Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

December 2021 www.nassaubar.org Vol. 71, No. 4

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SAVE THE DATE

122ND ANNUAL DINNER GALA

Saturday, May 14, 2022

See page 6

WHAT'S INSIDE

OF NOTE

NCBA Member Benefit—I.D. Card Photo

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UPCOMING PUBLICATIONS

COMMITTEE MEETINGS

Thursday, January 6, 2021, at 12:45 PM

NCBA Honors Legal Trail Blazer

James P. Joseph

The Nassau County Bar Association hosts various events, including CLEs, committee meetings, lunches, and dinners which serve our community, educate our members, and provide networking opportunities. With so many outstanding programs, it is unusual when a single event not only fulfills these purposes but also demonstrates what is possible at the Bar Association.

The centennial celebration in memory of the Hon. Constance Baker Motley (September 14, 1921—September 28, 2005), held on Tuesday, October 19, 2021, hosted by the Diversity & Inclusion Committee of the Nassau County Bar Association, was one such special occasion. This event was enjoyable and impactful, so much so that it will forever be etched in the memory of those in attendance.

This event was held at Domus as part of NCBA President Gregory Lisi's initiative to hold quarterly events to promote outreach to members of the Long Island legal community who have not historically found their home at Domus. Various affinity bar groups were invited, including the Amistad Long Island Black Bar Association, Asian American Bar Association of New York, Columbian Lawyers Association of Nassau County, Jewish Lawyers Association of Nassau County, Long Island Hispanic Bar Association, Network of Bar Leaders, New York County Lawyers Association, and the New York State Bar Association

The evening began with a cocktail reception featuring the highly regarded musical group Caribbean Swing, and the percussive sounds of Jose Ramis and Frankie Ortiz, opening the evening in a unique—for Domus—and immensely enjoyable manner.

See HON. CONSTANCE BAKER MOTLEY, Page 17

Successful Open House Highlights National Pro Bono Week

Gale D. Berg, NCBA Director of Pro Bono

For the past nine years, the Nassau County Bar Association has hosted a joint Open House with Nassau Suffolk Law Services and The Safe Center L.I. during National Pro Bono Week. Due to the pandemic, an in-person event was not possible in 2020 or 2021. However, the NCBA was not to be deterred, and successfully adapted by holding the Open House virtually.

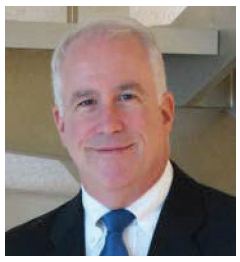
The Chairs of the NCBA Access to Justice Committee—Sanford Strenger, Vice President of the NCBA, and Kevin McDonough of Cullen and Dykman LLP not only participated—but spearheaded a program to digitalize the process of registration for attorneys and participants. As a result, approximately 60 volunteer attorneys signed up to return calls and answer the questions of 78 Nassau and Suffolk County residents who registered to speak with an attorney one-on-one to obtain advice and get answers to their legal questions. The areas of law ranged from family, real estate, and labor, to credit counseling and mortgage foreclosure, as well as legal questions involving COVID-19 and negative effects on employment, health, education, and housing matters. The volunteer attorneys spoke one-on-one with residents to explain complicated legal issues and provide guidance, assistance, and referrals.

When asked, many of the attorneys who volunteer their time will say that it is a rewarding experience. If you have never volunteered at this event or at a clinic, you are truly missing out. Too often as attorneys, we do not see the results of our efforts immediately, but through volunteering you can. Volunteer attorney Christina Lamm of Makofsky Law Group, P.C. shared, "I would say that I volunteer to be able to give back to the community I work in. I enjoy being able to give support where needed and make a difference," said Christina Lamm Makofsky Law Group, P.C.

Both the volunteer attorneys and the public were satisfied with the outcome of the Open House. Many wished it was held more often, and a few have been waiting for it since last year. One resident said, "Thank you so much for organizing this. It was a pleasure to meet

See PRO BONO WEEK, Page 23

Khoren Bandazian
Partner



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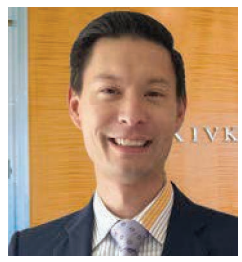

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Michael Balboni
Of Counsel

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Of Counsel

Claudia Hinrichsen
Of Counsel

Eric Ploumis, DMD
Of Counsel

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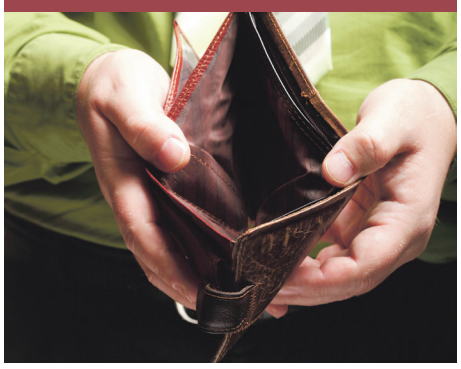
FOCUS:
BANKRUPCY LAW

Eastern District Bankruptcy Roundup



Jeff Morgenstern

In 2021, the U.S Bankruptcy Court in the Eastern District of New York produced another set of interesting decisions. The following is a capsule summary of some of the highlights:

Debtor's Exemption in Personal Injury Suit v. Claim of Litigation Finance Company

In *In re Reviss*,[1] a Chapter 7 Debtor started a personal injury action in state court in January 2019 (the "PI case"). He received a total of $20,000 in advances against the PI case from Greentree Case Funding, with repayment contingent upon the success of the PI case. Interest accrued at 3.5%/monthly, and Greentree was given an assignment of a portion of the proceeds to be received from the PI case. Its agreement stated that upon a bankruptcy filing, the debtor would list the assigned proceeds as an asset of Greentree and not as a debt owed to it.

The debtor filed a Chapter 7 in July 2019. He listed the PI case as an asset, took the federal personal injury and "wild card" exemptions allowed under 11 U.S.C. 522(d) in the total of $39,040 and listed Greentree as a creditor for $20,000. Greentree filed a proof of claim for $49,560 secured by the PI case proceeds.

The trustee settled the PI action for $175,000 and then sought to pay the debtor the exempt portion of the proceeds and to reclassify the Greentree claim as an unsecured claim. Greentree opposed that motion and tried to assert an equitable lien on the proceeds.

Initially, Judge Stong held that the proceeds of the settlement became property of the estate, even though the debtor assigned them to Greentree; this was because under New York law, personal injury actions are property of the estate. While an assignment of such causes of action are prohibited under the N.Y. General Obligation law, assignment of the *proceeds* of such cases are permitted, and therefore upon the filing, the debtor had a legal interest in the PI case and in its funding.

As to the other important issue, the Court ruled that the PI case itself did not convey a present interest to the assignee, since there were no proceeds in existence at the time of the filing. Greentree retained an equitable lien which would only come into existence and depend on the occurrence of a future event—typically the entry of a judgment in the PI case. Put another way, Greentree had an interest in the PI case only if the debtor was successful in it; its lien could only have arisen when proceeds of the PI case arose, based upon either a judgment or a settlement.

As the result, the debtor's rights to his exemptions were superior to the creditor's rights and he was granted the full exemption of $39,040. Greentree merely had an unsecured claim at the time of the filing which was inferior to the estate's legal interest in the PI case. In addition, it was held that its equitable lien did not relate back to the date of the assignment of proceeds.

Judgment of Foreclosure & Sale Not an Avoidable Preference

In *Buckskin Realty Inc. v. Windmont HOA Inc.*,[2] the debtor sought to vacate a Judgment of Foreclosure and Sale entered by its HOA, which had a lien for unpaid common charges. The HOA was the successful bidder at the foreclosure sale. The issue before the court was whether or not the Judgment of Foreclosure & Sale, entered within 90 days of the Chapter 11 filing, was a preference under §547 of the Bankruptcy Code, which enabled it to receive more that it would in a hypothetical Chapter 7 case. The Judgment was held to be not avoidable, as it just gave the secured creditor the authority to foreclose, which it was already entitled to; therefore, the secured creditor did not receive more than it would have in a Chapter 7 case under §547(b)(5). The Court also cited and relied upon the Supreme Court holding in *BFP v. Resolution Trust Corp.*,[3] which protected regularly conducted, non-collusive foreclosure sales from avoidance as a preference.

Elements of §363(f) Satisfied to Allow Trustee's Sale

In *In re Hamilton Road Realty LLC*,[4] the trustee sought to sell property of the estate free and clear of liens, pursuant to §363(f) of the Bankruptcy Code. The debtor objected and claimed to have standing based on the possibility of a surplus existing if the sales price were to exceed the face amount of the liens encumbering the property. The first two mortgage holders agreed to accept the total of about $1,880,000. The formula set out in §363(f)(3) is that the sales price must be greater than the "value" of the liens, which does not translate to what the value of the collateral would be under §506(a) of the Bankruptcy Code. The court had to determine if the statute was satisfied as to the holders of nonconsensual tax liens and judicial liens. The dilemma was that under §363(f)(5), it had to be shown that those lien creditors could be compelled to accept payment in full in exchange for satisfaction of their liens.

Judge Grossman held that the judicial lienholders *could* have been compelled to accept full payment in satisfaction of their liens, because under New York law that could have happened if the lienholders moved for a Sheriff's execution sale under CPLR §5235 or §5236 to compel a sale.

Similarly, the trustee could have subordinated the lien of the tax lienholders under §724(b) and compel them to take payment in satisfaction of their liens, which would subordinate them to Chapter 7 administrative expenses up to the amount of their liens; if insufficient monies were available to pay the tax liens, the balance would be treated as unsecured claims.

As a result, the Court found that all of the elements of §363(f) were satisfied and approved the sale.

Homestead Exemption for Non-Primary Residence

In *In re: Banfi*,[5] a joint Chapter 7 case, the debtors owned a house that was only the primary residence of the husband. The Bankruptcy Court initially granted the husband an avoidance of judicial liens docketed against him only. The husband claimed the Federal homestead exemption of $25,150, and the wife (who did not live in that house) claimed a separate "wild card" exemption in the same property of $13,900.

On reconsideration, the Court considered the then recent release of the Second Court's decision in *In re: Maresca*,[6] concluding that "residence" under 11 U.S.C. §522(d)(1) includes both primary and non-primary residences. On the strength of Maresca, Judge Trust held that residency is irrelevant to a debtor's ability to use the "wild card" exemption and that both debtors don't have to use §522(d)(1) for the same property in order to be able to avoid liens. The statute does not prohibit that, and in addition, the "wild card" exemption applies to both real and personal property. As a result, the wife was able to use the "wild card" exemption to avoid a judicial lien which impaired that exemption in the subject house even though she did not live there.

Stripping Off Junior Lien After Discharged Debt

In *In re: Hopper*,[7] a debtor obtained

See BANKRUPTCY, Page 20

Jeff Morgenstern maintains an office in Carle Place, where he concentrates in bankruptcy, creditors' rights, and commercial and real estate transactions, and litigation. He is also an Editor of the *Nassau Lawyer*.

THANKSGIVING

FROM THE PRESIDENT

Gregory S. Lisi

Thanksgiving is my favorite holiday. Yes, I get to sit around and eat as much as I can stand, and then add dessert, because everyone knows the food on Thanksgiving has no calories. Sure, I get to watch football until I fall asleep on the couch at a relative's house—yes, I am that uncle. Of course, the lack of having to worry about presents is similarly really nice. However, it is also because every year I sit for a few minutes and think about those I need to say "thank you" to the people I love and the people who have helped me throughout my presidency. This year, there are many people who I need to acknowledge in my life who have made my presidency go a little smoother, and my existence a little more wonderful.

First, a huge thank you to the **staff of the Nassau County Bar Association**. These are such hardworking people who do not get enough credit but are always there for me and for all of us. I want to make sure you know who they are, and I want to send my heartfelt thanks to:

Liz Post is the Executive Director who works tirelessly to make the NCBA a success. Her hand is in everything, and her ideas have helped us make a plan to guide the NCBA out of the darkness that COVID put us in.

