant, Jeffrey M. Wasyln, a seller of a Broome County residence. Seller listed his house for sale in August 2008 and provided the buyer with a completed property condition disclosure as per RPP §462. Plaintiff, purchaser, conducted a home inspection of the property, which revealed no concerns of water infiltration, signed a contract to buy the property. Sometime in the early part of 2009, months after the purchase, the plaintiff noticed water permeating into the basement of the home.

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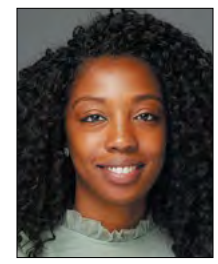
More than three years later in September of 2011, there was a severe flood in the southern tier regional area of New York, including Broome County, where the property was located. During that flood, plaintiff experienced water gushing into the basement, after which mold and damage was uncovered. It appeared that those defects had existed for some time. Two plus years later in 2014, plaintiff brought the above described suit against defendant. The allegation is that there were material defects that defendant knew or should have known, denied knowledge, of and failed to disclose in the PCDS.


SABINE K. FRANCO

Defendant Seller moved for summary judgment. The trial court granted plaintiffs summary judgment motion and the appellate court affirmed, in January of this year, due to the fact plaintiff could not prove that defendant had actual knowledge of any material defects. Under that act, seller must have actual knowledge and must willfully fail to comply; meaning actively conceal a known, materiel defect.[1] Similar offers of proof were required for the remaining causes of action.[2]

Defendant had testified that he had experienced water damage in the past, due to a previous severe flood. Defendant repaired the damage and made corrective measures to prevent future water infiltration and or damage. Defendant answered the disclosure no and unknown to questions regarding the current condition of the foundation, water infiltration, and standing water, which was truthful according to his knowledge since he had taken corrective measures.[3] A false statement in a disclosure statement could be considered active concealment.[4] The required disclosures are based on actual knowledge only,[5] not constructive notice, as the claims in the Kazmark Plaintiff would imply.

What is the PCDS?

The PCDS is a required disclosure under the PCDA, which was intended to provide buyers with a greater ability to get the information they need to make informed decisions about purchasing property.[6]

Real Property Law §462 provides as follows: every seller of residential real property pursuant to a real estate purchase contract shall complete and sign a property condition disclosure statement as prescribed by subdivision two of this section…

Real Property Law §462(2) provides the exact language of the disclosure form and explains: the property condition disclosure act requires the seller of residential real property to cause this disclosure statement or a copy thereof to be delivered to a buyer or buyer's agent prior to the signing by the buyer of a binding contract of sale. This is a statement of certain conditions and information concerning the property *known* to the seller.[8]

Why should an attorney should advise that their client violate the PCDA and deal with the consequences?

If seller fails to provide the disclosure prior to signing the contract of sale, seller must give buyer a whopping $500 credit at closing.[9] It also provides that if seller does comply and provides the completed disclosure or fails to provide a revised disclosure, should seller's knowledge change, seller will be liable for a willful and intentional failure to comply and actual damages.[10]

The PCDA was enacted in 2002.

Prior to the enactment of PCDA the full risk was on the buyer under the common law doctrine of caveat emptor. Caveat emptor being Latin for "let the buyer beware" (or take care), basically left the buyer as the sole judge to discover the actual condition of the property being purchased. It allows seller to avoid liability for failing to disclose defects in premises when each party is acting in its own interest and/or seller is not willfully or actively hiding a defect.[11] Caveat emptor does not require seller to disclose according to seller's knowledge unless those defects are not readily discoverable upon reasonable inspection.

It is unclear in the Kazmark case why seller opted to give the disclosure rather than the credit.

Counsel should caution sellers that providing the credit does not override the seller's responsibility under caveat emptor to disclose latent defects known to seller that cannot be discovered by reasonable inspection. Sellers with a fiduciary duty or relationship of trust are also obligated to disclose not just latent defects, but also known defects. Additionally, seller also has the responsibility to disclose under federal law, its knowledge regarding lead-based paint on the property.[12]

Note: Sabine K. Franco, Esq. is the principal attorney at Franco Law Firm, P.C., located in Hempstead New York. Ms. Franco focuses her practice on real estate and business transactions.

1 See Real Property Law §§ 461(3); 462(2)
2 Kazmark v. Waslyn, 167 AD3d 1386 (3rd dept 2019).
3 Id.
4 Pettis v Haag, 84 AD3d 1553, 1554 (3rd dept 2011).
5 See Real Property Law § 461(3)
6 Lucrezia, P. (2003). New York's Property Condition Disclosure Act: Extensive Loopholes Leave Buyers And Sellers Of Residential Real Property Governed By The Common Law. [online] Scholarship.law.stjohns.edu. Available at: https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1324&context=lawreview [Accessed 26 Feb. 2019].
7
8 Real Property Law § 462(2)
9 See Real Property Law § 465(1)
10 See id.
11 Simone v Homecheck Real Estate Servs., Inc., 42 AD3d 518, 520 (2nd dept 2007); See also Lucrezia, P. (2003). New York's Property Condition Disclosure Act: Extensive Loopholes Leave Buyers And Sellers Of Residential Real Property Governed By The Common Law. [online] Scholarship.law.stjohns.edu. Available at: https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1324&context=lawreview [Accessed 26 Feb. 2019].
12 Residential Lead- Based Paint Hazard Reduction Act of 1992, 1018 (1992).

FREEZE FRAME

LaCova Receives Accolades at Visionary Women Dinner

Suffolk County Bar Association Executive Director Jane LaCova was honored at the Visionary Women of Justice dinner for her dedication to the legal profession.

The Suffolk Lawyer wishes to thank Real Property Section Editor Andrew Lieb for contributing his time, effort and expertise to our April issue.

Airbnb, You, Me and Constitutionality

By Irwin S. Izen

As technology takes hold on our everyday lives, embracing e-commerce poses both challenges and rewards for those embroiled in the Airbnb vs. Town legal front. Municipal authorities seek to regulate short term rental opportunities under the guise of proper land use and zoning ordinances. The power of local municipalities to regulate the activities occurring on the land within and subject to their jurisdiction derives from section 10 of the Municipal Home Rule Law.

Can a change to the legal landscape be far off? The proliferation of e-commerce platforms should be embraced as potential revenue stream ("Occupancy /Sales Tax"), but who will pioneer this "outside the box" thinking? What will it take to bring the constituents, local business community and politicians together in championing this new cause? The Constitution!

In an average transient rental complaint, the homeowner is faced with a Town Code that reads something like this: it shall be unlawful and a violation of . . . to use, rent or suffer or permit . . . a rental occupancy . . . without first having obtained a valid rental occupancy permit therefor.

"transient" rental is defined as a rental period of 29 days or less.

"transient" rentals are prohibited.

Unsuccessful challenges to rental permit obligations have been lodged, but no constitutional challenges to transient rental prohibitions have ripened into a justiciable controversy in this state. As e-commerce continues to remain at the forefront of social change, can a constitutional challenge be far behind?

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Equal protection per se

From the homeowner's point of view, "renting" is a property right that the local municipality is trying to regulate. This property right is equally protected by both the federal and state Equal Protection rights [*See Hernandez v. Robles*, 7 N.Y.3d 338, 362 (2006)].


IRWIN IZEN

Under the Equal Protection Clause, all persons similarly situate are to be treated alike; hence any homeowner seeking to legally rent their property must comply with the local rental permit ordinance. Restricting the homeowner from renting might seem like an unreasonable restraint on the homeowner's property rights but applying the well-established "rationally related" standard to any property right deprivation would bring us back to our 1L Constitutional Law class.

This regulation of this property right is judged on whether the intent of the ordinance, to protect the health, safety and welfare of the town's residents [in requiring a rental permit] is rationally related to the ordinance. The guise of any rental permit ordinance is to protect the rental property occupants as well as property neighbors and consequently the "rental permit ordinance" would withstand the rationally related standard. But what about the subsequent classification created by the transient rental prohibition?

In further classifying those homeowners who maintain valid rental permits as either "transient or unlawful" vs. "permitted or lawful" simply by the number of days of the rental period, without further justification, is where the transient rental prohibition does not pass constitutional muster.

Similarly situated citizens, both holding valid rental permits for their property, are subsequently treated unequally by the number of days in the rental period. As often cited, the town's interest in the safety of its residents who occupy rentals is paramount to the permit process, but what justification is there for any more or less safety being present at a rental home that is for 29 or less days as compared to more than 29 days? Safety conditions in the property are no more or less to be impacted by the term of the rental. Further municipal justification for minimum rental periods is that long term rentals are more invested in the community. This reasoning is flawed when compared to the premise that a homeowner is always more vested when compared to a renter due to property ownership [it should be noted that vested property owners do leave abandoned blighted properties].

For those who would argue this homeowner classification is rationally related to the legitimate municipal interest of protecting the health, safety and welfare of the rental occupants as well as the property neighbors, this argument is disingenuous when examining the unequal treatment of the short-term rental problem by our local municipalities. A cursory review of some local municipal transient rental ordinances shows neither uniformity in the minimal rental term nor a true nexus to perceived community threat which spawned such ordinances. Municipalities are arbitrarily seeking to restrict property rights.

Reviewing the minutes of Town Board meetings, it appears the political inertia of neighbors complaining of "John Belushi and the Deltas moving in next door for the weekend," yet this concern is not addressed by the ordinance. Any homeowner or legal tenant could host a party so long as the local noise and other nuisance ordinances are not violated. Arguably, the length of the rental term as it is used to justify a transient rental prohibition is not "rationally related" to its intended purpose and would result in all valid rental permit holders being treated alike in violation of the protections afforded by the Equal Protection Clause.

Equal protection as applied

Another challenge to transient rental ordinances is selective enforcement. What difference is there between a homeowner's graduation party and a guest having some friends over? The party atmosphere is still the same, yet code enforcement has purposefully and unreasonably targeted those properties allegedly in violation of the transient rental ordinance by persistent investigation and by selective enforcement.

Discriminatory enforcement of this seemingly dormant ordinance has only recently been resurrected as more and more complaints are lodged and vacationers look for alternatives. Even-handed enforcement of the rental permit ordinance would require code enforcement to investigate all complaints of illegal rentals, not only those advertised on the popular "house sharing" websites. Enforcing transient rental ordinances by reviewing Airbnb or VRBO listings, rather than an independent investigation, demonstrates a purposeful and intentional enforcement as against these websites. Does evidentiary proof gathered through the online "booking calendar" demonstrate an ulterior motive and a purposeful enforcement as against the alleged "transient" renter?

Fourth Amendment

As the recently issued preliminary injunction against NYC's reporting ordinance demonstrates, the Fourth Amendment still shields the homeowner from unreasonable search and seizure. But with more "nontraditional" business platforms defending privacy rights of host members, are additional constitutional challenges on the horizon? Can invoking the almighty Commerce Clause be far behind?

Note: Irwin S. Izen, is a solo practitioner concentrating in real estate, business and transactional law. He is currently the co-chair of the Transactional Law Committee and is the past co-chairman of the Real Property Committee. He represents both individuals and small companies in business transactions and maintains his office at 357 Veterans Memorial Highway, Commack, New York, 11725 and can reached via email at Izenlaw@aol.com.

INTELLECTUAL PROPERTY

Copyright: 'Registration' vs. 'Application' Finally Solved

By Eryn Truong

A copyright gives the creator of a work an exclusive legal right to reproduce and authorize others to reproduce the protected work. Before a copyright owner can enforce this right with a civil lawsuit, he must register this work with the U.S. Copyright Office.[1] Surprisingly, however, ownership of a copyright exists apart from registration.[2] The creator of a work becomes the owner of the copyright of the work upon its creation. If this sounds inconsistent, then you're right. Although someone may have the ownership rights to copyrightable work, he or she may not enforce this right until the work is "registered." U.S. Copyright law establishes the prerequisite of "registration" prior to bringing an action for copyright. The problem over the last couple of years was that no one was entirely sure what "registration" meant.

For decades, copyright litigants were treated differently across the nation depending on which jurisdiction the litigant sued in. Some courts construed the "registration" requirement to be satisfied after the Copyright Office acted upon a copyright owner's application, otherwise known as the "registration approach." Other courts deemed "registration" to be satisfied after the copyright owner merely submitted an application, materials, and fees to the copyright office, otherwise known as the "application approach."


ERYN TRUONG

The issue has finally been resolved *in Fourth Estate Public Benefit Corporation v. Wall-Street.com, LLC.*[3] The Supreme Court deemed the "registration approach" to be the correct approach based on the plain language of the statute. Fourth Estate is a news organization that licensed its work to Wall-Street. Fourth Estate sued Wall-Street after Wall-Street failed to remove the Fourth Estate's works after canceling the parties' license agreement. Fourth Estate had filed applications to register the works with the Copyright Office; however, the Copyright Office had not acted upon the applications. The trial court dismissed the complaint stating that Fourth Estate had not satisfied the registration requirement and the appellate court affirmed the ruling. Fourth Estate appealed again to the Supreme Court.