Hector Herrera, "Mr. Everything," is just that. Those of you who have late-at-night events know he is there to take the pictures and close the building, no matter what time. He changes the light bulbs and fixes the carpet. He makes sure the Wi-Fi works and the Zoom meetings run properly. He is the head of technology and makes sure the cleaning crew has this place spotless at the end of the night. This is only a portion of the wonderful things he does for this Bar and its members.

Pat Carbonaro, the head of the Lawyer Referral Service, and Carolyn Bonino, Lawyer Referral Service Coordinator, screen the callers and send them to the right attorneys for the issue. I have said before that no one makes more money for our members than Pat and Carolyn. They also run the "Ask A Member" program which puts our members who have questions in touch with other members who have more experience in that area of law. They bring so much to the NCBA, and Pat has for over 31 years!

Jen Groh is the Nassau Academy of Law Director of CLE. All the free CLE programs we take go off without a hitch because Jen is on top of every aspect of them. Plus, Jen also gets speaking engagements for our members through the Speaker's Bureau. Her efforts are so important.

Ann Burkowsky, the head of Marketing, makes the NCBA look good every day. Between her work on the *Nassau Lawyer*, managing our social media, getting signs for the courts, and dealing with the press, Ann has been an invaluable addition to this team.

Stephanie Pagano, the Committees Liaison, runs the Committee meetings. Every time you schedule a meeting, it is Steph who coordinates it, sends news to the members, and reminds them of their committees' happenings.

Barbara Decker, the Office Manager and Controller, keeps the money flowing and the accounts balanced.

Bridget Ryan, the Special Events Assistant and WE CARE Coordinator, helps make all the events, which are getting us all back to Domus, special.

Donna Gerdik, the Membership Coordinator, answers all your questions about membership and helps find new members.

Patti Anderson, our Executive Assistant, is everywhere. She helps keep the Academy and the Board of Directors running smoothly.

Beth Eckhardt, Lawyer Assistance Program Director, is one of the most caring people you will ever meet. She helps our members who really need it the most in a private and confidential way. She purposely stays under the radar, but her services and compassion are invaluable.

Gale D. Berg is the head of the Mortgage Foreclosure Project as well as our go-to person on grants. She is a tireless advocate for the NCBA and the people of Nassau County. Her staff—including Madeline Mullane, Cheryl Cardona, and Omar Daza—are so dedicated to helping people. It is a pleasure to watch them work.

Bob Nigro is the Director of the Nassau County Assigned Counsel Defender Plan. He and his staff of Judith Kabashi, Debbie Ally, Marie Pascuzzi, and Chris Sheppard do an outstanding job of protecting Nassau's citizens in need of defense counsel and getting attorneys paid.

I am often asked how members can show their appreciation to the staff. There is a Staff Holiday Fund—a flyer is included in this issue of Nassau Lawyer—which allows you to donate to the monetary gift for the staff. They notice this and really appreciate it. The staff is wonderful, and I certainly give thanks for all of them.

Additionally, the **Executive Committee**—Rosalia Baiamonte, Sandy Strenger, Dan Russo, James Joseph, and Dorian Glover—give so much time and huge effort to the NCBA. They are at every event and are an extension of me, and this Bar, at every function. They help set up and tear down, they volunteer for every project I come up with, and give everything they do their all. It often does not stop with just them, as their firms also step up in so many ways. I give thanks to them and their zeal for this wonderful Bar.

Speaking of firms, I am so overwhelmed and humbled by my **Partners at Forchelli Deegan Terrana LLP** (**FDT**). They know that my time as President takes time away from my work as a Partner, and yet they all try to help and support me in any way they can. Some have even volunteered for Committee Chair and Vice-Chair positions at the NCBA as they know how important this Bar Association is to the rule of law in Nassau. I am so thankful for the **Forchelli Deegan Terrana LLP family**.

Further, my **Labor & Employment Law Department**—Frank Brennan, Elbert Nasis, Lisa Casa, Alex Leong, and Michael Berger—do so much both here at the NCBA and at Forchelli, that makes my life easier and frees up time for me to be President. A special thank you to my fantastic secretary Carri Ocasio, who goes out of her way to help on nearly everything I do at the NCBA and FDT, including reviewing and commenting on all my president's columns. I am so thankful for and proud of this department.

Furthermore, in this trying time, it is not only the NCBA which is taking so many affirmative steps to help the rule of law and the people of Nassau County, but the courts as well. I am so impressed by the **leadership of the Courts here in Nassau County**—Deputy Chief Administrative Judge for Courts Outside New York City Hon. Norman St. George, Presiding Justice of the Appellate Division Hon. Hector LaSalle, Acting Nassau County Administrative Judge Hon. Vito DeStefano, and the Chief Judges of the different sections of the Nassau County courts—who have been so active in improving access to the courts and to justice, making rules and exceptions for attorneys and

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Nassau Lawyer

The Official Publication
of the Nassau County Bar Association
15th & West Streets, Mineola, N.Y. 11501
Phone (516)747-4070 • Fax (516)747-4147
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Published by
Long Island Business News
(631)737-1700; Fax: (631)737-1890

Publisher Joe Dowd
Graphic Artist Wendy Martin

Nassau Lawyer (USPS No. 007-505) is published monthly, except combined issue of July and August, by Long Island Commercial Review, 2150 Smithtown Ave., Suite 7, Ronkonkoma, NY 11779-7348, under the auspices of the Nassau County Bar Association. Periodicals postage paid at Mineola, NY 11501 and at additional entries. Postmaster: Send address changes to the Nassau County Bar Association, 15th and West Streets, Mineola, NY 11501.

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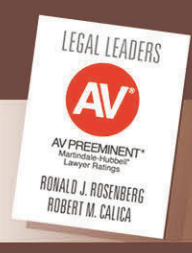

FOCUS:
IN MEMORIAM

In Memoriam: A. Kathleen Tomlinson (1948—2021)

Cynthia A. Augello

On October 17, 2021, the legal profession lost an amazing judge, friend, mentor, and a truly kind-hearted individual. Judge Tomlinson received a B.A. in English and Sociology, magna cum laude, from Rutgers University in 1972 and an M.A. in English and American Literature from Long Island University ("LIU") in 1975.

Many would be surprised to learn that the law was not Judge Tomlinson's first career. For fourteen years, Judge Tomlinson served LIU as an academic administrator and rose to the position of Assistant University Dean for the Faculty of Arts and Sciences. Her duties and responsibilities spanned LIU's six campuses. She was also an adjunct faculty member in the English Department.

After graduating from St. John's University Law School in 1987, Judge Tomlinson joined the Appeals Bureau of the Nassau County Legal Aid Society. Tomlinson then served as a law clerk to the late United States District Judge Arthur D. Spatt, with whom she had a great relationship. After she became a Magistrate Judge, Judges Spatt and she would often share stories of the years she clerked for him.

In 1991, Judge Tomlinson entered private practice at Farrell Fritz, P.C., in Uniondale. She became a partner in 1997 and served as Chair of the firm's Pro Bono Committee. Her practice concentrated in complex litigation, labor and employment law, white collar defense, and civil rights litigation in the state and federal trial and appellate courts.

In addition, Judge Tomlinson previously worked as a member of the Criminal Justice Act Panel for the Eastern District. The Judge also served as counsel to the Eastern District's Board of Judges Grievance Committee and as a member of the Magistrate Judge Merit Selection Panel for the District.

In proceedings before the Judge, she was always fair, pleasant, and knew the facts of each case before her. Anyone with a matter before Judge Tomlinson knew the following:

- know the facts of your case better than the Court.
- prepare an ESI agreement.
- know the District Judge's and Judge Tomlinson's Individual Rules, the Court Rules, and the Federal Rules.
- meet and confer before going to the Court with a discovery dispute—and a meet and confer must be by telephone or in-person, and
- she already allowed for extra time to complete discovery—don't ask for an extension.

As long as you abided by those "rules," proceedings before Judge Tomlinson were quick and painless.

Due to her profound fairness, parties were often willing to attempt to resolve actions with the assistance of Judge Tomlinson. She would spend as much time as necessary, despite her overflowing caseload, to help the parties reach an agreement and resolve their disputes. Parties appreciated her warmness but also her willingness to explain the good and bad facts of a case to a party that might have needed to hear it from someone other than counsel.

In addition to Judge Tomlinson's courtroom proficiency, she was very active in various bar associations throughout her career, including the New York Bar Association, the Nassau County Bar Association where she was a past Director, the Federal Bar Council and the Federal Bar Association, Eastern District of New York Chapter where she served as a board member and a Chair of the CLE Committee. In her role in the FBA EDNY Chapter, Judge Tomlinson was instrumental in creating, coordinating and presenting the Annual Civil Practice Update for the last 10 years, as well as the Annual Criminal Law Update.

Judge Tomlinson also spearheaded an annual Naturalization Ceremony at

See TOMLINSON, Page 25

Cynthia A. Augello practices in the areas of employment litigation defense and education law. She is a former President and current board member of the Federal Bar Association, Eastern District Chapter and a Vice Chair of the Publications Committee of the Nassau County Bar Association.

CALL FOR NOMINATIONS

The Nominating Committee welcomes applications for nominations to the following Nassau County Bar Association offices for the 2022-2023 year:

☐ President-Elect ☐ Vice President ☐ Treasurer

☐ Secretary ☐ Director

Applications are welcome for nominations to serve on the Nassau County Bar Association Board of Directors. There are eight (8) available director seats, each is for a three-year term.

The Nominating Committee invites applications for nominations to the following offices of the Nassau Academy of Law for the 2022-2023 year:

☐ Dean ☐ Associate Dean ☐ Assistant Dean (2)

☐ Secretary ☐ Treasurer ☐ Counsel

NCBA members interested in applying for any of the above nominations, or in submitting suggestions for such nominations, are invited to submit such information to:

Richard D. Collins
Nassau County Bar Association
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Mineola, NY 11501

JANUARY 24, 2022 DEADLINE FOR ALL NOMINATIONS.

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Annual Dinner Gala of the Association

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Additional details to follow.

FOCUS:
BANKRUPTCY LAW

The Interplay Between "Critical Vendors" and Preference Actions

Mickee M. Hennessy

In some corporate Chapter 11 bankruptcy cases—particularly larger cases involving a debtor or debtors that have several key vendors—it is common to see, among the first few motions filed with the bankruptcy case, a "Critical Vendor" motion. This is a motion pursuant to 11 U.S.C. §§105(a) and 363(b) seeking authority for the debtor to pay certain pre-petition creditors post-petition and honor pre-petition obligations.

The general rule is that the filing of a voluntary bankruptcy petition under Title 11, Chapter 11 of the United States Code triggers the automatic stay provisions of Section 362 of the Bankruptcy Code (such that pre-petition debts cannot be pursued by creditors or paid by debtors without Bankruptcy Court approval). A debtor's request to pay "critical vendors" is an exception to that general rule. The rationale often invoked by a debtor seeking this relief is that, without the goods or services of certain "essential" or "critical" pre-petition creditors, the debtor may lose the ability to reorganize or sell its business as a going concern.

One of the other tools in the bankruptcy arsenal is the ability for a debtor or a trustee to seek to avoid certain transfers made to creditors prior to the bankruptcy filing. That is to create, in theory, a "pool" of assets that can more fairly be distributed to pre-petition creditors on a pro rata basis.

Thus, Section 547(b) of the Bankruptcy Code, titled "Preferences," provides, in pertinent part, that a trustee may avoid:

…any transfer of an interest of the debtor in property—
(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made—(A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition if such creditor at the time of such transfer was an insider; and
(5) that enables such a creditor to receive more than such creditor would receive if—(A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.[1]

In addition to other defenses available to creditors, as set forth in the statute and in various cases, some creditors that had been deemed "critical vendors" at the outset of the bankruptcy case have attempted to argue a "critical vendor defense"—i.e., if the bankruptcy court previously permitted the debtor to pay pre-petition obligations of a creditor by an order authorizing the debtor to do so for the benefit of "critical vendors," then the debtor (or a post-confirmation trustee) should not be able to later end-run that bankruptcy court order by asserting that transfers to that "critical vendor" can be avoided as preferential.

Courts, however, have read the ability to pay critical vendors on certain pre-petition transfers more narrowly, looking to the express language in the order granting such relief and not extending such relief to the entire 90-day preference period. For example, in *Insys Liquidation Trust v. McKesson Corporation et al., (In re Insys Therapeutics, Inc.),* 2021 WL 3083325 (Bankr. D. Del. July 21, 2021), the Delaware bankruptcy court denied that portion of a creditor's motion to dismiss preference claims against the creditor, who had been paid as a "critical vendor" pursuant to an earlier order of the bankruptcy court (the "Customer Order").

This was done primarily for three reasons. First, the Court relied on the discretionary language of the Customer Order, which provided that the debtor was "*authorized*, but not *directed*," to pay certain pre-petition creditors and, did not specifically identify the moving creditor (emphasis provided).[2]

Second, the *Insys* Court distinguished cases upholding a critical vendor defense where underlying contracts had been assumed by the debtor (which, pursuant to Section 365 of the Bankruptcy Code, requires the debtor to 'cure' pre-petition defaults as a condition to assumption of the contract), and, where the order authorized payment of priority claims, such as wage and employment claims, as opposed to claims that would be deemed general unsecured claims.[3]

Third, the *Insys* Court found that transfers made to a creditor prior to a request to the Court or, authorization by the Court, to pay pre-petition claims did not insulate transfers made to that creditor before the order was entered. In fact, the order entered in the *Insys* case expressly reserved the debtor's rights to assert all other claims.[4]

In our district, bankruptcy courts have held similarly. In *Devices Liquidation Trust v. KMT Wireless LLC (In re Personal Communications Devices, LLC),* 588 B.R. 661 (Bankr. E.D.N.Y. 2018) ("PCD"), Chief Judge Alan S. Trust held that a transferee was not entitled to summary judgment as a matter of law by asserting a critical vendor defense. As in the *Insys* case, the language in the 'critical vendor' order previously entered in the case authorizing payment of certain pre-petition obligations was permissive, not mandatory.[5]

In addition, the Court noted that there was no request in that order that the debtors waive any Chapter 5 causes of action (which would have included preference actions). "[W]hile this Court is certainly poised to interpret and enforce the orders it has entered, it is not prepared to reimagine what it might have done had it been asked to provide significantly different relief on notice to parties-in-interest with an opportunity to objection and be heard."[6]

The lesson for creditors that have the advantage of being considered "essential" or "critical" is to at least attempt to utilize that leverage to negotiate their treatment at the outset of the case, such as being specifically identified in the proposed critical vendor motion, without the caveat of a debtor being "authorized but not directed" to pay.

Creditors should try to seek a waiver of Chapter 5 causes of action as against them as part of the initial relief in the critical vendor motion or obtain a commitment by the debtor to assume their contract. At a minimum, creditors will need to understand, in light of these cases, that the special treatment of being able to get payment for certain pre-petition claims after a bankruptcy filing as a 'critical vendor' may not insulate all the transfers those creditors have received from the debtor, the latter of which will be subject to further review.

1. 11 U.S.C. §547(b) (AWHFY, L.P. 2020).
2. *Insys*, 2021 WL 3083325 at *3.
3 *Insys,* 2021 WL 3083325 at *4, distinguishing *Official Committee v. Medical Mutual of Ohio (In re Primary Health Systems*, 275 B.R. 2709 (Bankr. D. Del. 2002) (authorizing payment of wage claims) and *In re Kiwi Int'l Air Lines, Inc.,* 344 F.3d 311 (3d Cir. 2003) (affirming summary judgment where debtor had assumed agreements with creditor under section 365(a) of the Bankruptcy Code.
4. *Id.*
5. *PCD*, 588 B.R. 661 at 664.
6. *PCD*, 588 B.R. 661 at 666.

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FOCUS:
MENTAL HEALTH

Stigma and the Legal Profession

Jacqueline Cara

As Co-Chair of the Nassau County Lawyers Assistance Committee, I am grateful to the Nassau County Bar Association for the ongoing support of such an important program. NCBA LAP shares the distinction of being one of only three Lawyers Assistance Programs in our state and our wonderful Director, Elizabeth Eckhardt, has been helping the program improve and, in some instances, save the lives of attorneys in need of assistance with substance use disorder and mental health issues for years. Each year those numbers grow, and the pandemic has seen far more attorneys seeking assistance from our program than ever before.

This is why the LAP Committee and Program feel sharing information and working to end the stigma of substance use disorder and mental health issues is of such importance.

What is Stigma?

Look at any resource talking about mental illness, substance use disorder, or a host of physical issues, and you will come across a discussion about the stigma attached to those issues and how that stigma causes those struggling to hide their illness or issues and not seek help.

Stigma is the sense of shame or judgment that many individuals struggling with conditions like mental illness and substance use disorder and a host of other physical and personal issues feel.

Stigma around these issues comes from old ideas and inaccurate beliefs that Mental Illness and Addiction are moral failings, instead of a chronic, treatable disease from which patients can recover and lead productive lives.

There is a well-known and repeated misconception that people struggling with stigmatized issues are weak and suffer from some personal or moral failing that has led to their struggle. That belief is compounded by the secrecy that surrounds stigmatized illnesses. Along with those misconceptions come the belief that individuals suffering from some mental or physical disabilities are to blame for their condition, should be punished or even ostracized for their illness, and that these individuals cannot be productive members of our community. For some, there is even the belief that such conditions are rare and that support around those struggling is unnecessary and not worth the investment of the time and money needed to educate, support, care for, and help heal those suffering with such illnesses.

Substance Use Disorder and Mental Illness Findings in the United States[1]

- An estimated ***20.8 million*** Americans have alcohol or other drug use disorders.
- More Americans die every year from drug overdoses than in car accidents.
- An estimated 89 percent of individuals in need of treatment do not receive treatment.
- 19.1% of U.S. adults experienced mental illness in 2018 (47.6 million people). This represents 1 in 5 adults.
- 4.6% of U.S. adults experienced serious mental illness in 2018 (11.4 million people). This represents 1 in 25 adults.
- 16.5% of U.S. youth aged 6-17 experienced a mental health disorder in 2016 (7.7 million people)
- 3.7% of U.S. adults experienced a co-occurring substance use disorder and mental illness in 2018 (9.2 million people)

Statistics in the Legal Profession

According to the Journal of Addiction Medicine:[2]

- 21% of working lawyers are considered problem drinkers.
- Another study by the American Bar Association concluded that an estimated ⅓ of attorneys have a drinking problem.
- 31.2% of lawyers struggle with depression.
- 40% of law students suffer from depression.

How Many Lawyers is That?

In the United States there are about 1,338,678 lawyers.[3] So, what does that mean when we talk about the impact of substance use disorder and mental health issues in our profession?

Between 281,122,38 and 401,603 working lawyers are considered problem drinkers. Around 425,000 suffer from mental disorders, such as depression, and over 856,753,92 identify themselves as struggling with anxiety.

Take into consideration that most people, in or out of the legal profession, don't get help for these stigmatized disorders.

What Does this Mean to Our Profession?

- 70% of legal malpractice issues are associated with substance abuse.
- Alcoholism and substance abuse account for 500 million lost days of work per year.
- For attorneys suffering with mental disorders such as anxiety and depression, the impact on job performance can be varied, but equally as impactful on an attorney's handling of matters.

At the Lawyers Assistance Program, we speak to lawyers every day who report that their depression and anxiety make it really difficult to do their jobs. Many express the feeling as "slogging through quicksand" and being unable to get out of their own way and feeling as if every task is insurmountable. Most with whom we deal with report their ability to handle their caseloads has been negatively impacted by depression, anxiety, or substance use disorder.

How Has the Pandemic Made the Problem More Prevalent?

At a time when people are uncertain about the future, caring for their own health or the health of loved ones, and dealing with unprecedented struggles (from business and economic pressures to home-schooling children), lawyers are at even higher risk for substance abuse disorders.

Complicated by isolation, working from home, job loss, and other factors, law firms need to be even more proactive in finding creative solutions to keep their workforce healthy.

The number of calls that have come into LAP in the past 18 months has skyrocketed because of these and other concerns. And these skyrocketing calls are not just to LAP.

Clinicians are reporting a growing caseload, coupled with a shortage of available professionals to care for patients. Many mental health professionals are experiencing burnout and "compassion fatigue."

Everyone has found themselves in a state of crisis in the last year or more. Even as business gets back to normal, uncertainty, fear, unemployment, and financial insecurity plague not just patients but practitioners as well.

Rates of Substance Use Are Much Higher in Our Profession

Stigma is the sense of shame or judgment that many individuals struggling with conditions like mental illness and substance use disorder and a host of other physical and personal issues feel.

There are many factors that contribute to the much higher rates of substance use disorder and mental illness in the legal profession. Generally speaking, roughly 19% of the general population experiences some level of mental illness, including substance use disorder. Compare that to the numbers in our profession alone, which shows these numbers to be closer to 30% across the profession.

Colleagues contribute to the higher rates of substance use disorder amongst attorneys due to issues like extreme stress, long hours, difficult clients, overwork, unreasonably high expectations, perfectionism, and a culture of drinking to manage stress, networking and socializing to gain clients.

Couple the increased rates of these issues within the profession with the culture that exists in the profession on the whole, for signs of weakness or vulnerability, the impression that attorneys can't be competitive if they must reduce hours, care for family members or suffer an illness of their own and we can see why lawyers and law students hesitate to get help for their mental health and substance use disorders.

Most report embarrassment, denial, fear and uncertainty, shame, the need to protect their personal image, repercussions to their positions, lost

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Jacqueline Cara, Chair, NCBA Lawyer Assistance Program.

Please—if you or your firm are able, donate to the LAP program directly through the Nassau County Bar Association website.

FOCUS:
COMMERCIAL LITIGATION

Have You Considered Snap Removal?

James G. Ryan and Ryan Soebke

As a litigator, when you are first made aware that a lawsuit has been filed against your client, there are likely a number of issues you look for when analyzing the complaint. Has your client been served? Is venue proper? Is there insurance coverage? When is your response to the complaint due? If the action was filed in state court, many litigators will consider whether the action can be removed to federal court and whether removal would be beneficial to their client's position.

Most litigators are aware, however, that when a defendant is sued in its home state, that defendant cannot remove an action from state to federal court on the basis of diversity jurisdiction. Nevertheless, fast-acting litigants may be able to take advantage of a procedural tool that has become known as "snap removal" to remove a matter from state to federal court, even when the case was originally filed in the defendant's home state.

What is Snap Removal?

Generally, for a defendant to successfully remove an action to federal court, the federal court must have subject matter jurisdiction over the case. Typically, a federal court will have subject matter jurisdiction over an action if the matter involves a federal question or if there exists complete diversity of citizenship.[1]

What may be surprising to practitioners not familiar with federal practice is that removal based on diversity of citizenship is limited by what is known as the "forum defendant rule." Under the forum defendant rule, an action that is "otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[2] Thus, if, for example, a defendant is a citizen of New York and is "properly joined and served" in an action pending in a New York State court, that action cannot be removed to federal court on the basis of diversity jurisdiction.

However, fast-acting litigants may be able to overcome the forum defendant rule through snap removal. Snap removal allows a forum defendant, who would otherwise be unable to remove a matter based on diversity jurisdiction, to remove the action after suit has been filed in state court but *before* the forum defendant has been properly served and joined. Whether or not snap removal is possible is a technical issue that turns on whether the forum defendant has been "properly served and joined" before a notice of removal has been filed.