The thorough opinion written by Justice Ginsburg on behalf of the unanimous court decided that the correct way to construe the law is by requiring a copyright owner's application to be acted upon by the Copyright Office before bringing a civil action for infringement. The court comes to this conclusion by analyzing the plain language of each sentence within the statute and finally resolving the split in the lower courts. The "registration approach" will be used in every copyright infringement suit from here on out, putting an end to the inconsistency.

The takeaway: Copyright owners should begin registering works that are vulnerable to infringement sooner rather than later. Although plaintiffs are entitled to damages, including those that occur prior to registration,[4] some of the harm suffered from infringement can be irreparable. Owners should make sure they are able to bring suit as soon as they are aware of infringement to best protect their works.

Note: Eryn Truong manages the Litigation Department at Campolo, Middleton & McCormick, LLP, a premier law firm with offices in Westbury, Ronkonkoma, and Bridgehampton, and also chairs the Intellectual Property Department. Contact Eryn at etruong@cmmllp.com.

1 17 U.S.C. § 411(a)
2 17 U.S.C. § 408(a)
3 No. 17-571, 2019 WL 1005829 (Sup. Ct. Mar. 4, 2019).
4 17 U.S.C. § 504

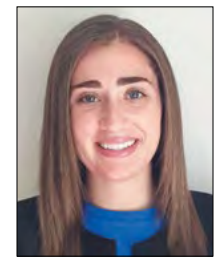
FUTURE LAWYER'S FORUM

The Benefits of Being on the Law Review During Law School

By Olivia Lattanza

Before starting law school, every 1L student begins with their own legal interests and aspirations. For instance, some students gravitate towards criminal law, while others are interested in civil procedure and contract law. For me, I thoroughly enjoyed my two-semester legal writing class. In this class, we learned the fundamentals to properly write and research an extensive memorandum of law and an appellate brief. For many 1L students without any prior legal experiences, preparing these legal documents seems unnatural to our usual way of writing. Unlike papers written for our liberal arts majors, which favor flowery and elaborate sentences, legal writing needs to be concise and direct. We quickly had to accustom our way of writing in order to produce the most effective analysis of the relevant facts and the law. In developing this new way of writing and learning how to conduct legal research, I developed a new interest that would impact the rest of my law school career.

Specifically, I fully immersed myself in conducting research, writing, and editing when becoming a Law Review member at the start of my 2L year. While my class laid the foundation for effective legal writing, working on the Law Review requires one to develop additional writing and editing skills for producing publishable works. Unsurprisingly, I find that working on the Law Review serves as a natural complement to my classes for many beneficial reasons.



OLIVIA LATTANZA

First, the editorial process requires every staff member to pay close attention to detail. One thing that amazes me is that I always learn something new from the Bluebook when I edit footnotes and citations. While some citation rules become second nature, it is almost impossible to memorize every obscure rule and nuance that the Bluebook has to offer. On occasion, I often spend hours trying to learn how to properly cite an uncommon source. For that reason, I quickly learned how important it is to become familiar with the Bluebook for relevant rules and citation examples.

Additionally, the close attention to detail plays an integral role when reading multiple choice or essay questions. For Law Review articles, each staff member is responsible for closely examining that each footnote citation conforms with the Bluebook. By developing the skills to closely review each citation for errors, like spacing and italicization issues, I believe that this attention to detail benefits each student's close reading of the call of the question on an exam.

Second, the process of writing my Law Review Note has furthered my research skills. Before writing my Note, which is on a music copyright infringement case, I did not know anything about copyright law. At the start of last semester, I dove into research on this topic by reading many cases, treatises, and articles. With the assistance of my faculty advisor, I became aware of different resources to find appropriate research for my Note. As with writing any article, it is a great undertaking to compile research because it requires a substantial amount of time and dedication. When I reflect on that stage of my writing process, I feel that my knowledge of legal research has widely expanded and those new skills can be incorporated in my future class assignments.

As my 3L year approaches, I am excited to take on a leadership role in the editorial process of student and professional works. In fact, I am looking forward to developing the necessary skills with my fellow Editorial Board members to publish several issues next school year. Overall, being on the Law Review has greatly impacted my student and professional experiences because it is an evolving and continuing learning experience.

Note: Olivia Lattanza is a second-year student at Touro Jacob D. Fuchsberg Law Center, where she serves as an Associate Editor and Managing Editor (Elect) of the Touro Law Review. She also assists students as a Writing Coach in the Touro Law Writing Center. Olivia can be reached at Olivia-Lattanza@tourolaw.edu.

HEALTH AND HOSPITAL

Health Plan Administrators and Fiduciary Duty

By James G. Fouassier

When an insurer creates a healthcare coverage product it also must develop an entire system of benefit and claim administration as well as a network of healthcare providers of various types. State insurance regulators impose detailed and highly complex requirements and maintain careful licensing and regulatory oversight before allowing an insurer to market such a product.

When Local ABC develops its own self-funded health plan for its 10,000 covered members, retirees and their dependents, it does not have the resources, expertise or market strength to develop the same system of administration and health provider network availability. Instead Local ABC will contract with an existing healthcare plan administrative organization, usually an established health insurer, to access the insurer's extensive provider network and to do all the technical work — pre-service approvals, authorizations, claims adjudication, medical necessity and eligibility reviews, etc. — for a fixed fee. Most if not all of the claim payments are from the Local ABC benefit fund (although the plan may be partially insured, usually for stop-loss coverage). The plan administrator, in its turn, is required to administer the Local ABC health plan for the benefit of the plan members and in accordance with the terms and conditions of the plan as set out in the ERISA mandated "Summary Plan Description" and the plan benefit design itself. (Remember that ERISA and not state regulations control the administration of most self-funded plans.)

In this scenario the Local ABC benefit design will delegate to the administrator the exercise of certain defined functions, including the discretionary authority to make most, if not all of the eligibly and coverage determinations and, as a result, the administrator assumes the obligations of a fiduciary. This situation is so common, in fact, that federal law actually designates any such administrator as a "fiduciary" [29 USC 1002(14) (A)].

JAMES G. FOUASSIER

Here's where it gets sticky. In order to do business in an organized and uniform manner the plan administrator, again usually a health insurance company, develops a comprehensive set of policies, procedures and guidelines covering all areas of plan operations. All of the administrator's business — insured as well as administered — is operated in accordance with these guidelines. At the same time, however, and unlike in the administration of its own insured business, the fiduciary responsibilities assumed by the administrator of a self-funded plan must be exercised solely for the benefit of the plan members with exclusive loyalty and due care to those members, not any shareholders. How can a set of universally applicable guidelines reflect the duties and obligations the administrator assumes for each of the different health plans that it administers? Where, in the typical situation, an administrator is also an insurer, how can its universal guidelines advance its own business interests respecting its fully insured business (where costs, profits and shareholder dividends are important components of business decision-making) and at the same time advance the duties of loyalty and due care the administrator owes to the members of the self-funded plan?

This was precisely the issue in *Wit, et al. v. United Behavioral Health*, a federal ERISA case in the Northern District of California (14-cv-02346; 2-28-19) in which a group of members of several self-funded health plans administered by United through its Optum affiliate argued that the guidelines developed and applied by United improperly denied benefits to the members because the guidelines did not comply with the terms and conditions of the self-funded health plans that United was retained to administer.

The health plans delegated to United the discretionary authority to interpret and apply plan terms. United exercised that authority when it made coverage determinations and when it adopted uniform guidelines to standardize coverage determinations and insure that such determinations were consistent with generally accepted standards of medical care. This made United a "fiduciary" obligated to act with loyalty and due care solely to plan members. This included the duty to comply with plan terms. Because United was not a sponsor of the plan it could not modify or alter plan terms under the guise of interpreting and applying them.

Employing the abuse of discretion standard of review the court found that United breached its fiduciary duties. True, the health plan bestowed United with discretion to interpret and apply the terms and conditions of the plan benefit design. In the Ninth Circuit the plan administrator's decisions are entitled to deference unless illogical, implausible or without support in inferences that might be drawn from the facts on record. However, that circuit also recognizes that a determination of abuse of discretion may allow the application of a "degree of skepticism" based upon the extent to which the decisions may have been affected by a conflict of interest. (Note that the general rule applied across the country is that a significant conflict of interest deprives the administrator of the benefit of the "abuse of discretion" standard altogether, and will allow a court to review the challenged decisions *de novo*. This in-between rule appears to allow more judicial wiggle room in finding abuse of discretion without disregarding the administrator's determination altogether.

To be continued next month….

Last time I reported on the *Texas v. U.S.* case. The U.S. District Court found that since the fine required by the Affordable Care Act was eliminated by Congress in 2017 the Individual Mandate was unconstitutional, and since the mandate is essential to and cannot be severed from the ACA then the illegality of the mandate renders the entire act invalid.

In a one-page letter to the clerk of the Fifth Circuit Court of Appeals dated March 25 the U.S. Department of Justice informed the court that it now takes the position that Judge O'Connor's decision in the Northern District of Texas should be affirmed, and that it will file a brief in the case. This is a change from the DOJ's previous position. (The DOJ is charged with defending the constitutionality of federal laws; rarely has it taken a formal position against the legality of acts of Congress.) Sixteen states have announced that they will file briefs in opposition to the decision and in support of the ACA. The House of Representatives as an institution already has filed its opening brief in the case. It may be found at: https://www.theusconstitution.org/wp-content/uploads/2019/01/Opening-Brief-of-U.S.-House-of-Representatives.pdf

Note: James Fouassier, Esq. is the Associate Administrator of the Department of Managed Care at Stony Brook University Hospital, Stony Brook, New York and co-chair of the Association's Health and Hospital Law Committee. His opinions are his own. He may be reached at: james.fouassier@stonybrookmedicine.edu.

Cohalan Truly Does Care For Kids (***continued from page 1***)

the center, and the event continues to raise the necessary funds, thanks to the generosity of its sponsors and attendees.

Ms. LaCova, who was honored this year, thanked everyone for their efforts. "I'd also like to thank the Board of Directors for allowing me to spread my wings and help the community," she added.

Judges Marion Tinari and Gaetan Lozito are the chairs of the Children's Advisory Center.

Judge Tinari said she was impressed by the turnout at this year's event, the largest ever. "Everyone in this room has done something for a child," she added.

"Judge Hinrichs has such a special place in his heart for the Children's Center," Judge Tinari said. "And Cheryl has been a beacon for me. There are so many children that had a nice Christmas because of Cheryl."

Ms. Ramos-Topper jokingly called Mr. Zimmer an underachiever. "She's enthusiastic and grateful to become involved from the beginning to provide a safe haven for children in the court system," Ms. Ramos-Topper said.

When Ms. Zimmer spoke, she characteristically focused on the work of others. "This is such a celebration not just of me, but of all of our work with children," she said. "The Children's Center is a unique collaboration of so many people in the community with a common goal, to care for the children while their parents are in court. We provide a safe haven."

She asked that everyone celebrate the work being done for the children. "This is a tribute to all of our endeavors," Ms. Zimmer said.

Note: Laura Lane, an award-winning journalist, is the Editor-in-Chief of The Suffolk Lawyer. She has written for the New York Law Journal, Newsday and is the senior editor for three North Shore publications at Herald Community Newspapers in Nassau County.

Photos by Barry Smolowitz

Three Extraordinary Visionary Women of

By Sarah Jane LaCova

The SCBA, Amistad Long Island Black Bar Association, Long Island Hispanic Bar Association and the Suffolk County Women's Bar Association hosted a collaborative event celebrating Women's History Month featuring a special theme — Visionary Women of Justice — at the Stonebridge Country Club on March 26.

The following women were the honorees.

Hon. Fern A. Fisher

Justice Fisher is a retired New York State Supreme Court Justice. She serves as the special assistant to the Dean for Social Justice Initiative at the Maura A. Dean School of Law at Hofstra University.

Justice Fisher received her B.A. summa cum laude, Phi Beta Kappa in 1975 from Howard University, and received her J.D. in 1978 from Harvard Law School. Her career started in the Civil Court as a legal services attorney practicing in Manhattan Housing Court. She served as deputy director of Harlem Legal Services, Inc. and as an assistant attorney general in the New York State Department. For four years, she provided pro bono legal services to Harlem-based community organizations as a project director of the National Conference of Black Lawyers. In 1989, Justice Fisher was appointed Judge of the Housing Part of the Civil Court, and later, in 1990, was elected to the Civil Court where she served as deputy supervising judge. Justice Fisher was elected in 1993 to the NYS Supreme Court. In December 1996, she was appointed Administrative of the Civil Court where she served until March 2009.

Our Justice Fisher contributed the Views from the Bench in the Thomson-West practice guide, "Residential Landlord-Tenant Law in New York" for 21 years. She served as the host of a series of television shows on housing issues for "Crosswalk's," a public service cable show. She has been a frequent lecturer at the New York State Judicial Institute and has taught at CUNY Law School and Touro Law School. Justice Fisher is a founding member of the Metropolitan Black Bar Association, a member and past board member of the Association of the Bar of the City of New York and the New York County Lawyers Association. She also served as the chair of the Housing Court (Judges) Disciplinary Committee and chair of the Anti-Bias Committee of the New York County Supreme Court. She served as an expert on the court of lower jurisdiction for the Yale Law School China Law Center during two workshops in China devoted to exploring improvements to the Chinese judiciary system. In 2006, Harvard Law School awarded her the Gary Bellow Public Service Award. In 2008, she was appointed to the American Bar Association Standing Committee on the Delivery of Legal Services. She is the recipient of numerous awards and was honored by our Pro Bono Foundation.

Hon. Sandra L. Sgroi

Hon. Sandra L. Sgroi is a NYS Supreme Court Justice, retired, Appellate Division, Second Judicial Department. Since 2009 until her recent retirement, Justice Sgroi served with distinction as an Associate Justice in the Appellate Division of the Supreme Court, Second Judicial Department. Justice Sgroi was elected to the Supreme Court for the Tenth Judicial District in 2000 and was appointed to the Appellate Division by then Governor David Paterson in October of 2009. She was re-elected to the Supreme Court in 2014 and re-designated as an associate justice in that year by Governor Andrew M. Cuomo.

In 1966, Justice Sgroi was elected to the Suffolk County District Court for the fourth District, Town of Smithtown, where she served for four years. During that time, she co-chaired the Women in the Courts Committee.

Justice Sgroi served as a councilwoman for the Town of Smithtown from 1992 – 1996, having been elected for two terms. From 1986 to 1991, she served as the Town Attorney for the Town of Smithtown and as an assistant town attorney from 1984 – 1986. She served as the first woman president of the Smithtown Rotary Club in the year 2000-2001.

Justice Sgroi graduated Magna Cum Laude from the State

PHOTOS BY DAVID ZIMMERMAN

Justice Received Honors

University of New York at Buffalo in 1974 with a B.A. in Sociology, and from Hofstra University School of Law in 1978 with a J.D. degree. From 1979 to 1996 Justice Sgroi engaged in the private practice of law with a concentration in elder law, wills, estates and trusts.

Justice Sgroi is a member of the New York State Bar Association, the Women's Bar Association, and the Suffolk County Bar Association.

Hon. Mary Werner

Hon. Mary Werner is a retired NYS Supreme Court Justice and a former Suffolk County Administrative Judge. Her life is an amazing journey. The mother of seven, she returned to college at the age of 40. After graduating from Dowling College and St. John's University School of Law, Justice Werner began her legal career as an Assistant District Attorney. She was one of the first women to serve in the District Court, Grand Jury, Rackets and Family Crime Bureaus. As Chief of the Family Crime Bureau, she was an ardent advocate for victims of family violence.

In 1991, Justice Werner was appointed to the NYS Supreme Court and was subsequently elected to that positon. In 1994, she was appointed District Administrative Judge of Suffolk County, the first woman to hold that position. In that position, she initiated trial case management reforms and implemented the Drug Treatment Court in both the Suffolk County District Court and Family Court with the mission of providing treatment and rehabilitation. With the support of the Suffolk County Women in the Courts, she was the driving force behind the establishment of the Children's Central at the Cohalan Court Complex, located in the District Court. Today, the center continues to offer a safe, secure and nurturing environment for children whose parents are attending to court business.

Justice Werner is an active member of the Board of the Energeia Partnership, a stewardship program at Molloy College that fosters leadership roles in the business, government and education communities. She also serves on the Board of Advisors of ERASE Racism, an organization dedicated to exposing racial discrimination and advocating for laws and policies that eliminate racial disparity.

A founding member and past president of the Suffolk County Women's Bar Association, Justice Werner is a member of the New York State Bar Association, a former member of the SCBA's Board of Directors, and long-time member of our Bar Association and a lecturer of the SCBA's Academy of Law. She is also a former member of the New York State Family Violence Task Force and has served as a member of the Boards of the Cleary School for the Deaf and St. John's University School of Law Alumni Association. She is an active participant in the Osher Lifelong Learning Institute at Stony Brook University.

Justice Mary M. Werner is the recipient of numerous awards, proclamations and citations and has been honored by the United States Department of Justice Drug Enforcement Administration and the Long Island Women's Coalition, Inc. for her professionalism and humanitarian achievements.

She retired from the bench in 2006, but her professional contributions to the legal system continue to have a tremendous impact on the lives of attorneys, employees, litigants and children in Suffolk County. Her personal legacy stands as an inspiration for future generations of women.

Note: Sarah Jane LaCova is the executive director of the Suffolk County Bar Association.

PERSONAL INJURY

Presumed Authentic if I Exchanged it?

By Paul Devlin

In litigation stemming from motor vehicle accidents, all parties typically demand photographs of the vehicles involved. Quite often, the photographs ultimately exchanged by the parties were taken by insurance-company damage adjusters and show vehicles in various stages of repair. The testimony of the parties usually clears up any discrepancies between how the vehicle appeared at the accident scene and how it appears in the photographs.

In the wake of an amendment adding Rule 4550-a to the CPLR, one of my colleagues raised an important question. When we exchange vehicle damage photographs taken by an insurance-company adjuster, are the photographs automatically deemed authentic and in evidence at trial? Is that so even if the photographs show a dismantled vehicle instead of a vehicle in the condition it was at the scene of the accident?

CPLR 4540-a, effective Jan. 2, 2019, provides for a presumption of authenticity for certain documents. The precise language of the statute follows: materials produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such a party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of the evidence proving such material is not authentic, and shal l not preclude any other objection to admissibility.

Paul Devlin

At the outset, it should be noted that the sponsor's memorandum for CPLR 4540-a indicates that the statute "codifies and expands upon caselaw that has been overlooked by many New York courts, practitioners, and commentators." See *Driscoll v. Troy Housing Auth.*, 6 N.Y.2d 513 (1959); *Bieda v. JCPenny Communications, Inc.* 1995 WL 437689 n.2 (S.D.N.Y. 1995); et. al. A review of the relevant caselaw makes evident that CPLR 4540-a does not significantly change the law. The same arguments that can now be made for the admissibility of a document authored and produced by a party under the statute were previously valid arguments under the caselaw.

Another important point is that the statute only applies to materials authored or created by a party. If an insurance-company adjuster took the photographs at issue, then the statute arguably does not even apply. If the party we represent is the owner or operator of a vehicle as opposed to the damage adjuster/insurance company that took the photographs, then the photographs were not authored or produced by the party. Rather, they were produced by the non-party insurance company and, as such, the statute does not apply.

It should also be noted that the statute provides for a rebuttable presumption of authenticity. The sponsor's memorandum indicates that the "rebuttable nature of the presumption protects the ability of the producing party, if he or she has actual evidence of forgery, fraud, or some other defect in authenticity, to introduce such evidence and prove, by a preponderance, that the item is not authentic. A mere naked 'objection' based on lack of authenticity, however, will not suffice . . . Furthermore, the presumption recognized by the statute applies only to the issue of authenticity or genuineness of the item. A party is free to assert any and all other objections that might be pertinent in the case, such as a lack of relevance or violation of the best evidence rule."

In our example of vehicle damage photographs, the issue of authenticity is of utmost concern. But just as before the amendment, a party can argue against admissibility of a photograph based on testimony and other proof that it is not a fair and accurate representation of the vehicle's appearance after the accident. The principle difference is that the statute now codifies the shifting of the burden of proof. If our client authored the photographs and we produced them, we have the burden of proving by a preponderance of the evidence that they are not authentic, i.e., not a fair and accurate representation of the vehicle's appearance after the accident. It seems this should be readily accomplished by our client's testimony detailing how the vehicle appeared immediately post-accident as opposed to how it appears in the photograph. Of course, this testimony could include comparison with photograph that does accurately depict the vehicle immediately-post accident.

For counsel hesitant about exchanging any material that may be presumed authentic pursuant to CPLR 4540-a, the following should be kept in mind. First, the law before this amendment was essentially the same. The statute codifies case law that was previously overlooked by many but provided for the same presumption of authenticity. Second, the material presumed authentic pursuant to the statute must be authored or created by the party exchanging it. There is a valid argument to be made that the presumption should not apply because the material was created by a non-party. Finally, the presumption is only with respect to authenticity and it is rebuttable. The presumption of authenticity may be rebutted by a preponderance of the evidence and all other objections such as relevancy are still available as they were prior to the amendment.

Note: Paul Devlin is an associate at Russo & Tambasco where his practice focuses on personal injury litigation. He is an active member of the SCBA, serving as co-chair of the Membership Services Committee and Treasurer of the Suffolk Academy of Law.

CYBER

Cybersecurity: The Standard of Care

By Victor Yannacone

Attorneys have a unique duty of care with respect to cybersecurity. The standard of care is still being defined as cybersecurity litigation proliferates. A successful ransomware attack may even be considered prima facie evidence of malpractice, and ransomware raises the question of whether the attorney owes the client a duty to pay the ransom to retrieve the sensitive information that was accessed.

New York Ethics Opinion 1019, ¶9 warned attorneys in May 2014, that "lawyers can no longer assume that their document systems are of no interest to cyber-crooks." All attorneys now have a non-delegable duty to exercise due care in their cybersecurity efforts. That means, at the very least, compliance with industry accepted cybersecurity standards. Unfortunately, it is no longer a matter of whether you will be the victim of a cyber attack, but when, and how much damage it will cause.

Business downtime, loss of billable hours, professional fees, costs associated with having to replace hardware and software, loss of important files and information, as well as damage to professional standing and personal reputation and an erosion of the trust of current and prospective clients and the public are only some of the damages which follow a data breach at a law firm.

Victor Yannacone

The cyber standard of care imposed on attorneys

The commentary to Rule 1.1 of the Model Rules of Professional Conduct expects attorneys to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

Failure to take these precautions and affirmative actions can have dire consequences, including claims for legal malpractice.

Cybersecurity legal malpractice claims

Cybersecurity malpractice claims typically sound in tort for failure to protect client confidential and personal data as well as fraud and misrepresentation. The fundamental issue at trial will be whether an attorney or law firm "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession." *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY 3d 438, 442, 835 N.Y.S.2d 534, 867 N.E.2d 385, 387 (N.Y. 2007).

A Long Island attorney who used an AOL email account for a large real estate transaction was the defendant in a malpractice suit because the lawyer's email was hacked by cyber-criminals who read and intercepted all the lawyer's communications. The cyber-criminals forwarded bogus payment instructions to the client and the lawyer did not confirm the authenticity of the sender causing the client to wire $1.9 million to the cyber criminals. More on the lessons from this case in a later column.

How to avoid claims

The duty to protect confidential client information extends to taking affirmative steps to prevent the unauthorized access of client information. At a minimum, lawyers should establish a protocol to prevent a cyber breach consistent with the risk of loss from their computers and servers — intellectual property, medical records, bank records, and even government secrets as well as any other information which hackers might be able to monetize.

If the firm receives any medical information, all employees must know how to handle, receive, and transmit this information in accordance with HIPAA (Health Insurance Portability and Accountability Act).

Basic data security

Every data security plan should include encryption, two-factor authentication, and secure networks.

According to many cybersecurity professionals, more than half of all data breaches can be prevented by using multifactor authentication. Prompt and continuous updates of operating systems and software programs; hardware and software firewalls, end-to-end anti-malware protection and ensuring that the firm's protective measures extend to the Cloud and all mobile devices.

Cybersecurity insurance

Whether it is a rider to your professional liability policy or a separate cyber policy, cybersecurity insurance coverage is now as essential as professional liability insurance. Your traditional professional liability will *not* cover many types of data breaches or provide sufficient benefits to meet all the costs and expenses incurred to recover from a data breach.

Don't rely on technology providers to protect you

With e-discovery becoming a fundamental element of federal court litigation, litigators have an additional duty to protect any confidential documents received during litigation whether or not there is a protective order outstanding. The attorney of record in the litiga-

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MUNICIPAL

Regulation of Homestay Uses in Suffolk County

By Mark A. Cuthbertson and Matthew DeLuca

Large technology companies such as AirBnb and Uber have proven to be significant marketplace disrupters. With valuations of roughly $72 billion and $31 billion, respectively, Uber and AirBnB have become forces to be reckoned with by established market players in the taxi and hotel industries. However, these companies, particularly homestay companies like AirBnB, have had a direct impact on Main Street and quiet residential areas in towns and villages across the country, including in Suffolk County.