Snap Removal in the Second Circuit

Federal courts around the country are divided as to whether snap removal should be permitted. Some federal courts have reasoned against the use of snap removal, reasoning that snap removal defies Congress' purpose in enacting the forum defendant rule.[3] Federal courts in several jurisdictions, however, including the Second Circuit, have permitted defendants to utilize snap removal, holding that the language of the forum defendant rule "unambiguously" permits forum defendants to employ snap removal.[4]

Until recently, district courts in the Second Circuit were split as to whether forum defendants could utilize snap removal. This split was resolved by the Second Circuit in *Gibbons v. Bristol-Myers Squibb Company*.[5] *Gibbons* involved a number of lawsuits against two pharmaceutical companies brought by plaintiffs around the country that were eventually transferred to the Southern District of New York (the "S.D.N.Y.").[6] Following the S.D.N.Y.'s dismissal of many of the complaints, some plaintiffs refiled their complaints in Delaware state court where the defendants were

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FOCUS: BUSINESS, TAX, ACCOUNTING

NYS Taxable Estate vs. Federal Taxable Estate

Matthew E. Rappaport and Louis J. Kesselbrenner

As attorneys throughout New York State (NYS) keep a close eye on the federal government to monitor pending legislation that could change the estate and gift tax laws, the potential for a changing statutory framework is a good opportunity to review fundamental concepts. The one we will discuss here is the difference in how the Internal Revenue Code and the New York Tax Law each calculate a decedent's gross and taxable estates. If new legislation does indeed modify the rules on the federal level, those changes will have a cascading impact for NYS purposes because of how the state rules reference the federal rules. At the same time, the contrast between the statutory frameworks for calculating a decedent's taxable estate could present planning opportunities (for those in the know) or traps for the unwary (for those in the dark).

Basic Overview of the Federal Estate Tax Regime

The federal gross estate includes all of a decedent's property, "real or personal, tangible or intangible, wherever situated," as long as the decedent is subject to the jurisdiction of the United States taxing authorities.[1] Besides the property to which the decedent has legal title, the Internal Revenue Code also includes certain property to which the decedent might not have legal title. As examples, revocable transfers,[2] transfers with certain retained interests,[3] and property over which the decedent holds a general power of appointment are all included in a decedent's federal gross estate.[4] Both the regulations under Section 2031 and Rev. Rul. 59-60[5] set forth methodology and framework to determine the fair market value of illiquid assets or other property not traded on an established market, though valuation is a constant source of disagreement between the Internal Revenue Service (IRS) and taxpayers upon examination of IRS Forms 709 (U.S. Gift and GST Tax Return) and 706 (U.S. Estate and GST Tax Return).

The Tax Cuts and Jobs Act of 2017 changed the unified estate and gift tax exemption— that is, the total amount of property transferrable by a taxpayer in transactions subject to the estate or gift tax without incurring a liability—by increasing it to $10,000,000 per person, indexed for inflation from 2010.[6] However, this increased exemption amount "sunsets" on December 31, 2025, upon which the exemption will revert to $5,000,000 per person, indexed for inflation from 2010.[7] The exemption is "portable" between spouses, meaning any exemption unused upon the death of a first spouse to die will be added to the exemption available to the surviving spouse.[8] This concept lessens the sensitivity of using so-called "A/B" trusts to maximize use of the federal exemption between couples, since transfers between spouses are generally deductible against the estate tax;[9] prior law gave the exemption a "use it or lose it" quality that made proper planning crucial.[10]

Calculating the New York Taxable Estate—Residents

The NYS estate tax regime for residents mirrors many aspects of the federal government but deviates in a few ways that can significantly impact planning and administration. The following five differences are perhaps the most notable:

- The methodology for determining the NYS taxable estate, as opposed to the federal one;
- The amount of the NYS estate tax exemption;
- The way NYS taxes gifts;
- The NYS estate tax "cliff"; and
- The absence of portability between spouses, as the federal regime allows.

Calculating the taxable estate for a NYS resident begins with determining his or her federal gross estate under Section 2031, irrespective of whether she was subject to the requirement to file a federal estate tax return.[11] Afterward, the following items are added and subtracted to determine his or her NYS taxable estate:

- Decreased by the value of real or tangible personal property with an actual situs outside of New York State;
- Increased by the "three-year claw-back" for gifts (discussed in greater detail below); and
- Increased by the value of "qualified terminable interest property" (QTIP) received by the decedent when her spouse died (and not already included in her federal gross estate), and for which a deduction was taken from her spouse's gross estate under the New York estate tax law.[12]

When a taxpayer makes a gift within the three years preceding her death—even if it is otherwise excludable from the taxpayer's gross estate under federal law—NYS includes such gifts as if the taxpayer never made the gift (i.e., "the three-year claw-back" mentioned above).[13] The claw-back is intended to prevent NYS residents from circumventing state-level estate tax when making a gift within three years preceding their death, reducing their taxable estates below the NYS exclusion amount. This provision will remain within NYS law until December 31, 2025, which is the expiration date for the increased federal exemption amount under the Tax Cuts and Jobs Act of 2017.

The starkest difference between the estate tax laws of NYS and the federal government is the estate tax "cliff" under NYS law. In effect, this law states that once the NYS taxable estate reaches 105% of the NYS estate tax exemption amount, then every dollar of the decedent's taxable estate—starting from dollar one—is subject to NYS estate taxes. For example, when a NYS resident decedent has a taxable estate of less than the exemption amount under NYS law (currently $5,930,000), he or she has no federal or NYS estate tax obligations. By contrast, if the estate were $6,226,501 (i.e., just over 105% of the NYS exemption amount), the estate owes NYS estate taxes on the *entire* $6,226,501 amount, not just the excess over the exemption. Yet federal law would provide that only the excess is subject to federal estate taxes.

For this reason, advisors must build provisions into plans for NYS residents that allow for post-mortem adjustments to the NYS taxable estate to attempt avoidance of the cliff itself. Since the size of one's NYS taxable estate and the available exemption amount upon death are not readily predictable in most cases, documents such as one's Last Will and Testament should contain provisions allowing for contingent charitable gifts or similar mechanisms to decrease the NYS taxable estate below the cliff threshold. If taxpayers are amenable to lifetime planning, advisors should consider lifetime gifts, which are excludable from the NYS taxable estate subject to the claw-back rule. Advisors must conduct a balancing act of sorts between the merits of lifetime gifts and the benefits available for property includible in a decedent's taxable estate, such as an adjustment to income tax basis.[14]

The treatment of a spouse's unused exemption is another significant difference between the federal and NYS regimes. As described above, federal law allows "portability" of a deceased spouse's unused exemption. On the other hand, NYS has no portability rule, despite the idea that the most recent NYS estate and gift tax legislation (its 2014-15 Executive Budget) came after the federal government's legislation enshrining portability into law. This concept creates the need for planners to include "A/B" trusts into clients' testamentary instruments. The purpose of an "A/B" trust is to ensure maximum usage of the NYS exemption of the first spouse to die, and these trusts can come in many different forms, including Credit Shelter Trusts, Disclaimer Trusts, and QTIP Trusts.

Calculating the New York Taxable Estate—Non-Residents

For non-residents of NYS, the law only includes in those decedents' taxable estates the real and tangible personal property physically located in New York State that is also included in the non-resident decedent's federal gross estate.[15] The notable exclusion from a non-resident's NYS taxable estate is intangible property,[16] which invites both debate and planning opportunities. The NYS Department of Taxation and Finance (DTF) has adopted the position that real property can be permissibly "transformed" into intangible property depending on how the real property is held. For instance, New York real property is clearly included in a non-resident's NYS taxable estate if held directly or through an entity disregarded for federal income tax purposes, such as a revocable trust or a single-member LLC; but the same real property would apparently not be includible in a non-resident's NYS taxable estate if it is held in a multi-member LLC taxed as a partnership.[17]

The flipside of the exclusion of intangible property from the NYS taxable estate is that deductions relating to this property will also not be allowable against the NYS gross estate. The Tax Law similarly disallows deductions relating to other property not includible in the NYS taxable estate, such as out-of-state realty.[18] Some questions remain regarding whether general expenses not attributable to a specific property must be apportioned between included and excluded property.

Non-residents of NYS need only file an NYS Estate Tax Return (Form ET-706) if the non-resident's federal gross estate exceeds the NYS estate tax exemption.[19] Even so, we typically recommend decedents file a return at both the federal and NYS levels for any estate of substantial value for several reasons: the filing of a return begins the

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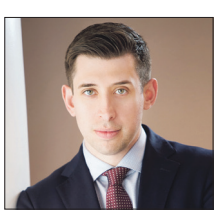

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FOCUS: BUSINESS, TAX, ACCOUNTING

Grantor Trusts: Who Pays The Tax?

Christina Lamm

The trustee of a trust is responsible for reporting all income generated by the trust and seeing to it that any income tax due is paid. The question is who pays the tax: the trust, the grantor, or even the beneficiary? That answer can differ depending on the client's goals and financial picture.

Advantages of Grantor Trust

A grantor trust is one where the grantor of the trust is seen as the owner of the trust assets for income tax purposes. If the trust is set up as a grantor trust,[1] the grantor will be the one paying the tax on the trust income regardless of whether any income is actually distributed to the grantor.[2]

One major advantage to having a trust set up as a grantor trust is that the grantor is usually taxed at a lower tax rate than trusts as the income tax brackets for trusts are compressed. In 2021, where the taxable income of a trust exceeds $13,050, it is taxed at the maximum rate of 37%. In contrast, an individual's taxable income is not taxed at the maximum rate until it exceeds $523,600. Thus, substantial income tax savings may be available if the trust includes grantor trust provisions allowing the grantor to be taxed on the income generated as opposed to the trust bearing the burden of paying the income tax.

Additionally, this payment of income tax generated by the trust is not considered a gift to the trust beneficiaries for gift-tax purposes.[3] This allows for the wealthy grantor to decrease the value of his or her own estate, through the payment of taxes, while simultaneously receiving the benefits of the assets growing in the trust estate tax free.

Grantor Trust Rules

Certain sections of the Internal Revenue Code ("IRC"), enacted in Title 26 of the United States Code, must be incorporated into the trust in order for it to be deemed a grantor trust for income tax purposes and cause the income to be taxed to the grantor (or a third party in certain instances).[4] IRC §§ 671–79 are commonly known as the grantor trust rules.

IRC § 671 states, in pertinent part, that when a grantor or another person is treated as the owner of the trust under any of the provisions in the subpart, then all of the income, deductions and credits shall be used to compute the individual's own income tax obligations. As discussed above, this means that the grantor (or other individual in certain instances) will be responsible for paying the income tax on the trust regardless of whether any of the income is actually distributed. IRC § 672 goes through the definitions and relevant rules relating to the grantor trust provisions that follow in Sections 673–79.

Under IRC § 673, entitled "Reversionary Interests," the grantor is treated as the owner of any portion of the trust in which he or she has a reversionary interest and the interest exceeds 5% of the value of such portion.[5] Here the grantor can, or will, reacquire at least a portion of the assets in the trust. In order to determine if the value of the reversionary interest exceeds the 5% threshold, the grantor is deemed to have a reversionary in the maximum amount of assets that could revert back to him or her if any discretionary powers in the hands of the trustee were exercised.[6]

A reversionary interest in the assets could be counter to the grantor's intentions, so careful attention needs to be paid here. For example, if the grantor's intention is to use the trust for Medicaid planning purposes, a reversionary interest in the trust assets would cause the assets in the trust to be a countable resource and could cause ineligibility. The attorney draftsman must always be aware of the grantor's intentions.

IRC § 674 deals with the power of the grantor and/or a non-adverse party[7] to control beneficial enjoyment of the transferred property.[8] This section applies whether the power is over principal or income or both. There is a list of exceptions to the rule that the drafter of the trust should familiarize himself or herself with if trying to achieve (or avoid) grantor trust status.[9] A popular way to gain grantor trust status through this Code section is for the attorney draftsman to include a limited lifetime power of appointment retained by the grantor to change the income beneficiaries or the remainder beneficiaries of the trust.

Keep in mind that close attention needs to be paid to the objectives of the grantor. For example, if the trust is being created to protect the assets from Medicaid (or other governmental benefit programs), the attorney draftsman needs to make sure that the power is a limited general power of appointment. A general power of appointment allows for the grantor to exercise the power of appointment in favor of the grantor, the grantor's estate, or creditors of the grantor, and would cause the trust to be a countable resource for Medicaid purposes.