Suffolk County towns and villages have attempted to grapple with this changing landscape by adopting a variety of regulatory schemes. Interestingly, these responses are sometimes been driven by the context in which homestay companies operate. East End towns and villages, for example, have appeared willing to entertain some level of homestay activity given the tourist environment. In contrast, other municipalities have chosen to dig in and ban these homestay uses entirely.

In attempting to understand the challenge companies like AirBnB pose to municipalities, it is helpful to bear in mind the size of these companies. In 2018, AirBnB reported that it had a record 139,200 guests stay on Long Island, including 114,200 guests in Suffolk County alone. This was nearly double the number of guests reported in 2016, driven by a 38 percent year-over-year increase in bookings. There are now 3,600 hosts in Suffolk, earning an average of $11,400 annually from renting through AirBnB.

Depending on your perspective, the emergence of AirBnB and its peers has been either a blessing or a curse. For the 3,400 hosts, the extra income from AirBnB is substantial. Guests also benefit from being able to find cheaper or more desirable accommodations. Finally, the influx of guests from AirBnB rentals provides a boost for local businesses like restaurants, particularly in tourist areas that rely on seasonal visitors.

Mark A. Cuthbertson

Matthew DeLuca

However, homestay activities are not without controversy. An influx of short-term rentals can create a range of adverse impacts on the quality of life in suburban neighborhoods, such as excessive noise, reduced parking and the unwelcome sight of transient visitors.

Municipalities have taken a variety of approaches to short-term rental regulations. A summary of the municipal regulations adopted by Suffolk County towns and villages is in the PowerPoint mentioned below. On the one end of the spectrum are areas, like the Towns of Hempstead and Riverhead, which have decided to simply ban short-term rentals. However, the efficacy of such bans is questionable, and will ultimately depend on code enforcement mechanisms.

Other municipalities, like the Town of Shelter Island, have taken a more nuanced approach to regulating short-term rentals. Currently, Shelter Island requires a minimum rental period of 14 days, except where the homeowner is living at the same or adjacent premises. It also requires that hosts obtain and renew an annual license, keep a registry of rentals, and have a local contact person. Additionally, hosts must provide renters with a "good neighbor brochure" outlining the local regulations.

Three common aspects of short-term rental regulations are durational limits, owner-occupancy requirements, and codes that regulate quality of life regulations. The details of these regulations can vary widely between jurisdictions. For example, the Town of Huntington allows owner-occupied rentals for up to 120 days per calendar year, along with permit requirements and quality of life regulations. This results in a slightly more liberal regulatory scheme than Shelter Island, despite using many of the same regulatory tools.

It is worth mentioning that several of these regulatory schemes have spawned lawsuits. For example, in *Luxurybeachfrontgetaway.com, Inc. et al. v. Town of Riverhead*, 2018 WL 3617947 (E.D.N.Y. 2018), the Town of Riverhead defeated a claim that its short-term rental laws violated the Fair Housing Act. Courts have also blocked attempts to circumvent short-term rental bans by claiming a prior nonconforming use where such rentals were not expressly permitted under the prior code provisions. *Cradit v. Town of Southold*, Suffolk Cnty. Sup. Ct., Index No. 7056/16.

For better or worse, homestay companies appear to be here to stay. Yet, as shown by the examples above, municipalities have a variety of options in addressing the challenges they present.

Note: Mark A. Cuthbertson is the sole proprietor of the Law Offices of Mark A. Cuthbertson in Huntington, where he has served on the Town Board since 1996. Matthew DeLuca is an associate at the firm. A PowerPoint on this topic, presented at the Allen Sak Municipal Law Program can be found at www.cuthbertsonlaw.com/cuthbertsonAirBnBpresentation.

1 Yes, another defined term.
2 Notice 2019-07. https://www.irs.gov/pub/irs-drop/n-19-07.pdf
3 Other than a publicly traded partnership.
4 You may recall that it is up to the PTE (not its owners) to determine whether it is engaged in a qualified trade or business.
5 Reg. Sec. 301.7701-3; for example, a single-member LLC; so, two tiers of entities at most (one of which must be disregarded) – an S corp. that owns an interest in a 2-person partnership that owns rental real estate would not qualify.
6 There is no in-between, where some similar properties are treated as one enterprise while others as separate enterprises.
7 As of yet undefined.
8 Query how this may affect a taxpayer's decision to treat all "similar" properties held for the production of rents as a single enterprise?
9 You guessed it. C'mon, it's tax – we love defined terms within defined terms. They put Russian nesting dolls to shame.
10 The contemporaneous records requirement will not apply to taxable years beginning prior to January 1, 2019.
11 Although not spelled out in the proposed revenue procedure, presumably this includes some of the following: providing and paying for gas, water, electricity, sewage, and insurance for the property; paying the taxes assessed thereon; providing insect control, janitorial service, trash collection, ground maintenance, and heating, air conditioning and plumbing maintenance.
12 This does not purport to be an all-inclusive list.
13 The number of times I have seen taxpayers count such travel time in trying to establish their material participation for purposes of the passive activity rules!
14 Under section 280A of the Code. In general, a taxpayer uses a property during the taxable year as a residence if he uses such property for personal purposes for a number of days which exceeds the greater of: 14 days, or 10 percent of the number of days during such year for which such property is rented at a fair rental.
15 Under Section 162, which may be small comfort – after all, that's why the safe harbor was proposed.
16 Not that everything was rosy. Example 1 of proposed §1.199A-1(d)(4) described a taxpayer who owns several parcels of land that the taxpayer manages and leases to airports for parking lots. The IRS shared that some taxpayers questioned whether the use of the lease of unimproved land in the example was intended to imply that the lease of unimproved land is a trade or business for purposes of section 199A. The IRS explained that the example was intended to provide a simple illustration of how the 199A calculation would work; it was not intended to imply that the lease of the land is, or is not, a trade or business for purposes of section 199A beyond the assumption in the example. In order to avoid any confusion, the final regulations removed the references to land in the example.
17 For example, the material participation regulations under Reg. Sec. 1.469-5T.
18 For example, attending a hearing of a local zoning board.

TAX

Rental Real Estate and the Sec. 199A Deduction

By Louis Vlahos

This is the second part of a two part series.

To help mitigate the resulting uncertainty, the IRS recently proposed — concurrently with the release of the final Section 199A regulations — the issuance of a new revenue procedure that would provide for a "safe harbor" under which a taxpayer's "rental real estate enterprise" will be treated as a trade or business for purposes of Section 199A.

To qualify for treatment as a trade or business under this safe harbor, a rental real estate enterprise must satisfy the requirements of the proposed revenue procedure. If the safe harbor requirements are met, the real estate enterprise will be treated as a trade or business for purposes of applying Section 199A and its regulations.

Significantly, an S corporation or a partnership (pass-through entities; "PTE") that is owned, directly or indirectly, by at least one individual, estate, or trust may also use this safe harbor in order to determine whether a rental real estate enterprise conducted by the PTE is a trade or business within the meaning of Section 199A.

Louis Vlahos

Rental Real Estate Enterprise

For purposes of the safe harbor, a "rental real estate enterprise," is defined as an interest in real property held for the production of rents; it may consist of an interest in one or in multiple properties.

The individual or PTE relying on the proposed revenue procedure must hold the interest directly or through an entity that is disregarded as an entity separate from its owner for tax purposes.

A taxpayer may treat each property held for the production of rents as a separate enterprise; alternatively, a taxpayer may treat all "similar" properties held for the production of rents as a single enterprise. The treatment of a taxpayer's rental properties as a single enterprise or as separate enterprises may not be varied from year-to-year unless there has been a "significant" change in facts and circumstances.

Commercial and residential real estate may not be part of the same rental enterprise; in other words, a taxpayer with an interest in a commercial rental property, who also owns an interest in a residential rental, will be treated as having two rental real estate enterprises for purposes of applying the revenue procedure.

Rental as Section 199A Trade or Business

A rental real estate enterprise will be treated as a trade or business for a taxable year (solely for purposes of Section 199A) if the following requirements are satisfied during the taxable year with respect to the rental real estate enterprise:

(A) Separate books and records are maintained to reflect income and expenses for each rental real estate enterprise, as well as a separate bank account for each enterprise;

(B) For taxable years beginning:

(i) prior to Jan. 1, 2023, 250 or more hours of "rental services" are performed per year with respect to the rental enterprise;

(ii) after Dec. 31, 2022, in any three of the five consecutive taxable years that end with the taxable year (or in each year for an enterprise held for less than five years), 250 or more hours of rental services are performed per year with respect to the rental real estate enterprise; and

(C) The taxpayer maintains contemporaneous records, including time reports, logs, or similar documents, regarding the following:

(i) hours of all services performed;

(ii) description of all services per-

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EMPLOYMENT

Misclassification of Employees as Independent Contractors: A Costly Mistake

By Mordy Yankovich

Misclassifying an employee as an independent contractor can be devastating to an employer. Employers can potentially be liable for, including but not limited to, back wages, overtime pay, liquidated damages, attorneys' fees and stark penalties for failure to withhold applicable taxes, pay workers compensation and unemployment insurance. Employers commonly make the mistake of assuming that self-classifying workers as independent contractor and issuing them a Form 1099 is determinative. That approach is faulty and can be costly.

Courts apply varied standards in determining whether an individual is an independent contractor or an employee. However, all courts focus on the actual functional relationship between the purported employer and the individual — especially the level of control the purported employer has over the individual — and not simply whether a 1099 is issued as opposed to a W-2.

In the context of coverage under the National Labor Relations Act, the National Labor Relations Board recently revised its standard for determining whether an individual is an independent contractor under the NLRA and, thus, not afforded its protections regarding unionizing. In *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), the NLRB reverted to its 2010 standard — known as the "traditional common law test" — in finding that a group of airport shuttle operators were independent contractors pursuant to the NLRA. In so doing, the NLRB overturned its 2014 decision in *FedEx Home Delivery*, 361 NLRB 610 (2014) (issued during the Obama presidency). The traditional common law test considers the following non-determinative factors: The extent of control the purported employer maintains over the individual; the method of payment; whether the purported employer or individual provides the supplies, tools, and work location; extent of supervision over the individual; whether the purported employer and the individual believe they created an employer/employee relationship; whether the work is part of the purported employer's regular business operations (i.e. working as an attorney at a law firm); length of employment/engagement; and skills required to perform the work.

Mordy Yankovich

In analyzing these factors, the NLRB determined that the shared-ride operators were independent contractors. The NLRB reasoned that these individuals had significant entrepreneurial opportunity and control over the "manner and means by which [they] conduct their business." Specifically, the NLRB found determinative that the individuals purchased or leased their vans, controlled their own work schedules and working conditions, paid a monthly fee to the company and retained all fares collected.

Courts generally apply a modified version of this test when determining whether an individual is an independent contractor or employee, with the overall control the purported employer has over the individual being the dominant factor. *See Salamon v. Our Lady of Victory Hosp.*, 514 F.3d 217, 227 (2d Cir. 2008) (applying a 13 factor common law agency test to a Title VII and NYSHRL discrimination case with the most important factor being "the extent to which the hiring party controls the manner and means by which the worker completes her assigned tasks"); *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988) (applying five factor "economic reality test" to Fair Labor Standards Act matter); *Paiva v. Olympic Limousine, Inc.*, 270 A.D.2d 534 (3d Dept. 2000) (determined that employer "exercised direction and control over individuals' work to establish their status as its employees" requiring the employer to pay unemployment insurance contributions).

In order to avoid significant financial consequences, employers must consider these different factors in the context of the overall control exerted over workers, prior to classifying them as independent contractors.

Note: Mordy Yankovich is a senior associate at Lieb at Law, P.C. practicing in the areas of Employment, Real Estate and Corporate Law. He can be reached at Mordy@liebatlaw.com.

LGBTQ

LGBTQ Pride — Not a Political Posture or Legal Position, but a Celebration of Ourselves

By Christopher Chimeri

June 28, 1969, known worldwide as the beginning of the Stonewall Riots, marked the "turning point" of what many credit as the commencement of the modern-day gay rights movement. But, those involved in the historic may-lay do not relate this to any pending "landmark" court case, proposed legislation, or even a political platform at large. Instead, gay pride events, the most common of which are annual parades, have little, if anything, to do with politics or law. While the annual celebrations may incorporate some reference to current legal happenings and political discourse that at the time cannot be ignored, these international assemblies, most often held in June each year, commemorate for all a celebration of self. Were this a political question, one would be hard-pressed to distill the question beyond the "right to BE."

The LGBTQ community includes all races, genders, creeds, and groups and lest there be any doubt in this regard, I invite one to poll a sample of participants at a gay pride event about any specific legal or political question, in response to which answers would uniformly and unequivocally range (as it similarly would in a sampling of non-LGBTQ citizens) from a blank stare to a much more detailed and impassioned set of beliefs on either side of the political aisle. Democrats, Republicans, young, old, black, white and everyone in between come together not in spite of, but because of these differences to celebrate the collective "we," the fact that we are from all walks of life with a single common thread — that we were born this way.

Proof positive that gay pride parades are not "political" events is found in the very history of the Stonewall Riots, which began as pushback toward law enforcement in New York City during an attempt to raid a gay bar. The historic event, simplified and distilled due to word count restrictions here and with no disrespect to the original Stonewallers, came when for decades prior (and after) police raided gay bars as underworld activity. They arrested "associates" involved in homosexual activity, not for drugs, violent crimes and or for any other criminal reason for which arrests are legally intended, but rather, the common thread was that arrestees' liberty was taken for simply being gay. The patrons at Stonewall Inn on that fateful day decided to impactfully announce that they would not be outlawed for embracing their fullest "selves."

Christopher Chimeri

What does this have to do with, or why does it belong in, "The Suffolk Lawyer?" The Hon. Chris Ann Kelley and I co-chair the Bar Association's LGBTQ Law Committee, whose mission statement includes: "to educate members of . . . the public on legal issues affecting the LGBTQ community and to promote full and equal participation in the legal profession by members of differing sexual orientations and gender identities; and to promote justice in and through the legal profession for the LGBTQ community." In furtherance of that portion of our mission statement, the committee requested of the Bar Association's board permission to participate in the Long Island LGBTQ Pride Celebration in Long Beach this year, in part in honorable recognition of the 50th Anniversary of Stonewall, but more so apropos as the next logical step in expanding the Bar Association's almost unanimously approved acceptance message mentioned above, and to do so beyond the four walls of 560 Wheeler Road.

It became apparent that there was a contingent of "opposition" on the board, manifesting such opposition with a claimed "concern" that with SCBA-sanctioned participation in a pride event, we were "taking a political stance." The lesson learned, which lesson connotes its own symbolic importance, is that many still believe that the assembly of LGBTQ people at an event is, in itself, political in nature. So, I pondered, is one's right to exist political? Surely, it is not. The founding documents of our great country laud our right to freedom of assembly and expression, and the host of personal liberties that define what it is to be American far predate even the faintest political hint of "gay rights issues." Lest there be any doubt about the non-political nature and purpose of a pride event, one need only look to a sampling of attendees to find that the crowd includes those who define as "red" and "blue" alike, some are married, some single, races come together as one and the same, a growing number of attendees are not even gay (defining as "allies," aligned with the right to be one's self) and the only common thread found is the desire to celebrate the uniform and inalienable right to be one's self, a right this committee wishes to celebrate with the very public we serve each day.

Certainly, I believe it appropriate to credit the board for having given us its time and after, consideration, for ultimately supporting this request. Though the decision was by no means unanimous and in fact, by a narrow margin, the committee is most appreciative of the board's decision.

Indeed, the committee's very existence within SCBA is symbolic of this celebration and association. Much as the original Stonewall group stood their ground and decided they would no longer be treated as underground criminals required to exist privately and on the fringe of society just for being themselves, when we initiated this committee, Judge Kelley and I chose to exist within the Suffolk County Bar Association, our Bar Association, rather than symbolically sneak off to a dark corner and form our own association. It was and remains important to the committee membership, a significant portion of which includes allies and not just LGBTQ people, that we exist as part of Suffolk County's legal community. For that reason, we continue to participate in more CLE programs than any other committee within the SCBA, and we will continue to seek new ways to increase participation and membership as a positive reflection on the SCBA.

In furtherance of our celebration this June, the SCBA LGBTQ Law Committee proudly invites anyone to join us during Long Island's LGBTQ Pride events. Details on how to become involved can be obtained by contacting me at CJC@QCLaw.com or by telephone at (631) 482-9700.

Likewise, the committee proudly invites all to the Central Islip Courthouse Central Jury Room on June 13 at 1:00 p.m. for our 3rd Annual Pride Celebration. This year, we welcome distinguished guest the Honorable Paul Feinman, Justice of the New York State Court of Appeals, and it remains the committee's hope that Suffolk County can impress the state's high court with the overwhelming support for this celebration, which includes Feinman's own identity as the first openly gay justice on the New York State Court of Appeals. Formal details on this event, sponsored in conjunction with OCA and the overwhelming and always-appreciated support of Administrative Judge C. Randall Hinrichs and his staff, will follow in the coming weeks.

Note: Christopher J. Chimeri is a partner with Quatela Chimeri PLLC, with offices in Hauppauge and Mineola, and he focuses on complex trial and appellate work in the matrimonial and family arena. He sits on the Board of Directors of the Suffolk County Matrimonial Bar Association and is a co-founder and co-chair of the Suffolk County Bar Association's LGBTQ Law Committee. From 2014-2018, he has been peer-selected as a Thomson Reuters Super Lawyers® "Rising Star."

CONSUMER BANKRUPTCY

Disclose Your Fees or it May be Disgorged

By Craig D. Robins

All bankruptcy attorneys who represent debtors are required to disclose their legal fees to the court. As we can see from a very recent decision in our district, failure to do so can lead to a very harsh result. *In re Persio A. Nunez*, Case No. 14-41746-CEC (Bankr. E.D.N.Y., March 29, 2019).

Attorneys who routinely file consumer cases are keenly aware of Form 2016(b) which requires the attorney to disclose his or her legal fee. Doing so is necessitated by Bankruptcy Code § 329 which mandates that any attorney representing a debtor in a case file with the court a statement of the compensation paid or agreed to be paid. Attorneys sometimes run afoul of this statute by either not fully disclosing their legal fee or by charging additional legal fees after the petition is filed and not disclosing these fees to the court.

Bankruptcy Rule 2016(b) states that every attorney for a debtor shall file and transmit to the U.S. Trustee, within 14 days after the petition is filed, the statement required by § 329. A supplemental statement shall be filed and transmitted to the U.S. Trustee within 14 days after any payment or agreement not previously disclosed.

The reason for such disclosure dates back several decades to a prior overhaul of the Bankruptcy Code. At the time, the legislature sought to prevent attorneys from taking advantage of vulnerable clients by requiring them to disclose their fees and make them subject to review.

CRAIG D. ROBINS

In *Nunez*, a Chapter 7 consumer case before Chief Bankruptcy Judge Carla E. Craig, the debtor, who filed his case *pro se* in 2014, apparently became dissatisfied with an attorney he later retained. The debtor wrote a complaint letter to the judge indicating that he paid the attorney $70,000 in legal fees pursuant to two post-petition retainer agreements that he entered into in 2015 to represent him in his bankruptcy case and related matters. However, the judge immediately observed that the attorney is not the attorney of record for the debtor and he never disclosed his representation of the debtor or the existence of the post-petition retainer agreements.

Consequently, Judge Craig issued an order to show cause as to why the court should not impose sanctions on the attorney for his failure to adequately represent the debtor, and why the court should not order the return of legal fees paid in connection with the case and determine the fee to be excessive. Although the debtor lived in Queens, within the jurisdiction of the Brooklyn Bankruptcy Court, the attorney was located in Rochester, quite a distance away.

The debtor owned two parcels of property in Corona. He had transferred one of them to his girlfriend of 35 years, and the Chapter 7 trustee brought an adversary proceeding against the girlfriend, seeking to avoid the transfer as a fraudulent conveyance. At the time of the transfer, a foreclosure proceeding was also pending on that property. The trustee obtained a default judgment, worked out a deal with the mortgagee, and sold the property. The debtor received a discharge.

In the letter to the court, which was almost two years after the default judgment, the debtor complained that neither he nor his girlfriend were served in the adversary proceeding, and that the transfer should not have been set aside. The debtor suggested to the judge that his attorney and the trustee may have acted without providing him or his girlfriend with proper notice.

The debtor attached an exhibit to his letter to the judge. It consisted of a copy of a very bizarre letter his attorney wrote him several years prior, stating: "I wanted you to know that after my first contact with the Office of The United States Trustee, everything, including the foreclosure actions, has been halted . . . The Trustee wanted to have your case thrown out of the Bankruptcy Court, basically handing you naked to the wolves. Since I've appeared, he stopped this attempt, keeping your case alive and in the court. The result is that all of your assets are still protected. More importantly, this means that the foreclosures are now stopped, just as I told you they would be. It's clear that I've spent a great deal of attorney time on your case. What you don't know is that I'm now dealing with the Department of Justice and other separate Federal agencies. This is very intricate and tricky work that, by its very nature, places me at personal risk. But this was something I knew might be part of the job when we signed the agreement on Aug. 4, 2015. In return, you promised in that same agreement to pay me $50,000."

The attorney did not file his response to the order to show cause until the day of the hearing in August 2018. Not surprisingly, the judge adjourned the hearing and directed the attorney to submit his time records.

Eventually Judge Craig ascertained that the debtor and his girlfriend did, indeed, enter into two retainer agreements with the attorney, and did pay him $70,000. In addition, it was undisputed that the attorney did not file any statement disclosing the retainer agreements or his receipt of legal fees.

The court did not believe the attorney's excuse that he was unaware of the bankruptcy filing when he entered into the first retainer agreement. He also unconvincing-

(continued on page 26)

VEHICLE AND TRAFFIC

Everyday Vehicle and Traffic Law

By David Mansfield

The Vehicle and Traffic Law applies to our members and to their families daily. The purpose of this article is to review some everyday ordinary situations that frequently affect our members, their families and clients.

A particularly troublesome area is the selling of a used motor vehicle with a value of less than $1,000. The problem arises when a vehicle is sold for a small sum of cash and usually haphazard records are kept. The purchaser does not title, register and insure the vehicle.

The seller will dutifully remove the registration sticker, the inspection sticker and surrendered the license plates and then inform their insurance company that the vehicle is off the road by forwarding the appropriate receipt for the license plates surrender. Members of the Suffolk County Bar Association should always use the official Department of Motor Vehicles Bill of Sale Form MV-912 (12/16). It is not required that it be notarized.

The custom and practice at the Suffolk County Traffic and Parking Violations is to require a notarized document to resolve an issue that arises concerning vehicle ownership.

What can go wrong? If the new party does not register, title and insure the vehicle and leaves it parked illegally or abandoned without any license plates, the vehicle will be cited for thousands of dollars of summonses for multiple violations including abandoned vehicle §1224 charges, which carries substantial fines to be issued against the last titled owner of record.

A trip to a local municipal parking agency or Suffolk County Traffic and Parking Violations Agency will find some degree of flexibility, but in the end, you could end up paying substantial fines.

DAVID MANSFIELD

How do you prevent to the best of your ability that the sale of the old clunker from becoming a legal problem?

The purchase of a new or newer car may provide an opportunity to trade it in for a token value at a reputable dealer which will leave you with the knowledge that it is extremely unlikely you will have any further problems. You will also get a deduction as against the sales tax on your purchase. And you will have a clear paper trail as to the disposition of the vehicle.

Should you not wish to trade the vehicle, you may donate the vehicle; however, there are a few caveats. The most important precautionary note is not to sell the vehicle to a third party who states that they will then donate it to a reputable charitable outfit. Beware of anyone who offers to take the vehicle off your hands for a nominal cash payment and assure you that it will be repaired for their use or sold.

When it came time to dispose of my father's old Buick LeSabre after a year of delicate family negotiations, I chose to donate the vehicle directly to a reputable charity. I can report no further problems.

I did see a recent advertisement by a self-styled financial wizard that said you should never donate your car. I would again strongly recommend that you consider one of those two options unless you are transferring the car to a family member that you will have a degree of control to ensure that the vehicle will be registered, titled and insured.

Equipment violations can be problematic for the members of our association. We all run on very tight schedules. Even so, you should repair equipment violations as soon as possible to avoid the possibility of being stopped at the worst possible moment, not to mention the inconvenience and expense of going to traffic court. You will have 24 hours to correct your equipment violation.

A completed specialized Suffolk County Police Department Affidavit of Repaired Equipment Defects affidavit that is attached to the electronic summons or handed out with a handwritten ticket will be required to be produced. You can report to a police precinct and request completion of the form without any further documentation.

An automobile repair shop can also verify but must also submit a statement of correction on their letterhead signed by the person who performed the repairs. The Suffolk County Traffic and Parking Violations Agency may require a notarized statement from the repair shop.

Individual motorists performing their own repairs must submit proof of purchase with the original receipt.

It is clear that repairing an equipment defect before being issued a summons is preferable to the alternative.

I have had my share of issues with cracked windshields, peeling license plates and defective inspection stickers. The peeling plates has been previously written about in violation of §402. You can log onto https://dmv.ny.gov/registration/peeling-license-plates or call the Department of Motor Vehicles (518) 402-4838 for the Custom Plates Unit. You may be asked to email a photograph, which they will review. Free replacement plates maybe be offered or plates for a fee. You can keep the license plate and they will make other arrangements.

If you have a problem with fading inspection VS-188(10/15) or registration sticker (MV-82D) there is a form.

It goes without saying that you should keep your inspection, registration and insurance up to date to avoid further complications. Prompt attention and vigilance to these matters will help keep the members of our association, their families and their clients from having unnecessary involvement with the authorities.