IRC § 675 pertains to administrative powers reserved by the grantor and/or a non-adverse party.[10] Even if the grantor retains no direct benefit from the trust assets he or she will be treated as the owner for income tax purposes if he or she retains one of these administrative powers providing indirect control over the assets. The trust will be treated as a grantor trust if the grantor and/or a non-adverse party has the power to deal with the income and principal for less than adequate consideration,[11] to borrow from the trust without adequate interest or security,[12] or holds certain powers of administration[13] in a non-fiduciary capacity.

The most often used power of administration is the power of substitution.[14] This power allows the grantor to transfer trust property to himself or herself in exchange for property of equivalent value. While this power can be largely illusory and many times is used exclusively to gain grantor trust status, it has an additional advantage. When the transfer of assets to the trust is a completed gift and the transferred property will not be included in the grantor's estate, the ability to swap out appreciated assets for unappreciated assets—thus preserving a step-up in basis that would otherwise be lost—is a valuable bonus.[15]

IRC § 676 states that any trust in which the grantor or/and a non-adverse party retains the right to revoke the trust and the trust assets will revest in the grantor will be deemed a grantor trust.[16] A power to revoke, terminate, alter, or amend the trust will cause grantor trust status.[17]

Under IRC § 677 the trust will be a grantor trust if the income is or may be payable to the grantor (or the grantor's spouse) without the approval of an adverse party or if the income may be used to pay life insurance premiums on policies on the life of the grantor or the grantor's spouse.[18] This Code section deems a trust a grantor trust regardless of whether the right to income is mandatory or discretionary.

Trust income can also be taxed to a person other than the grantor under IRC § 678. This Section states that if a person has the individual power to vest corpus or income in himself or herself then such person shall be treated as the owner of that portion

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FOCUS: BUSINESS, TAX, ACCOUNTING

New York State Suspended Your Driver's License: What This Means and What You Can Do

Karen Tenenbaum LL.M. (Tax), CPA and Jacob Schuster

In conjunction with the Department of Motor Vehicles (the "DMV"), the New York State Department of Taxation and Finance (the "DTF") has established a program to aid in the collection of outstanding tax liabilities owed to New York State (the "State").[1] This program authorizes the DMV to suspend the driver's license of any taxpayer who has a tax liability, including interest and penalties, of at least $10,000 and does not have any collection resolution in place.[2]

Since its inception, the DTF has had incredible success and is responsible for the collection of an enormous amount of money owed to the State. It is important to note that a taxpayer whose driver's license has been suspended as a result of this program will remain subject to all other enforcement and collection actions from the State. But what does it mean to have a suspended license?

Once a taxpayer's license is suspended, he/she is not allowed to operate his/her vehicle. If a taxpayer with a suspended license is caught driving, he/she will likely receive a citation, a fine, possibly have his vehicle impounded, and may even face potential jail time. The taxpayer may, however, be able to receive a restricted license for limited (necessary) driving.[3]

Once the DTF identifies a taxpayer as having a past-due tax debt of $10,000 or more, it will put that taxpayer on notice of the possible license suspension.[4] Correspondence is sent to the taxpayer detailing the tax debt, including information as to how the taxpayer can resolve the tax debt or request further information.[5] This mailing will also include a consolidated statement of the tax liabilities owed by the taxpayer to the State.

Once this notice is received, the clock starts ticking and the taxpayer has 60 days to respond. If the taxpayer fails to timely respond to this letter, the DTF will notify the DMV that it is authorized to process the suspension of the taxpayer's license within 15 days. The taxpayer's response must include one of the following to avoid the suspension of his license:

1. Payment in full of the past-due tax debt
2. A request to enter into a payment arrangement, such as an Installment Payment Agreement (IPA)[6] or
3. Proof of one of the following exceptions to the program:
   - the individual in receipt of the notice is not the taxpayer with the past-due tax liability
   - the past-due tax liability has been satisfied
   - that the taxpayer's wages are being garnished by the DTF for payment of the past-due tax liabilities
   - that the taxpayer's wages are being garnished for the payment of child support or child/spousal support
   - that the taxpayer's license is a commercial driver's license (CDL)[7]
   - that the taxpayer is in the process of seeking Innocent Spouse Relief[8]
   - the taxpayer has filed a petition to stay the past-due tax liabilities under the US Bankruptcy Code[9]
   - the taxpayer is receiving a form of public assistance [10]
   - the taxpayer is receiving Supplemental Security Income (SSI) or
   - the taxpayer would realize undue economic hardship as a result of the suspension of his driver's license.[11]

The taxpayer has no appeal rights with the DMV regarding the suspension, and the suspension will remain in effect until the taxpayer either pays the past-due tax liability in full or enters into a payment arrangement with the State. If the taxpayer does not currently hold a valid driver's license, the suspension will still apply and prevent the taxpayer from obtaining a New York State driver's license.

The suspension of a taxpayer's license may impact the taxpayer beyond his ability to drive within New York State, as provided by the Driver License Compact (the "DLC").[12] The DLC is an agreement among most states which facilitates the exchange of information between states regarding license suspensions and other traffic violations.

In short, if your driver's license is suspended in New York for an outstanding tax-debt, that suspension will apply in most other states as well. The only states that are not members of the DLC are Georgia, Maine, Michigan, Tennessee, and Wisconsin.

If a taxpayer receives notice that his license is subject to suspension, or if his license has already been suspended, he should immediately consult experienced tax attorneys for guidance and assistance in lifting the suspension of his license and resolving his outstanding tax liability efficiently and effectively.

1. https://on.ny.gov/3HFalvt
2. *Id.*
3. Necessary driving may include transport to and from work, shopping for necessities, doctor visits, etc.
4. https://on.ny.gov/3HFalvt
5. *Id.*
6. If the taxpayer requests an Installment Payment Agreement and it is granted, the taxpayer must remain compliant with the terms of that agreement. If the taxpayer defaults on this agreement more than once within a one year period, the license suspension may take effect immediately.
7. As defined in Vehicle and Traffic Law § 501-a.
8. Tax Law § 654.
9. Title 11 of the United States Code.
10. Public assistance includes programs that have been identified by the Office of Temporary & Disability Assistance. These programs provide monetary and other in-kind assistance to individuals and families in need of such. The taxpayer must provide proof of their receipt of such assistance.
11. This exception requires the taxpayer to file forms DTF-5 and DTF-5.1 to show that the suspension would lead to the taxpayer's inability to pay basic, reasonable living expenses.
12. Vehicle and Traffic Chapter 71, Title 5, Art. 20 § 516.

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Jacob Schuster is a Law Clerk at Tenenbaum Law, P.C., concentrating in the resolution of federal and New York State tax controversies, including offers in compromise, installment agreements, liens, levies, and warrants. Jacob can be reached at jschuster@litaxattorney.com and at (631) 465-5000.

FOCUS: LAW AND AMERICAN CULTURE

Capra, Christmas and Copyright

Rudy Carmenaty

My films explore the heart not with logic, but with compassion. I will deal with the little man's doubts, his curses, his loss of faith in himself, in his neighbors, in his God. And I will show the overcoming of doubts, the courageous renewal of faith, and the final conviction that of himself he can and must survive and remain free.

-Frank Capra

Frank Capra's *It's a Wonderful Life* premiered in 1946. At the time of its initial release, it received tepid reviews and failed to recoup its production costs. For a quarter of a century, the movie languished as interest in it faded. Then by a sheer happenstance of the copyright statute, the unexpected happened. Renewed interest transformed a forgotten film into a Christmas classic.

Under the 1909 Copyright Law, which formerly governed such matters, the movie's copyright had been allowed to expire. For a brief twenty-year window, the film was able to freely work its magic. *It's a Wonderful Life* attracted a new audience as a new generation discovered it after repeated showings on television.

Unfortunately, the movie is now no longer in the public domain. The film's unlikely origins would trigger its return to protected status. It was a considerable gain for the corporation that can now claim royalties. It was also a loss for the American people. *It's a Wonderful Life* will nonetheless always be a part of our culture, in spite of all the legal niceties.

Any appreciation of *It's a Wonderful Life* begins with Frank Capra. His life-story reads like one of his movies. Born in Sicily, his family arrived on these shores with little more than their faith and a belief that in America anything is possible. Through sheer determination, Capra achieved the American Dream by bringing it to the silver screen.

The art of Frank Capra is profoundly populist, it celebrates the inherent virtues of this nation with pride and affection. He was more than a moviemaker. Supreme Court Justice William O. Douglas rightfully called Capra *"the Carl Sandburg of Hollywood,"* and so he was.[1] Depression-era audiences embraced him as the cinematic laureate of the common man.

His philosophy was as simple as it was perceptive—*One Man, One Film*.[2] Be it *"Mr. Deed Goes to Town"* or *"Mr. Smith Goes to Washington"* or *"Meet John Doe"*, the archetypical Capra story pits the naïve, the unsophisticated, and the genuine against the greedy, the corrupt and the selfish. Capra's hero, with humor and decency, emerges triumphant defeating those who would thwart his intentions as well as crush his ideals.

Capra's cinema is a paean to American values and democratic principles. A reflection of the man, Capra's movies celebrate the innate goodness of the American people. Often dismissed by his critics as *"Capracorn,"* to his admirers his films are *"Capraesque."*[3] Perhaps John Cassavetes summed it up best, *"maybe there wasn't an America, maybe it was only Frank Capra."*[4]

During World War II, he left a lucrative career behind to serve his adopted country. His brilliantly crafted *"Why We Fight"* series was conceived to explain the war effort to the average G.I. These documentaries championed the cause of freedom. In the words of Winston Churchill, *"I have never seen or read any more powerful statement of our cause or of our rightful case against the Nazi tyranny than these films portray."*[5]

By now everyone should be familiar with the plot of *It's a Wonderful Life*. If you are not, then shame on you. Part fantasy, part romantic comedy, part drama, the movie is pure Americana. George Baily is an American everyman. A bright young fellow who is itching to see the world, his ambitions and aspirations are constantly frustrated by circumstance.

George's life is circumscribed by the confines of his hometown of Bedford Falls. George, brought vividly to life by Jimmy Stewart, sacrifices his own well-being, time and again, for the good of his neighbors. The cast includes Donna Reed, as his wife, Mary, and such wonderful character actors as Thomas Mitchell, Beulah Bondi, Ward Bond, and Gloria Graham.

George's life-long antagonist is Mr. Potter. Played by Lionel Barrymore, he is a villain worthy of Dickens. George and his family's Building & Loan have been able to prevent Potter from taking control of the whole town. Then a banking mishap places George in jeopardy of ruin and scandal. Thinking himself a failure, in desperation he attempts suicide on Christmas Eve.

Divine intervention occurs when his guardian angel, a winsome character named Clarence who has yet to earn his wings, is sent from Heaven. He offers George a glimpse of what his world would be like without him. George realizes how many lives he has touched. He comes to appreciate his own value and the community rallies behind him in his time of need.

Before the war, Capra's movies were eagerly embraced by moviegoers. He received three Academy Awards for Best Director during the 1930's.[6] *It's a Wonderful Life*, however, marked the beginning of Capra's decline. Although today considered one of the great American movies, post-war audiences seemed less receptive to Capra's images of optimism and perseverance.

It's a Wonderful Life actually lost money at the boxoffice. And the film's financial loss was bornout not only by the studio, but also by Capra himself. The movie was produced by Capra's production company Liberty Films. Founded by Capra with fellow veterans William Wyler and George Stevens, Liberty Films was a short-lived attempt at creative freedom that faltered financially.

Liberty Films was bought-up by Paramount, who acquired the film. Paramount, or rather its parent entity CBS/Viacom, once again controls the movie's copyright by virtue of its predecessor holding the rights to the movie's underlying story. In the interim between when Paramount first obtained the movie and the present, the rights to *It's a Wonderful Life* belonged to National Telefilm Associates, a television syndicator.

National Telefilm Associates failed to renew the movie's copyright in 1974. The Copyright Act of 1909 provided an initial, automatic period of copyright protection for twenty-eight years, with a subsequent renewal for another twenty-eight years with the timely filing of a notice with the Copyright Office.[7] Replaced by the Copyright Act of 1976, the current governing law now grants a seventy-five year period of protection from first publication.[8]

Whether it was a clerical failure or a lack of interest on the part of National Telefilm Associates is an open question. Its copyright having expired due to this dereliction, the movie entered the public domain. Accordingly, the film could be aired on broadcast television without the need to pay licensing fees and later distributed on home video without the paying of royalties.

Maybe it was just sheer repetition. After all every year from Thanksgiving through New Year's day, *It's a Wonderful Life* was omnipresent as local stations and PBS affiliates would run the movie adnauseum. However it occurred, the film captured the public's fancy in a way it had never manage to do before. As Capra himself observed:

> *"It's the damnedest thing I've ever seen. The film has a life of its own now and I can look at it like I had nothing to do with it. I'm like a parent whose kid grows up to be president. I'm proud ... but it's the kid who did the work. I didn't even think of it as a Christmas story when I first ran across it. I just liked the idea."*[9]

A perennial holiday tradition, *It's a Wonderful Life* by the 1990's had become a hot commercial property that everyone could view, and anyone could exploit. But what the copyright laws giveth, the copyright laws can taketh away. Sixteen years after the film's copyright lapsed, a Supreme Court ruling would effectively take *It's a Wonderful Life* out of the public domain.

In 1990, the Court ruled in *Stewart v. Abend* that a derivative work which is based on a copyrighted piece can likewise be protected by virtue of the original source's copyright.[10] As such, distribution of a derivative work, in this case a film whose copyright was no longer valid, is still an infringement that can be enforced by whomever owns the rights to the underlying property.

Republic Pictures, the successor to National Telefilm Associates, owned the copyright to Phillip Van Doren Stern's *The Greatest Gift*. The film's source material was a privately published short story that began as a Christmas card. Stern registered his work with the Copyright Office in 1945 and it was properly renewed.[11] Republic Pictures held these rights and also the rights to the film's original musical score by Dimitri Tiomkin.[12]

Republic Pictures was in a position to assert its rights to *It's a Wonderful Life*. In 1993, it issued over five-hundred cease and desist letters to television stations, cable networks, and home video distributors warning of legal action for *"copying, selling, renting or showing versions licensed by Republic, as well as seeking damages for past infringements."*[13]

Claims arising from prior airings were never pursued. But the point was made, and Republic Pictures had the muscle to back-up its warning. Saturation showings of the film on tv came to a complete halt and knock-off VHS versions were withdrawn from circulation. In 1994, Republic Pictures sold to NBC exclusive rights to broadcast the film, which the network airs only twice on the Friday after Thanksgiving and on Christmas Eve.[14]

The film remains unprotected, even if the story and score are. It is conceivable someone could exhibit an altered version with new music and the story reedited and/or rearranged. But who would tamper with a beloved classic? And no one was willing to go up against Republic Pictures previously or Paramount today, which regained ownership of the film after various corporate mergers and maneuverings.

A treasured Christmas tradition has not been entirely lost, but it has been diminished. It was a twist story worthy of Capra himself that *It's a Wonderful Life* became the holiday movie America loves during the time it could be freely exhibited. And it is act worthy of Mr.

See CAPRA Page 25

Rudy Carmenaty serves as a Bureau Chief in the Office of the Nassau County Attorney, is the Director of Legal Services for the Nassau County Department of Social Services, and the Language Access Coordinator for the Nassau County Executive. He is also Co-Chair of the NCBA Publications Committee and Vice-Chair of the Diversity and Inclusion Committee.

NAL PROGRA

Pre-registration is REQUIRED for all Academy programs. Go to
CLE material, forms, and zoom link will be sent to p
All programs will be offered via HYBRID unless otherwise noted. Please RSVP to acade

December 2, 2021
Dean's Hour—It's More Common than You Think: Stress, Substance Misuse and Burnout in the Legal Profession
With the NCBA Lawyer Assistance Program and the Nassau County Bar Association Assigned Counsel Defender Plan
12:30-1:30PM
1 credit in ethics

December 9, 2021
Dean's Hour—Because We All Know Someone: Legal and Ethical Implications of Impairment and How to Help
With the NCBA Lawyer Assistance Program and the Nassau County Bar Association Assigned Counsel Defender Plan
12:30-1:30PM
1 credit in ethics

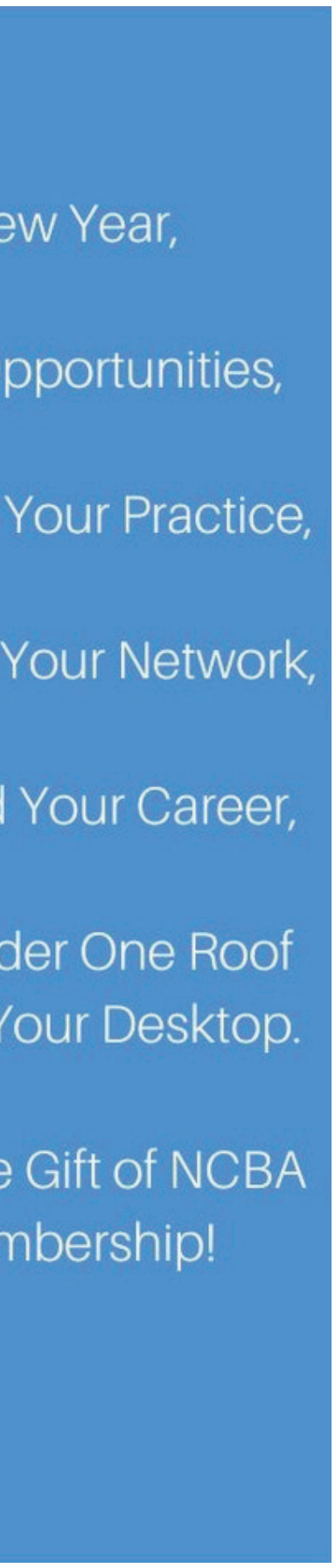
December 10, 2021
Dean's Hour—Remote Residency: The Fight to Pay Tax Where a Taxpayer Actually Resides (ZOOM ONLY)
With the NCBA Business Law, Tax and Accounting Committee
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in professional practice

December 14, 2021
Dean's Hour—Look Before You Leap: Avoiding Ethical Pitfalls as an Arbitrator
With the NCBA Alternative Dispute Resolution and Ethics Committees
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in ethics

December 15, 2021
Dean's Hour— LGBTQ Rights After Bostock: Where We Stand a Year + Later
With the NCBA LGBTQ and Labor and Employment Law Committees
12:30-1:30PM
1 credit in diversity, inclusion, and elimination of bias

M CALENDAR

nassaubar.org and click on CALENDAR OF EVENTS to register.
ore-registered attendees 24 hours before program.
my@nassaubar.org 24 hours before program date if you would like to attend in person



December 16, 2021
Dean's Hour: "Per My Previous E-Mail"—Improving Your Digital Communication
Program sponsored by NCBA Corporate Partner Champion Office Suites
12:30-1:30PM
1 credit in professional practice
Skills credits available for newly admitted attorney

January 6, 2022
Vicarious Trauma and Compassion Fatigue Among Attorneys: Recognizing and Developing Resiliency Skills
With the NCBA Lawyer Assistance Program and the Nassau County Bar Association Assigned Counsel Defender Plan
12:00-2:00PM
2 credits in ethics

January 12, 2022
Dean's Hour—Dirty Harry and Frontier Justice in the City by the Bay (Law and American Culture Lecture Series)
With the NCBA Diversity and Inclusion Committee
12:30-1:30PM
1 credit in professional practice

January 13, 2022
Dean's Hour—Trauma Informed Lawyering in Matrimonial Practice
With the NCBA Matrimonial Law Committee
Program sponsored by NCBA Corporate Partners MPI Business Valuation and Advisory and Champion Office Suites
12:30-1:30PM
1 credit in professional practice

January 13, 2022
Two Yoots—What My Cousin Vinny Can Teach Attorneys About Ethics (ZOOM ONLY)
With the NCBA Ethics Committee
5:30-6:30PM
1 credit in ethics

Judiciary Night

October 21, 2021

Photos by Hector Herrera

Hon. Constance Baker Motley…

Continued From Page 1

This was followed with Shanell Parrish-Brown, Esq. performing stirring renditions of the *Star-Spangled Banner* and *Lift Every Voice and Sing*. The beauty and power of her voice was something I had never before experienced at Domus, much less elsewhere. The reception was sponsored by NCBA Corporate Partner Tradition Title Agency and sponsor Flushing Bank.

The judiciary was well represented with Hon. Ayesha Brantley, Hon. Randall Eng, Hon. Elizabeth Fox-McDonough, Hon. David Gugerty, Hon. William Hohauser, Hon. Steven Leventhal, Hon. Linda K. Mejias-Glover, Hon. Phil Solages, and Hon. Brianna Vaughn in attendance. On behalf of Nassau County was Dana Boylan, Esq., the Executive Director of the Nassau County Office of Youth Services.

Rudy Carmenaty, Chair of the Diversity & Inclusion Committee, Hon. Maxine S. Broderick, Margaret Ling, and Richard Blum engaged in a panel discussion of Judge Motley's life and legacy. Ms. Ling and Mr. Blum had both served as law clerks to Judge Motley in the Southern District of New York, and shared their personal recollections.

Mr. Carmenaty, who delivered a PowerPoint presentation, observed that the Diversity & Inclusion Committee's presentation of *Meredith v Fair: A Reenactment of a Landmark Decision* at Domus in May of 2018 was one of Motley's most significant legal victories. During her remarks, Judge Broderick spoke to the inspiration she drew from the example Judge Motley set long ago.

Ms. Ling spoke to the human side of Judge Motley, and how her experience as a law clerk shaped her own legal career. For his part, Mr. Blum, who worked with Judge Motley on her 1998 autobiography *Equal Justice Under Law*, provided a detailed portrait of a committed jurist and a fascinating personality.

Constance Baker Motley was truly a person of character, courage, and conviction. She was the first African-American woman admitted to the Bar of the United States Supreme Court, where she won nine of the ten cases she argued before the high court. As well, she was the first African-American woman to be elected to the New York State Senate and the first elected Borough President of Manhattan.

In 1966, President Lyndon Johnson nominated her to a judgeship in the Southern District of New York. Becoming the first African-American woman confirmed to the federal judiciary, from 1982 to 1986 she was the Chief Judge of the SDNY, another first, until she assumed senior status. By the time Judge Motley died in 2005, she had served nearly forty years as a federal judge.

The daughter of West Indian immigrants from Nevis, Constance Baker was born in New Haven, Connecticut, the ninth of twelve children. She decided on a legal career at the urging of a minister who drew her attention to the underrepresentation of black lawyers.

As a young woman, her family's resources were limited. It was only after a white philanthropist heard a teenage Motley speak and agreed to finance for her education, that she was able to go on to college.

Judge Motley initially attended Fisk University. But unaccustomed to the segregation then prevalent in Nashville, she completed her undergraduate degree at New York University. When she returned to New York, she bought with her a poignant souvenir from her time in Tennessee: a sign that read *"Colored Only."*

Judge Motley went on to Columbia Law School. After graduating in 1946, she was hired by the NAACP Legal Defense & Education Fund becoming the organization's first female associate counsel. At the outset of her career she worked on housing cases, fighting against restrictive covenants.

A colleague of Thurgood Marshall, Robert L. Carter, and Jack Greenberg, Motley played a key role in advancing racial equality through the courts. She help author the briefs in *Brown v. Board of Education*. During the 1950s and 1960s, she displayed her brilliance as both a courtroom and appellate advocate.

Judge Motley would represent Dr. Martin Luther King, Jr., Medgar Evers, the Freedom Riders, and most notably James Meredith in his effort to integrate the University of Mississippi. Her legal arguments led to the desegregation of public schools, state universities, as well as housing and other public facilities.

Constance Baker Motley was gracious and stately. She spoke in a low, lilting voice, almost regal in tone. The way she carried herself bespoke of her desire to affirm the dignity of all people. Her demeanor was part of her craft, as she approached issues with the skill of a strategist and the deportment of a total professional.