Note: David Mansfield practices in Islandia and is a frequent contributor to this publication.

*Bench Briefs (**continued from page 5**)*

Honorable William G. Ford

Petitioner's application for relicensure denied, however, action timely commenced; petition seeking review of respondent's appeals board denial of relicensure was timely under the 4 month statute of limitations

In *In the Matter of the Application of Curtis L. Prussick v. New York State Department of Motor Vehicles,* Index No.: 4404/2017, decided on Jan. 29, 2019, although the court denied petitioner's application for relicensure, the court found that the action had been timely commenced. With regard to the argument as to statute of limitations, the court noted that in order to commence a timely proceeding pursuant to CPLR article 78, a petitioner must seek review within four months after the determination to be reviewed becomes final and binding upon the petitioner, or after the respondents' refusal, upon the demand of the petitioner, to perform its duty. To the extent that the proceeding sought to undo the petitioner's underlying DUI arrest and prosecution in 2008 as well as the administrative DMV chemical test refusal hearing and license suspension and revocation, petitioner was time barred, which were clearly outside the 4 month look back period. However, as to the accrual of the instant claim, the court stated that the petitioner commenced the proceeding on Aug. 23, 2017.

The parties differed as to the appropriate measurement of accrual of petitioner's claim. The court noted that petitioner brought the proceeding after petitioner applied for relicensure on Dec. 21, 2016. That application was denied on Feb. 24, 2017, with requests for reconsideration denied on April 25, 2017. The record was unclear precisely how petitioner was apprised of these determinations, but assuming service by mail and adding 5 days, that aspect of the petition seeking review of respondent's appeals board denial of relicensure was timely under the 4 month statute of limitations.

Honorable Joseph C. Pastoressa

Motion for summary judgment granted; plaintiff failed to submit sufficient facts to demonstrate that the motion was premature.

In *Roseann Burger v. Metropolitan Transportation Authority, Long Island Railroad, Starrett-RDC Corporation, Starrett Corporation, Grenadier Realty Corp., Greystone and Greystone & Co., Inc.,* Index No.: 60427/2013, decided on Oct. 15, 2018, the court granted the motion for summary judgment. In opposition, the plaintiff contended that the motion was premature because depositions had not been conducted. The court noted that to defeat a motion for summary judgment based upon outstanding discovery, it is incumbent upon the opposing party to provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were within the exclusive knowledge and control of the moving party. Here, the court found that the plaintiff failed to submit sufficient facts to demonstrate that the motion was premature.

The plaintiff's contention that Greystone might have been obligated to procure insurance was not sufficient to warrant further discovery since a mere agreement to maintain insurance is not an indicia of control and has no bearing on the issue of liability to the plaintiff. In addition, the court pointed out that the case had been pending since 2013 and the plaintiff had ample opportunity to obtain discovery prior to the filing of the motion.

Motion for the issuance of a subpoena duces tecum denied; youthful offender statue provides that all official records and papers concerning the adjudication are sealed.

In *Malina Stylianos, an infant by her mother and natural guardian, Michele Stylianos and Michele Stylianos, individually v. Town of Brookhaven,* Index No.: 68386/2014, decided on Sept. 10, 2018, the court denied the motion by plaintiffs for the issuance of a subpoena duces tecum.

The plaintiff requested a subpoena duces tecum for the production of a complete criminal file and investigation of the Suffolk County Police Department and the Suffolk County District Attorney's Office. The defendant cross-moved to deny the motion, asserting that the files were sealed because the defendant therein was adjudicated a youthful offender. In denying the motion, the court noted that the youthful offender statue provides that all official records and papers concerning the adjudication are sealed. The privilege attaches not only to the physical documents constituting the record, but also, the information contained within those documents. The language in the statue permitting access to the confidential records "upon specific authorization of the court" refers only to the court which rendered the youthful offender adjudication. The court continued and states that absent a statute or order of the court which rendered the youthful offender adjudication, disclosure of the information in the confidential records may not be compelled unless the youthful offender waived the privilege. Accordingly, the plaintiff's motion was denied.

Honorable William B. Rebolini

Motion to compel deposition or in the alternative striking defendant's answer denied with leave to renew; under similar circumstances, precluding testimony of the party of the time of trial would be the appropriate sanction.

In *Yesenia Jiminez v. Jose M. Romero and Miguel A. Torres,* Index No.: 611780/2016, decided on Feb. 20, 2019, the court denied the plaintiff's motion compelling the defendant, Jose M. Romero, to appear at an examination before trial, or in the alternative, striking defendant's answer, was denied with leave to renew.

In denying the motion, the court noted that the plaintiff had not complied with the requirements of 22 NYCRR 202.7[c]. Notwithstanding same, the court noted that counsel for the defendants opposed the motion indicating that their office had been unable to make contact with the defendant Romero to advise him of his scheduled deposition. Counsel for defendants' retained an investigator to attempt to located defendant Romero. According to the report, defendant was no longer residing in New York and may no longer be in the United States. Counsel for defendants asserted that should defendant Romero not appear for a deposition, then defendants' answer should not be stricken, but defendant Romero would be precluded from testifying at the time of trial. The court noted, that under similar circumstances, it had been found that precluding testimony of the party of the time of trial would be the appropriate sanction.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6 percent of her class. She is a partner at Sahn Ward Coschignano, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation, immigration, and trusts and estate matters. She is also the President of the Nassau County Women's Bar Association.

DEAN'S LIST

Sound and Vision – Audio/Visual Updates Coming Soon

By Patrick McCormick

Here at the Academy, and at the Bar Association as a whole, the focus is often on the great curriculum of CLEs we offer, the fundraisers we host, and the important work we do for the Suffolk County legal community. But as we bring our offerings and events into the future, we must do the same with our beloved home on Wheeler Road — which is why I'm thrilled to share some exciting changes that will soon be implemented at our legal home away from home.

Starting in June, the main hall will undergo an update to both audio and video capabilities. Phase 1 focuses on audio upgrades: We will be replacing our microphones, receiving lapel mics, installing Bluetooth capabilities, introducing a more studio-like feel to ensure surround sound throughout the space, and more. Not only will this technology keep us current, but it also will keep us compliant with the Americans with Disabilities Act, providing a full experience for hearing impaired individuals.

PATRICK MCCORMICK

Phase 2 will be implemented in 2020 and will focus on our visual equipment. This new system will be capable of receiving input from any video source (laptop, cellphone, etc.) and sending it to our projector in HD format. We will also have easy control of sound and video equipment with an iPad that contains all necessary functions.

The entire system is focused on improving the quality of the speech reinforcement within the room while also improving the quality of the audio that can be recorded and streamed to remote viewers online, making video replays not only convenient, but as clear as if you're sitting right there in the room.

We are working with Audio Command Systems for this upgrade project. I have personal experience with the excellent job they perform, as they recently installed a state-of-the-art A/V system in my firm's training room. We'll keep you updated on the progress here at the bar association, and I hope you'll stop by and visit to see it for yourself.

Note: Patrick McCormick is a Senior Partner at Campolo, Middleton & McCormick, LLP, a premier law firm with offices in Westbury, Ronkonkoma and Bridgehampton. Email Patrick at pmccormick@cmmllp.com.

SUFFOLK ACADEMY OF LAW

OF THE SUFFOLK COUNTY BAR ASSOCIATION

The **Suffolk Academy of Law**, the educational arm of the Suffolk County Bar Association, provides a comprehensive curriculum of continuing legal education courses. Programs listed in this issue are some of those that will be presented during the Winter of 2019.

REAL TIME WEBCASTS: Many programs are available as both in-person seminars and as real-time webcasts. To determine if a program will be webcast, please check the calendar on the SCBA website (www.scba.org).

RECORDINGS: Webcast programs are available approximately one-week after the live program, as on-line video replays, as DVD or audio CD recordings.

ACCREDITATION FOR MCLE: The Suffolk Academy of Law has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education in the State of New York. Thus, Academy courses are presumptively approved as meeting the OCA's MCLE requirements.

REMINDERS: Cancellations for a full refund must be received within 24 hours before the course. You will be able to receive a credit for your next live program up to three months after the scheduled program. Program Locations: Most, but not all, programs are held at the SCBA Center; be sure to check the website listings for locations and times.

Tuition & Registration: Tuition prices listed in the registration form are for ***discounted pre-registration***. ***At-door registrations entail higher fees.*** You may pre-register for classes by returning the registration form with your payment. Sign up on line at: https://www.scba.org.

Non SCBA Member Attorneys: Tuition prices are discounted for SCBA members. If you attend a course at non-member rates and join the Suffolk County Bar Association within 30 days, you may apply the tuition differential you paid to your SCBA membership dues.

Americans with Disabilities Act: If you plan to attend a program and need assistance related to a disability provided for under the ADA, please let us know.

Disclaimer: Speakers and topics are subject to change without notice. The Suffolk Academy of Law is not liable for errors or omissions in this publicity information.

Tax-Deductible Support for CLE: Tuition does not fully support the Academy's educational program. As a 501(c)(3) organization, the Academy can accept your tax deductible donation. Please take a moment, when registering, to add a contribution to your tuition payment.

Financial Aid: For information, please call the Academy at 631-233-5588.

NOTEWORTHY –

If you have paid for a live program and were not able to attend, you will be able to receive a credit for your **next live program up to three months** after the scheduled program.

We invite you to plan a course or suggest a topic for CLE credit. Contact Dean, Patrick McCormick or Executive Director, Cynthia L. Doerler at cynthia@scba.org.

Materials for all Academy programs will be emailed to you usually one day prior to the program. Register on-line at www.scba.org.

April 2019 CLE Programs

Thursdays at the Courthouse: Evidence Series

12:45 – 2:00 p.m.
1.0 Professional Practice
Central Islip Courthouse, Central Jury Room

This program series will be a demonstration by experienced attorneys and Judges representing different aspects of evidence.

April 11, 2019
Missing witness; judicial fact research; judicial notice; how evidence procured; admissibility
Faculty: Scott Lockwood, Esq.

May 9, 2019

Lay testimony; medical condition; lay witness-opinion testimony and expert qualifications; basis of physician's testimony
Faculty:
Hon. James P. Flanagan

Transactional Tuesdays:

The ABCs of Acquiring a Building with a Company
12:45 – 2:00 p.m.
1.0 Professional Practice; .5 Ethics
SCBA Center, Hauppauge

This CLE program is a joint effort by the Real Property Committee and the Transactional Law Committee. In this extensive program, you will learn about a real estate transaction involving an existing business currently leasing space in the free standing real estate building. The sale of the real estate is contingent on the sale of the business.

Dates to calendar:

- **April 2, 2019** The Real Property Sale
- **April 9, 2019** Business Sale – What is being sold and what is being purchased?
- **April 16, 2019** Title Review and Clearance
- **April 23, 2019** Commitment, Closing Documents and Post Closing Issues

Sponsors: People's United Bank; Fidelity National Title Insurance Company

Annual Landlord-Tenant Update
Wednesday, April 3, 2019
6:00 – 8:45 pm
2.0 Professional Practice
SCBA Center, Hauppauge

The Annual Landlord-Tenant Update is back! This program will provide practical analysis based upon recent case law and changes to this technical area of law. The panel has a combined 125 + years' experience in Landlord – Tenant law.

Faculty:
Hon. Stephen L. Ukeiley
Suffolk County Acting County Court and District Court Judge
Victor Ambrose, Esq.
Nassau/Suffolk Law Services Committee
Warren Berger, Esq.
Marissa Luchs Kindler, Esq.
Nassau/Suffolk Law Services Committee
Patrick McCormick, Esq.
Dean, Suffolk Academy of Law
Partner, Campolo, Middleton & McCormick, LLP
Program Coordinators:
Hon. Stephen L. Ukeiley, Suffolk County Acting County Court and District Court Judge Patrick McCormick, Dean, Suffolk Academy of Law, Partner, Campolo, Middleton & McCormick, LLP

Thank you to our sponsor:

Cpl Article 730 And Capacity To Proceed A Guide For Practicing Attorneys

Thursday, April 4, 2019
12:45 – 2:00 p.m.
1.0 Professional Practice; .5 Ethics
SCBA Center, Hauppauge

Individuals can be judged not fit to proceed to trial, i.e. incapacitated as a result of mental disease or defect. This course will give you an in-depth examination of the legal requirements, procedures and statutes governing a criminal defendant's mental capacity to proceed, from arraignment through the imposition of sentence. The lecture will explore:

- Standards under CPL Article 730
- Practical and Constitutional Requirements of Competency Procedures
- Psychiatric Evaluations and Record Gathering

Faculty:
Guy Arcidiacono, Esq.
Deputy Chief, Appeals & Training; Attorney-in-Charge, Psychiatric Litigation Unit Suffolk County District Attorney's Office

How To Practice In The Suffolk County Commercial Division

Thursday, April 11, 2019
5:00 – 6:00 p.m. Reception
6:00 – 8:00 p.m. CLE Program
2.0 Professional Practice
SCBA Center, Hauppauge

This year has ushered in a distinguished panel of Commercial Division Judges to the bench. Join us for a Meet and Greet Reception followed by a CLE pan-

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el presentation. You will hear from Hon. Elizabeth H. Emerson, Supreme Court, Suffolk County, Appellate Term, Second Department, and Law Clerk, Joan Hannon, Esq.; Hon. Jerry Garguilo, Supreme Court, Suffolk County, Appellate Term, Second Department, and Law Clerk, Stephanie C. Galteri, Esq.; Hon. James Hudson, County Court Judge, Acting Supreme Court Justice and Law Clerk, Brian O'Keefe, Esq., Court Attorney Referee, Renee Roberts, Esq.