Later, Judge Motley would insist on the highest standards of the attorneys appearing before her in the courtroom. This was because as a practitioner, that was the way she had always carried herself whenever she was before the bench.

Although Motley regularly encountered bigotry when she travelled South on behalf of the NAACP, she never lost her composure. She was traversing some the thorniest legal terrain imaginable, devoting long and painstaking hours in her preparation. She was also breaking down barriers and defying prejudices. Yet she retained her poise and dignity in the face of it all.

As a black woman practicing law more than three-quarters of a century ago, she habitually experienced condescension from opposing counsel as well as from the bench. There were also taunts and intimidation from many outside the courtroom. A newspaper in Jackson, Mississippi, scorned her as *"the Motley woman."*

During her almost four-decades of judicial service, the Judge issued numerous decisions exemplifying the best of the federal bench. As she once noted, *"The work I'm doing now will affect people's lives intimately, it may even change them."* A brilliant advocate, legal strategist and respected jurist, Constance Baker Motley affected countless lives and made a lasting contribution to the law in the United States.

Our thanks to Rudy Carmenaty and Judge Broderick for an enlightening and amazing evening.

Snap…

Continued From Page 9

citizens.[7] Before being served with the complaints, the defendants removed the actions to federal district court in Delaware and the actions were ultimately transferred to the S.D.N.Y..[8]

The plaintiffs moved to have the matter remanded to state court in Delaware, relying on the forum defendant rule.[9] The S.D.N.Y. denied plaintiffs' motions to remand and dismissed the complaints.[10] The Second Circuit Court of Appeals affirmed the S.D.N.Y.'s decision, holding that the forum defendant rule, codified under 28 U.S.C. § 1441(b)(2), did not prevent removal.[11] Specifically, the Court of Appeals held that the text of the statute "plainly provides that an action may not be removed to federal court on the basis of diversity of citizenship once a home-state defendant has been 'properly joined and served.'"[12] The Court of Appeals held that because the defendants have "removed each of the Transferred Actions to federal court after the suit was filed in state court but *before* any Defendant was served" (emphasis added), removal was proper.[13]

The Court of Appeals rejected the plaintiffs' argument that applying the text of the forum defendant statute as written "produces an absurd result."[14] In doing so, the Court of Appeals stated that the result of snap removal "is not 'absurd' merely because it produces results that a court or litigant finds anomalous or perhaps unwise."[15] The Court of Appeals also held that Congress may have included the joinder and service requirement to "protect defendants from unfair bias" and to "shield them from gamesmanship."[16] The Court of Appeals similarly held that the possibility of non-uniform application of the rule depending on state law was also unpersuasive as "state-by-state variation is not uncommon in federal litigation, including in the removal context."[17]

Since *Gibbons*, courts in the Second Circuit have routinely denied motions to remand where forum defendants utilize snap removal.[18]

Potential Pitfalls

Although snap removal may seem simple on its face, there are a number of issues a defendant must take into account to successfully remove its case and to avoid the matter being remanded. The biggest pitfall a defendant will likely face when attempting to utilize snap removal concerns whether a forum defendant was properly served before the matter was removed. Whether or not service was proper is not always clear.

For example, in *McDaniel v. Revlon, Inc.*, the defendant attempted to utilize snap removal to have the action, which was originally filed in Supreme Court, New York County, removed to the S.D.N.Y..[19] After the defendant filed a notice of removal, the plaintiff moved to remand the matter back to state court arguing that the defendant had been properly served by email prior to the filing of the notice of removal.[20] While service by email is not typically recognized in New York, the S.D.N.Y. noted that email exchanges where a party agrees to accept service by email may constitute a binding agreement.[21] The court ultimately held that the defendant consented to be served by email and was therefore properly served prior to removal, thereby eliminating the defendant's ability to use snap removal.[22] Other courts in the Second Circuit have similarly held that service of a summons with notice in lieu of a complaint also constitutes proper service sufficient to defeat a snap removal attempt.[23]

Snap removal can also be thwarted in cases where a forum defendant other than the removing defendant has been properly served and joined prior to removal. Federal courts in the Second Circuit have routinely granted motions to remand pursuant to the forum defendant rule where a forum defendant, other than the moving defendant, has been properly served and joined prior to removal.[24] Thus, a defendant's attempt to utilize snap removal can be foiled by the plaintiff's service of another forum co-defendant that the removing defendant is not even aware of at the time of removal.

Defendants utilizing snap removal should also be conscious of the fact that snap removal does not eliminate the independent jurisdictional requirements to remove a matter based on diversity jurisdiction. Defendants must ensure that these requirements are satisfied before attempting to employ snap removal. Matters are routinely remanded in which a defendant attempts to employ snap removal, where either complete diversity of citizenship did not exist or the amount in controversy did not meet the jurisdictional requirement.[25]

Is Snap Removal Right for You

Because snap removal requires a defendant to move quickly after a case is filed, those considering snap removal will need to make a rapid assessment of whether removal will be beneficial. Defendants should consider whether the procedural and local rules of state or federal court are more beneficial to their potential litigation strategy. Defendants should also consider whether the relevant experience of the judges in a particular court may be more or less helpful to the issues in their particular case. In addition, the pace at which litigation moves in a particular court may also be of interest to a defendant.

Although snap removal may not be a viable option in every case, it certainly can be a useful tool for defendants. Attorneys are advised to routinely monitor state court dockets to ensure that they are aware of cases filed against their clients as soon as they are filed to improve the chances that snap removal will still be available to them.

1. 28 U.S.C. § 1331; 28 U.S.C. § 1332.
2. 28 U.S.C. § 1441.
3. *See, e.g. Goodwin v. Reynolds*, 757 F.3d 1216, 1221 (11th Cir. 2014).
4. *See, e.g. Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147, 152-53 (3d Cir. 2018); *Texas Brine Co., L.L.C. v. Am. Arb. Ass'n, Inc.*, 955 F.3d 482, 485-87 (5th Cir. 2020).
5. *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019).
6. *Id.*
7. *Id.* at 703.
8. *Id.*
9. *Id.*
10. *Id.* at 704.
11. *Id.* at 704-07.
12. *Id.* at 705.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 706.
17. *Id.*
18. *See, e.g. Castro v. Colgate-Palmolive Co.*, No. 19-CV-279 (JLS), 2020 WL 2933861, at *1 (W.D.N.Y. June 3, 2020); *C.Q. v. Est. of Rockefeller*, No. 20-CV-2205 (VSB), 2020 WL 5658702, at *2 (S.D.N.Y. Sept. 23, 2020).
19. *McDaniel v. Revlon, Inc.*, No. 20-CV-3649 (VSB), 2021 WL 2784548 (S.D.N.Y. July 2, 2021).
20. *Id.* at 1.
21. *Id.* at 3.
22. *Id.*
23. *Martha Barotz 2006-1 Ins. Tr. v. Barotz*, No. 20-CV-02605 (PMH), 2020 WL 1819942, at *2 (S.D.N.Y. Apr. 10, 2020).
24. *See Hardman v. Bristol-Myers Squibb Co.*, No. 18-CV-11223 (ALC), 2019 WL 1714600, at *2 (S.D.N.Y. Apr. 17, 2019); *see also Jane Doe v. Wilhelmina Models, Inc., Cal Tan, LLC, & New Sunshine, LLC*, No. 19 CV 11587-LTS, 2021 WL 3727097, at *4 (S.D.N.Y. Aug. 23, 2021).
25. *Rossillo v. Becton, Dickinson & Co.*, No. 21-CV-852 (LJL), 2021 WL 793916, at *3 (S.D.N.Y. Feb. 26, 2021).

NCBA Committee Meeting Calendar December 7, 2021 - January 14, 2022

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

IMMIGRATION LAW
George Terezakis
Tuesday, December 7
5:30 p.m.

MEDICAL-LEGAL
Christopher J. DelliCarpini
Wednesday, December 8
12:30 p.m

EDUCATION LAW
John P. Sheahan/Rebecca Sassouni
Wednesday, December 8
12:30 p.m.

MATRIMONIAL LAW
Jeffrey Catterson
Wednesday, December 8
5:30 p.m.

MUNICIPAL LAW AND LAND USE
Judy L. Simocic
Thursday, December 9
12:30 p.m
Thursday, December 9
12:30 p.m

COMMUNITY RELATIONS & PUBLIC EDUCATION
Ira S. Slavit
Thursday, December 9
12:45 p.m.

CIVIL RIGHTS
Bernadette K. Ford
Tuesday, December 14
12:30 p.m.

WOMEN IN THE LAW
Edith Reinahrdt
Wednesday, December 15
12:30 p.m.

ASSOCIATION MEMBERSHIP
Michael DiFalco
Wednesday, December 15
12:45 p.m.

ETHICS
Avigael Fyman
Wednesday, December 15
4:30 p.m.

ALTERNATIVE DISPUTE RESOLUTION
Michael A. Markowitz/Suzanne Levy
Thursday, December 16
8:30 a.m.

INTELLECTUAL PROPERTY
Frederick J. Dorchak
Thursday, December 16
12:30 p.m.

APPELLATE PRACTICE
Jackie Gross
Thursday, December 16
12:30 p.m.

DIVERSITY & INCLUSION
Rudolph Carmenaty
Thursday, December 16
6:00 p.m.

DISTRICT COURT
Roberta Scoll
Friday, December 17
12:30 p.m.

IMMIGRATION LAW
George Terezakis
Tuesday, January 4, 2022
5:30 p.m.

PUBLICATIONS
Andrea M. DiGregorio/ Rudolph Carmenaty
Thursday, January 6
12:45 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Ira S. Slavit
Thursday, January 6
12:45 p.m.

CIVIL RIGHTS
Bernadette K. Ford
Tuesday, January 11
12:30 p.m.

WOMEN IN THE LAW
Edith Reinhardt
Tuesday, January 11
12:30 p.m.

LABOR & EMPLOYMENT
Matthew B. Weinick
Tuesday, January 11
12:30 p.m.

EDUCATION LAW
John P. Sheahan/Rebecca Sassouni
Wednesday, January 12
12:30 p.m.

MEDICAL-LEGAL
Christopher J. DelliCarpini
Wednesday, January 12
12:30 p.m.

ETHICS
Avigael Fyman
Wednesday, January 12
4:30 p.m.

MATRIMONIAL LAW
Jeffrey Catterson
Wednesday, January 12
5:30 p.m.

MUNICIPAL LAW AND LAND USE
Judy L. Simocic
Thursday, January 13
12:30 p.m.

DISTRICT COURT
Roberta Scoll
Friday, January 14
12:30 p.m

Committee Reports

MATRIMONIAL LAW
MEETING DATE: 11/10/21
Chair: Jeffrey L. Catterson

Guest speakers Nassau County Supreme Court Justice Edmund M. Dane, John Biondo, Esq., and Glenn Liebman delivered a lecture entitled "Coming Out of Covid; Critical Issues Regarding Business Valuations and an Update from the Bench." This was a hybrid in-person and Zoom meeting.

The next meeting is scheduled for December 8, 2021, which will be the Annual Holiday Party with in-person attendance only.

ETHICS COMMITTEE
MEETING DATE: 11/17/21
Chair: Avigael C. Fyman

Member discussion held regarding ethical inquiries surrounding retainer agreements and various upcoming NCBA programs, including the presentation scheduled for December 1, 2021, at 5:00 p.m., entitled "An Evening of Ethics: Networking and Discussion."

The following upcoming CLE lectures will be co-sponsored by the Ethics Committee: (i) December 14, 2021, 12:30 p.m., entitled "Look Before You Leap: Avoiding Ethical Pitfalls as an Arbitrator"; (ii) January 13, 2022, 5:30 p.m. entitled "Two Yoots: What My Cousin Vinny Can Teach Attorneys About Ethics"; and (iii) January 26, 12:30 p.m. entitled "Ethics of Selling a Law Practice."

The next meeting is scheduled for December 15, 2021, at 4:30 p.m. via Zoom.