Do You Want Some Cheese with That Whine? Litigating & Negotiating With a Difficult Adversary And an Adversarial Judge

Wednesday, April 24, 2019
1.0 Ethics; .5 Skills; .5 Professional Practice
6:00 – 8:00 p.m. CLE Progam
8:00 – 9:00 p.m. Whine & Cheese Reception
SCBA Center, Hauppauge

Every attorney is eventually confronted with the proverbial "difficult" adversary and judge. Attendees will hear an experienced faculty of civil litigators share their views and techniques on the issue. The program will aid practitioners with ideas and responses drawn from actual instances of "inappropriate behavior," sometimes even from within Suffolk County! Attendees will also gain a greater understanding of what constitutes conduct that does and does not "cross the line."

The final hour will be a social event during which snacks, adult beverages and war stories can be shared convivially.

Faculty:
Hon. James C. Hudson, Glenn Auletta, Esq., Charles Eichinger, Esq., Robert Baxter, Esq., John Flaherty, Esq.

Immigration Law - Issue Spotting for the Criminal Lawyer, Family Lawyer and General Practitioner

Thursday, April 25, 2019
2.0 Professional Practice; .5 Skills; .5 Ethics
6:00 – 8:45 p.m.
SCBA Center, Hauppauge

This CLE course will assist you by helping you understand and avoid legal pitfalls for clients who are lawful permanent residents (green card holders), non-immigrants, asylees, and other non-citizens who reside in the United States. The panel discussion will highlight traditional and recent issues to be aware of when representing non-citizens in criminal court, family court and in general practice.

Faculty:
William Brooks, Professor
Director of the Immigration Law Clinic Touro Law School
Jackeline Saavedra-Arizaga
Long Island Regional Immigration Assistance Center
Christopher Worth, Esq.
Immigration and Removal Defense Attorney

Lunch With Court Of Claims Judge Hon. Carmen St. George

Tuesday, April 30, 2019
12:45 – 2:00 p.m.
Arthur M. Cromarty Court Complex, 210 Center Drive - Courtroom 3048, Riverhead

A number of new jurists have taken their places on the bench in 2019, and others are now working in different Parts. This program presents a special opportunity to learn how Court of Claims Judge, Hon. Carmen St. George, views the law, litigants, the legal system, and the concept of justice from her new position.

Hon. Carmen St. George will provide her perspective on:

The challenges of presiding over a courtroom
What is expected of lawyers in her courtroom
Procedural rules that should never be broken
Civility vs. zealous advocacy
Noteworthy matters that have come before her particular court

Faculty:
Hon. Carmen St. George
Court of Claims Judge, Acting Supreme Court Justice

27th Annual Law in the Workplace Conference

Friday, April 26, 2019 ● 9 a.m. to 4 p.m.
Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY
(L.I.E. Exit 56)

Thank you to our Sponsor:

jackson|lewis
Preventive Strategies and Positive Solutions for the Workplace℠

Agenda and Faculty
8:30 a.m. Registration and Continental Breakfast
9:00 a.m. ***WELCOME AND INTRODUCTIONS***

9:15 a.m. – 12:30 p.m.
WAGE AND HOUR LAW UPDATE - PRIVATE SECTOR
Presenter: Irv Miljoner, Retired, Director U.S. Dept. Of Labor Wage and Hour Division - Gain important insight on Wage and Hour enforcement processes and practices.

PRIVATE SECTOR LAW UPDATE
Presenters: W. Matthew Groh, Esq., Jeffrey N. Naness, Esq. - The Private Sector Update will be focused on compliance with NYS Labor Law wage and hour laws and the potential liability for non-compliance including class action damages.

PUBLIC SECTOR LAW UPDATE
Presenter: Phil Maier, Esq. - The Public Sector Law update will discuss recent developments at the NY State Public Employment Relations Board, and highlight significant cases and legislation affecting public sector employers, unions and employees.

Networking Break
PANEL PRESENTATION – SEXUAL HARASSMENT POLICY
Panel: Lisa Griffith, Esq., Hon. Chris Ann Kelley, Timothy Domanick, Esq. - This presentation will provide an overview of the sexual harassment laws and the steps New York employers, including all law firms need to take for compliance.

12:30 p.m. – 1:15 p.m. ***LUNCHEON PRESENTATION***
Presenter: United States Magistrate Judge,
A. Kathleen Tomlinson

1:30 p.m. – 3:00 p.m.
AFTERNOON BREAKOUT SESSIONS
(please choose one)

A. Private Sector:
Panel: Saul Zabell, Esq., Christopher Chimeri, Esq. - This session will discuss recent decisions pertaining to LGBTQ rights.

B. Public Sector: Panel: Philip Maier, Esq., Michael Krauthamer, Esq., David Cohen, Esq. – The topics will include recent developments in Section 75 of the Civil Service Law, the U.S. Supreme Court's decision in Janus and New York's pre-emptive changes to the Taylor Law, and PERB's deferral of improper practice charges to arbitration.

3:00 p.m. ***ETHICS***
Presenter: James Ryan, Esq. - This spirited session will discuss the important role technology plays in ethically representing clients.

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This year's Suffolk County High School Mock Trial Tournament was a tremendous success. Over 450 students from 26 Suffolk County public and private high schools participated in the competition. The **Honorable David Reilly, Supreme Court, Suffolk County** presided over the championship round that took place in the **District Court in Ronkonkoma** where the team from **Northport High School** defeated **Bay Shore High School.** Northport High School, the Suffolk County Regional Champion, will represent the County in the State Finals held in Albany (May 19-21).

The New York Statewide High School Mock Trial Program is a joint venture of the New York Bar Foundation, the New York State Bar Association, and the Law, Youth & Citizenship (LYC) Program. While the Mock Trial Tournament is set up as a "competition," emphasis is placed on the educational aspect of the experience which focuses on the preparation and presentation of a hypothetical courtroom trial that involves critical issues that are important and interesting to young people. High school teams from public and nonpublic schools participate in the tournament, beginning at the county level. In tournament competition, the teams argue both sides of the case and assume the roles of attorneys and witnesses. Judges, usually local judges or attorneys, score the teams based on a rating sheet that includes scoring on preparation, performance, and professionalism. The highest scoring team from County Tournaments proceeds to the Regional Competition to perform the Mock Trial against other county winners. The top team from each of New York State's eight regions is then invited to attend and participate in the State Finals.

The tournament encompasses the valuable lessons of ethics, civility and professionalism; furthers students' understanding of the law, court procedures and the legal system; improves proficiency in basic life skills, such as listening, speaking, reading and reasoning; promotes better communication and cooperation among the school community, teachers and students and members of the legal profession, and; heightens appreciation for academic studies and stimulates interest in law-related careers.

County Coordinators and Suffolk County Bar Association members, **Glenn P. Warmuth, Esq. & Leonard Badia, Esq.,** headed up this annual educational program co-sponsored by The Suffolk County Bar Association and The Suffolk Academy of Law.

The Suffolk County Bar Association & the Suffolk Academy of Law extends their appreciation to the attorneys who participated as judges & team advisors, and to the judges who were on the bench for the semi-final and final rounds. A very special thank you to **Hon. C. Randall Hinrichs** for his continued support of this important program.

—C. Doerler

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David Badanes
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Michael Trombello
Cynthia Vargas
Charlie Wallshein
Joseph Walsh
Barry Warren
David Welch
Janice Whelan
Kevin Yim
Michael Zaiff
Evie Zarkadis
John Zollo

Northport High School's exceptional effort and performance earned them the traveling trophy and title of Suffolk County Regional Champions for 2019.

President's Message (***continued from page 1)***

same firm) and to see the tremendous effort he has put in to make this the success we know it will be. Stay tuned for a report back next month.

Now, for those of you who are reading this in the paper you had delivered to your office (rather than online), and for everyone else who is curious, thanks to the hard work of our own Sarah Jane LaCova, it appears that the newspaper issues have been resolved. Not to tell tales out of school, and for those of you who know Jane, you won't find this surprising, but I can tell you that Jane was more upset than I have ever seen her over the newspaper issue, because she felt like the bar was not delivering a promised member benefit. She undertook to find a solution, and it appears that we have come up with a resolution that is satisfactory to not only the members, but to the new publisher/printer as well. Another feather in Jane's cap. And a special thank you to everyone who read my letter (I never assume that anyone reads anything I write) and expressed an interest in making sure that this issue was, in fact, resolved.

Finally, remember that May 6 marks the official start of my demise as President of your Bar Association. The Annual Meeting starts Lynn Poster-Zimmerman's coronation process, as we vote on the slate of officers presented by the Nominating Committee, but it also marks an opportunity for our members to get together (for free food and drink!), to socialize and to honor our colleagues who have practiced for 40, 50 and even 60 years, as well as to pay tribute to committee chairs and others who have served with distinction. Please make it a point to come, whether to cast your vote for the new slate, to join us in saluting our lawyers of long-standing, or even just to have a meal together with friends and colleagues. I look forward to seeing you there.

For those who celebrate, a zesin Pesach, a very happy Easter, and a joyous spring season to you, your families and friends.

Consumer Bankruptcy (***continued from page 21)***

ly contended that the retainer agreement related to the foreclosure proceeding and not the bankruptcy proceeding. He further stated that he was unaware of the disclosure requirements set forth in Rule 2016. In addition, he stated his belief that it was not the debtor who paid the legal fee, but instead, one of the debtor's friends who paid it.

In the written decision, after Judge Craig discussed the elementary disclosure requirements created by § 329 and Rule 2016(b), she noted that attorneys must comply, even if a third party paid the fee. The judge stated that the disclosure obligation is mandatory and not permissive, regardless of whether counsel will seek compensation from the estate, and that this is central to the integrity of the bankruptcy process. It is an attorney's representation of a debtor, and not the source of funds that triggers the attorney's disclosure obligations.

Addressing the attorney's claim that he was ignorant of the law, the judge declared that noncompliance with § 329(a) is not excused just because counsel is unaware of the disclosure requirements.

However, the judge noted that the plain language of Code § 329(a) and Rule 2016(b) make clear that the disclosure requirements only arise in relation to representation of the debtor. As it turned out, the first $20,000 that the debtor paid related to representation of the girlfriend. The representation must be of the debtor, and not a third party, to invoke the disclosure requirements. Therefore, the $20,000 was not subject to disgorgement.

The $50,000 payment was a different story. The judge stated that even if the attorney was given the benefit of the doubt and was unaware of the bankruptcy when the first retainer agreement was entered into, three years passed after he did learn of the bankruptcy; yet he did not make any disclosure.

The judge also noted that disclosure pursuant to § 329(a) extends to all services that will impact the bankruptcy case. Judge Craig opined that both retainer agreements involved trying to protect the estate's primary asset, the debtor's residence, and this was intertwined with the bankruptcy filing.

With regard to whether the fees were reasonable or not, the judge determined that even if the fees had been earned, this does not justify a disregard for the rules of disclosure.

Finally, Judge Craig held that nondisclosure warrants disgorgement. She stated that the attorney's failure to disclose deprived the court of the opportunity to provide protection to the debtor, the estate and creditors. Failure to file the disclosures mandated by § 329(a) and Bankruptcy Rule 2016(b) is grounds to deny all fees and costs sought by counsel. In doing so, the court held that it did not matter whether the fees requested were excessive or not.

The judge observed that it has long been the practice in the Second Circuit to deny compensation to those who fail to comply with disclosure provisions. However, the judge noted that other courts have held that full disgorgement is not automatic, and the court has the latitude to tailor a sanction that is appropriate under the unique circumstances of the case.

Judge Craig held that the attorney had to disgorge $25,000 – being one-half of the $50,000 payment. She said that this was appropriate because the attorney undertook to represent both the debtor and the girlfriend, who was a non-debtor. The refund was to be paid to the girlfriend.

The big takeaway here is: disclose, disclose, disclose. Be accurate with your fee disclosure, and should you receive post-petition fees, disclose those within 14 days. Also, a late disclosure is infinitely better than no disclosure.

Note: Craig D. Robins, a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past thirty-three years. He has offices in Melville, Coram, and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.

Cyber (***continued from page 18)***

tion has a non-delegable duty to oversee the cybersecurity practices of their litigation technology vendors.

Professional responsibility for client data does not end when a transaction is completed or a case is closed. Once documents are collected and digitized or received in electronic form, the data is in the firm's custody and control and will remain there. Data retention and destruction practices cannot be overlooked.

The global standard for information security is ISO 27001 and it provides reasonable assurance that security best practices are being followed. Compliance, while important, is not security

Be wary and beware

Regulatory agencies and law enforcement organizations such as the Attorney General are not just interested in the cyber criminals who steal data; they are coming after the custodians of the data for failure to properly protect it.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. He has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. He can be reached at (631) 475–0231, or vyannacone@yannalaw.com, and through his website https://yannalaw.com.

Constitutional/Civil Rights (***continued from page 6)***

as punishment is excessive under the Excessive Fines Clause only "if it is grossly disproportional to the gravity of a defendant's offense." "The touchstone of the constitutional inquiry under the Excessive Fines Clause," moreover, "is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." While not addressed before the Supreme Court in *Timbs*, the seizure of the vehicle under the circumstances seems to be excessive.

In *Dubin v. The County of Nassau*, No. 16-CV-4209 (JFB)(AKT) (E.D.N.Y. Sept. 27, 2017) ("*Dubin*"), United States District Court Judge Joseph F. Bianco summarized the applicable law regarding the Eighth Amendment Excessive Fines Clause in the Second Circuit in allowing claims against the Nassau County Traffic and Parking Violations Agency to survive a motion to dismiss. At issue in *Dubin* is the Driver's Responsibility Fee (Nassau County Ordinance 190-2012) charged as a non-discretionary penalty imposed merely for having been issued a ticket. Bizarre as it might seem, the complaint from which the TPVA sought dismissal in *Dubin* alleged that the fine "is an excessive fine issued against those whose only improper action is simply being issued a ticket," and that "[b]y charging a penalty after the charges/accusatory instrument have been dismissed, defendants have violated the Eighth Amendment's prohibition upon excessive fines in comparison to the accused actions." In acknowledging the applicability of the Excessive Fines Clause, Judge Bianco noted that this decision was based upon the allegations and not the argument that the fine was unconstitutionally excessive or disproportionate.

Long Islanders regularly feel increasing government fines, from recording a deed to fines associated with routine traffic matters. "The misuse of the forfeiture statutes has become epidemic among local and state police departments. Too often, it leads to baroque corruption, and it also functions as a backdoor way to fund basic services in municipalities that don't have the guts to ask their citizens for tax increases."[10] In *Timbs*, it was argued that the car in rural Indiana was "incidental not instrumental" to the sale of drugs. Where the incorporation of the Second Amendment to the states has recently led to a Federal District Court declaring that the nunchaku ban is void as violative of the Second Amendment,[11] perhaps we will see the regular forfeiture of vehicles in driving while intoxicated cases, the taking of expensive phones, the doubling and tripling of traffic fines or the threat of daily fines offered by municipal entities be addressed in the years to come.

Note: Named a SuperLawyer, Cory Morris is admitted to practice in NY, EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CA-SAC-T. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

1 Harmelin v. Michigan, 111 S.Ct. 2680, 2693 n. 9 (1991) (J. Scalia)

2 McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 3035, fn. 13 (2010) (citing Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276, n. 22, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989) ("Browning-Ferris").

3 German Lopez, Why the US Supreme Court's new ruling on excessive fines is a big deal, VOX (February 20, 2019), https://www.vox.com/policy-and-politics/2019/2/20/18233245/supreme-court-timbs-v-indiana-ruling-excessive-fines-civil-forfeiture.

4 Jason Snead and Elizabeth Slattery, Supreme Court's 9-0 Ruling Protects Americans Against Excessive Fines, The Daily Signal (February 21, 2019), https://www.dailysignal.com/2019/02/21/supreme-courts-9-0-ruling-protects-americans-against-excessive-fines/.

5 United States v. Bajakajian, 524 U.S. 321, 355 (1998) (J. Kennedy Dissenting) ("Bajakajian") (citations omitted).

6 Austin v. United States, 509 U.S. 602, 609–610 (1993) (emphasis deleted).

7 Id. at 610 (quoting United States v. Halper, 490 U.S. 435, 447–48 (1989).

8 Solem v. Helm, 463 U.S. 277, 290–92, 103 S.Ct. 3001, 3010-11, 77 L.Ed.2d 637 (1983).

9 United States v. Bajakajian, 524 U.S. 321, 328 (1998) (quoting Austin v. United States, 509 U.S. 602, 609-10 (1993)).

10 Charles P. Pierce, The Supreme Court Just Stopped Local Sheriffs From Carjacking to Pay the Bills, Esquire (February 20, 2019), https://www.esquire.com/news-politics/politics/a26433271/supreme-court-civil-asset-forfeiture-timbs-v-indiana/.

11 Maloney v. Singas, No. 03-CV-786 (PKC)(AYS) (E.D.N.Y. Dec. 14, 2018).

Tax (*continued from page 19)*

formed;

(iii) dates on which such services were performed; and

(iv) who performed the services.

Such records are, of course, to be made available for inspection at the request of the IRS.

Rental Services

The rental services to be performed with respect to a rental real estate enterprise for purposes of satisfying the safe harbor include the following:

- advertising to rent or lease the real estate;
- negotiating and executing leases;
- verifying information contained in prospective tenant applications;
- collection of rent and payment of expenses;
- daily operation, maintenance, and repair of the property;
- management of the real estate;
- provision of services to tenants; purchase of materials; and
- supervision of employees and independent contractors.

Rental services may be performed by the individual owners (in the case of direct ownership of the real property) or by the PTE that owns the property, or by the employees, agents, and/or independent contractors of the owners.

It is important to note that hours spent by an owner or any other person with respect to the owner's capacity as an investor are not considered to be hours of service with respect to the enterprise. Thus, the proposed revenue procedure provides that the term "rental services" does not include the following:

- financial or investment management activities, such as arranging financing;
- procuring property;
- studying and reviewing financial statements or reports on operations;
- planning, managing, or constructing long-term capital improvements; or
- traveling to and from the real estate.

Real estate used by the taxpayer (including by an owner of a PTE relying on this safe harbor) as a residence for any part of the year is not eligible for the safe harbor.

Real estate rented under a triple net lease is also not eligible for the safe harbor — it more closely resembles an investment than a trade or business. For purposes of this rule, a "triple net lease" includes a lease agreement that requires the tenant to pay taxes, fees, and insurance, and to be responsible for maintenance activities for a property in addition to rent and utilities. This also includes a lease agreement that requires the tenant to pay a portion of the taxes, fees, and insurance, and to be responsible for maintenance activities allocable to the portion of the property rented by the tenant.

Procedural Requirements, Reliance

A taxpayer or PTE must include a statement attached to the return on which it claims the Section 199A deduction or passes through Section 199A information that the requirements in the revenue procedure have been satisfied. The statement must be signed by the taxpayer, or an authorized representative of an eligible taxpayer or PTE, which states:

Under penalties of perjury, I (we) declare that I (we) have examined the statement, and, to the best of my (our) knowledge and belief, the statement contains all the relevant facts relating to the revenue procedure, and such facts are true, correct, and complete.

The individual or individuals who execute the statement must have personal knowledge of the facts and circumstances related to the statement.

If an enterprise fails to satisfy these requirements, the rental real estate enterprise may still be treated as a trade or business for purposes of Section 199A if the enterprise otherwise meets the general definition of trade or business.

The proposed revenue procedure is proposed to apply generally to taxpayers with taxable years beginning after Dec. 31, 2017; i.e., the effective date for Section 199A.

In addition, until such time that the proposed revenue procedure is published in final form, taxpayers may use the safe harbor described in the proposed revenue procedure for purposes of determining when a rental real estate enterprise may be treated as a trade or business solely for purposes of Section 199A.

Now what?

All in all, the final regulations and the proposed safe harbor should provide some welcomed relief and "certainty" for those individual taxpayers and PTEs that own smaller rental real estate operations; and they came just in time — barely — for the preparation of these taxpayers' 2018 tax returns.

But the proof is in the pudding, or something like that, and the actual impact of the proposed safe harbor will have to await the collection and analysis of the relevant data, including the reactions of taxpayers and their advisers.

As in the case of many other taxpayer-friendly regulations or procedures, the benefit afforded requires that the taxpayer be diligent in maintaining contemporaneous, detailed records for each rental real estate enterprise. This may be a challenge for many a would-be qualified trade or business.

Whether to treat "similar" rental properties as a single enterprise may also present some difficulties for taxpayers, at least until they figure out what it means for one property to be similar to another. Based upon the term's placement in the proposed revenue procedure, it may be that all residential properties are similar to one another, just as all commercial properties are similar to one another. In that case, a taxpayer may be able to treat all of its residential rentals, for example, as a single enterprise, which may allow it to satisfy the "250 or more hours of rental service" requirements of the safe harbor.

Just as challenging may be a taxpayer's distinguishing between business-related services and investment-related services.

Regardless of how the proposed safe harbor is ultimately implemented and administered, the fact remains that the IRS has clearly considered and responded to the requests of the rental real estate industry.

The questions remain, however: Will Section 199A survive through its scheduled expiration date in 2025; and if so, will it become a "permanent" part of the code?

Note: Lou Vlahos, a partner at Farrell Fritz, heads the law firm's Tax Practice Group. Lou can be reached at (516) 227- 0639 or at lvlahos@farrellfritzcom.

Preparing Medical and Health Buildings and Facilities for Inspections and Investigations (***continued from page 9)***

kept visibly labeled and locked.

- General safety and other miscellaneous important tips. Fire extinguishers should be in place and not expired. All expired medications and products must be removed from the space. No evidence of pests should be present. No evidence of mold either in ceiling tiles or elsewhere. Cubicle curtains must be clean and appropriate. Storage should be organized. Refrigerated medications must not be contained in the same refrigerator as food items. Fix all loose flooring tiles and any holes in carpet. Corridors must be unobstructed. Exit signs must be visible. Clinical records must be appropriately secured and maintained in a locked room or cabinet. Signs should be posted indicating the confidentiality of the records. Treatment tables should be cleaned and disinfected after each use. Paper protectors replaced after each use. Proper protective clothing and identification should be worn by practitioners and staff at all times while on the premises. Overall cleanliness must be maintained.

The above is not a comprehensive guide, but rather just an informal surface overview of the topic. As of February 2019 there were 6,522 medical auditor jobs available posted on just one online job website and the field is growing constantly. Medical and other health facilities would be wise to be prepared.

Note: Jordan Fensterman is a partner at the New York law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf, & Carone LLP. For more information about Mr. Fensterman or the topic discussed in this article you may contact him at 516-368-9430 or Jfensterman@abramslaw.com.

The Restored Factor: What it is and How it Can Bite Your Purchaser Client Post-Closing (***continued from page 10)***

out) with an automatic release provision.

The problems with this approach are that it eliminates finality on the closing date, which should always be the objective; and fails to contemplate the assessor's possible inaction within the agreed escrow period. The third option is an escrow held by the title company; the problems there are the title company's understandable reluctance to do so, since restored taxes are a post-policy lien; likely insistence on holding much more than the possible liability (perhaps 1-1/2 or 2 times); imposition of a justified service fee; and inability to pay the restoration without paying the *entire* tax amount, since there is no separate bill for the *restored* amount. The fourth option is for the purchasers' attorney to include contract rider language such as this:

"Supplementing the printed portion of this Contract, Seller represents and warrants that there are no real estate tax exemptions against the Premises that are subject to application of the restored factor for real estate taxes due for any period prior to Closing. If there is a restored factor applicable for real estate taxes due for any period prior to Closing, Seller shall be fully responsible for the same. If Seller or Seller's attorney receives demand therefor from Purchaser or Purchaser's attorney *within thirty (30) calendar days after Purchaser's receipt of notice of such obligation*, Seller shall promptly reimburse, indemnify and hold Purchaser harmless therefor, including any applicable interest and penalties and Seller's reasonable attorney's fees if Purchaser fails or refuses to comply with the foregoing. The provisions of this paragraph shall survive Closing."

The restored factor is a potential trap for the unwary. The onus of restored taxes will fall upon purchasers. Thus, it is imperative for purchasers' attorneys to recognize the existence of the risk of restored taxes and to react accordingly, by addressing that risk as part of the closing process.

Note: Mark S. Borten, Esq., is a Long Island transactional real estate attorney focusing on residential and commercial matters, with extensive experience involving coops and condos. A current co-chair of the Nassau County Bar Association's Real Property Law Committee, he has an office in Merrick. He can be reached at (516) 695-6068 and mbortenlaw@gmail.com. Please visit his website at bortenrealestatelaw.com.