Michael J. Langer

ELDER LAW, SOCIAL SERVICES & HEALTH ADVOCACY
MEETING DATES: 10/1/21, 10/19/21
Co-Chairs: Suzanne Levy, Ariella T. Gasner

At the committee meeting held on October 1, 2021, committee members engaged in a discussion of various topics of interest, including getting members back to the bar; the new Power of Attorney statute and its acceptance at financial institutions, the need and drafting of a committee letter/memo for bank use and distributing it to various institutions letting them know there is a new statute, Article 81 petitioners not be allowing to compel a neuro-psych evaluation, Medicaid eligibility lawsuit settlements, and issues with long-term care insurance and continuing care retirement communities.

At the committee meeting held on October 19, 2021, guest speakers Moriah Adamo, Esq., Virginia Belling, Geriatric Care Manager of Senior Placement Services, Inc., and Steven Oppenheimer, Director of Caring Partners, Inc. delivered a lecture about guardian and care management needs when commencing Article 81 Proceedings. Case studies were discussed with the panelists on powers to include in guardian appointment orders, orders to show cause, coordination on services provisions, safe and effective medication management for a ward, and the need for bonds.

The Committee Reports column is compiled by Michael J. Langer, a partner in the Law Offices of Michael J. Langer, P.C. Langer is a former law clerk in the United States Court of Appeals for the Second Circuit, and a former Deputy County Attorney in the Office of the Nassau County Attorney. Langer's practice focuses on matrimonial and family law, estate and commercial litigation, and criminal defense.

Thanksgiving…

Continued From Page 4

litigants during this trying time, and partnering the NCBA on so many issues and projects so that the attorneys of the county can rest assured they have a voice in their courthouses. I am very thankful for these leaders and their relationship with the NCBA.

Perhaps the most important people I am thankful for is **my family**—Judi, Jessica, Dylan, Ethan, and Zac the dog. I know I get home later than usual lately and am probably working more weekend hours than usual, but they do not complain and support me in this grand endeavor. I could not be more thankful for them.

Lastly, I am so thankful for you, the **members of the NCBA** and the **Corporate Partners of the NCBA**. *I* could list all the names, and really should list several of you who give so much of your time to the Bar Association, but the list would take up this entire paper. Many of you:

- Give freely of your time and money
- Never miss an event
- Have great ideas to better this Bar
- Run committees and panels
- Serve on the Board of Directors
- Serve as Committee Chairs
- Are Past Presidents who still devote time to the NCBA
- Serve as Officers in the Academy
- Are active on the Boards of WE CARE or LAP
- Are Sustaining Members
- Advertise in the Nassau Lawyer
- Are sponsors of the NCBA and its events

You are what keeps this Bar alive, vibrant, and exciting. I love coming here every day to see all of you and to discuss important issues concerning the NCBA, the Rule of Law, and Nassau County. You are amazing people who have said the pandemic will not make me give up on this great Bar Association because there is so much good we can do. You have all become so much more than just members or sponsors to me. So many of you I consider my friends and I am so thankful for all of you.

Thank you all for the for the first six months of my presidency. With all of us pushing to get the NCBA back to normal, I know that the next six months will be even more exciting and monumental.

Bankruptcy…

Continued From Page 3

a Chapter 7 discharge of debts which included a junior mortgage lien, and then twelve (12) years later, filed a Chapter 13 to try and "strip off" the lender's lien that was unaffected by the prior Chapter 7 discharge; the argument was, that this would leave that lender with an unsecured claim that would receive no distribution, as having an unenforceable claim. The Chapter 13 Plan otherwise provided for unsecured creditors to receive 100%.

In reviewing the combined effect of Sections 506, 1322, and 1325 of the Bankruptcy Code, Judge Grossman had to decide on the treatment of a wholly-unsecured junior mortgage lien for which the debtor no longer had personal liability, after having been "stripped off."

Judge Grossman held that there was no legal basis for fixing the value of the lender's in rem claim at zero; the applicable sections allow the lien to be stripped off, leaving an unsecured claim which must be treated equally as any other unsecured claim. This is because Section 506(a) only deals with how a secured claim is treated but stripping off the lien does not eliminate the claim entirely, and the mortgage still survives as a "claim" under Section 101(5). Although it could not be enforced against the debtor personally, the dollar amount of the claim is unaffected by both the prior discharge and the lien stripping.

Discharging Private Student Loans

In *Homaidan v. Sallie Mae Inc.*,[8] the debtor, a graduate of Emerson College, sought to discharge $12,567 in private student loans he took from Navient Solutions LLC, under Section 523(a)(8) of the Bankruptcy Code. The debtor maintained that Navient's loans did not fall within the category of "qualified private educational loans" which would be nondischargeable, because they were disbursed directly to the student borrower to be used as he wished and exceeded the tuition cost; "a qualified" loan must only fund qualified higher education expenses at an eligible educational institution.

Navient argued that its advances were "obligations to repay funds as an educational benefit, scholarship or stipend," but the Second Circuit disagreed in finding that the statute explicitly covered only a narrow category of conditional grant payments and did not mention all private student loans.

On this basis Navient's motion to dismiss the action was denied by the Bankruptcy Court and this was affirmed by the Second Circuit.

1. *In re Reviss*, 628 B.R. 388 (EDNY 2021)
2. *Buckskin Realty Inc. v. Windmont HOA Inc.*, 2021 Bankr. Lexis 775 (EDNY 2021)
3. *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994)
4. *In re: Hamilton Road Realty LLC*, 2021 Bankr. Lexis 1114 (EDNY 2021)
5. *In Re: Banfi*, 2021 Bankr. Lexis 1553 (EDNY 2021)
6. *In re Maresca*, 982 F.3d 859 (2d. Cir. 2020)
7. *In re: Hopper,* Chapter 13 Case No. 21-70139(8/5/21)
8. *Homaidan v. Sallie Mae Inc.*, 596 B.R. 86 (EDNY 2019,) *appeal certified*, 2020 Dist. Lexis 177126 (EDNY 2020), *aff'd,* 3 F.4th 595 (2d. Cir. 2021)

We would like to thank NCBA Members Florence Fass, John DiMascio, Jr., Jennifer Rosenkrantz on behalf of (Schlissel Ostrow Karabatos, PLLC,) and Ira S. Slavit for generously donating new technological equipment to the NCBA.

If you are interested in helping the NCBA update its equipment, contact NCBA Building Manager Hector Herrera at hherrera@nassaubar.org.

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NCBA Corporate Partner Spotlight

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Opal Wealth Advisors

Lee Korn
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Opal Wealth Advisors is an independent registered investment advisor (RIA) providing financial and professional development services for both individuals and businesses. Founded by longtime partners Lee A. Korn, Jesse Giordano, and Joseph N. Filosa, Opal Wealth Advisors offers independent advice coupled with fully integrated services, support, and technology. With a comprehensive focus on both financial planning and leadership development, Opal Wealth Advisors goes beyond traditional advice, inspiring clients to take action to achieve true financial freedom and fulfillment.

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Grantor…

Continued From Page 11

of the trust and taxed on the income therefrom.[19] For example, if the trustee of a trust has the sole power to distribute income to himself or herself the trustee will be taxed on all of the income regardless of if any income is actually distributed.

IRC § 679 is one of the lesser used of the grantor trust provisions. It states that a grantor is treated as the owner of the trust for income tax purposes if the trust is a foreign trust and the trust has a United States beneficiary.[20] Grantor trust status under this section could be gained by naming a non-citizen as trustee or co-trustee of the trust.

Be Guided by the Grantor's Goals

If the goal of a grantor is to be taxed on the income generated by the trust it is not enough to just throw in one of these grantor trust provisions. Many of these provisions that will invoke grantor trust status will also invoke estate inclusion under the "string provisions" of the Code.[21]

If the grantor trust provisions used cause estate inclusion, the full value of the trust can be pulled back into the grantor's estate for estate tax purposes. If one of the grantor's goals is to remove any future gain on the trust assets from his or her estate, including the wrong grantor trust provision could be costly in terms of estate tax consequences.

On the other hand, if a trust is being created for Medicaid planning purposes, it could be beneficial to have the assets be included in the grantor's estate in order to receive a step-up in basis. [22] Careful attention must be paid to the individual grantor's goals.

1. 26 USC §§ 671–79.
2. 26 USC § 671.
3. Rev. Rul. 2004-64.
4. *See* 26 USC §§ 671–79.
5. 26 USC § 673.
6. *See* 26 USC § 673(c).
7. *See* 26 USC § 672(b).
8. 26 USC § 674.
9. 26 USC § 674(b).
10. 26 USC § 675.
11. 26 USC § 675(1).
12. 26 USC § 675(2).
13. 26 USC § 675(4).
14. 26 USC § 675(4)(c).
15. 26 USC § 1014.
16. 26 USC § 676.
17. Treas. Reg. § 1.676(a)-1.
18. 26 USC § 677.
19. 26 USC § 678(a).
20. 26 USC § 679.
21. 26 USC §§ 2036–38.
22. *See* 26 USC § 1014.

Pro Bono Week…

Continued From Page 1

with this attorney and I am grateful for the opportunity. They were tremendously comprehensive and very generous with their time."

You can volunteer for any Mortgage Foreclosure/Bankruptcy clinic, which are currently held once a month, or to attend a mandatory conference in the morning for a few hours on behalf of a resident facing foreclosure. Volunteer attorneys are always needed and need not follow a case. Please volunteer if you haven't already done so. Contact NCBA Pro Bono Director Gale D. Berg at gberg@nassaubar.org for additional information on volunteer opportunities.

We Thank the October 2021 Open House Volunteer Attorneys

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NCBA Hosts Nassau Foreclosure Part Advocates Training

Co-presented by Empire Justice Center

Photo by: Hector Herrera

(L-R) Brian Goldberg, Esq., Gross Polowy, Supervising Attorney; Michael Wigutow, Esq., Nassau Suffolk Law Services, Supervising Attorney; Trina Kokalis, Esq., Long Island Housing Services, Supervising Attorney; Roxanne Jones, Esq., Frenkel Lambert, Supervising Attorney; Roman Solonyy, Esq., Legal Services for Elder Justice, Staff Attorney; Nicole Lubell, Esq., Empire Justice Center, Foreclosure Prevention Program Manager; Court Attorney-Referee Anthony J. Provenzano, NYS Supreme Court, County of Nassau Foreclosure Settlement Conference Part; Gale D. Berg, Esq., Nassau County Bar Association, Director Pro Bono Services; Rose Marie Cantanno, Esq., NYLAG, Associate Director Consumer Protection Unit; Madeline Mullane, Esq., Nassau County Bar Association, Settlement Conference Coordinator; Kim Kerber, Esq., American Debt Resources, Staff Housing Counselor

In Brief

Capell Barnett Matalon and Schoenfeld Partners **Robert Barnett, Gregory Matalon,** and **Yvonne Cort** have been selected as 2021 NY Metro Super Lawyers, designated as among the top five percent of attorneys in the State, and Associate **Monica Ruela** was selected as Rising Star. Partners Robert Barnett and **Stuart Schoenfeld** are presenting a webinar, "Income Tax Meets Elder Care Planning," at the 2021 National Accounting and Tax Symposium, now in its 19th year. Also at the Symposium, Partners Robert Barnett and Gregory Matalon are speaking on the topic of gift planning and general estate updates; and Partner Yvonne Cort is presenting on the topic of NYS tax warrants and collection, on a panel with the Deputy Commissioner, Civil Enforcement Division, NYS Dept. of Taxation and Finance. Robert Barnett will also be presenting several webinars on the topics of business losses, stock options and equity compensation, and S corporation and partnership updates.

Marc L. Hamroff of Moritt Hock & Hamroff is pleased to announce that the firm will fund the Hofstra Law School's Freedman Institute Social Justice Fellows Program. Marc L. Hamroff will be speaking at the upcoming SFNet Annual Convention which brings together secured lenders and their allied service providers for two days of networking and learning. Hamroff will be speaking on the "Workout and Bankruptcy Strategies—the New Playbook" panel. The firm has received national recognition in the 2022 "Best Law Firms," rankings by *U.S. News & World Report and Best Lawyers*®. The firm has also been ranked as a Tier 1 in the 2022 *U.S. News & World Report—Best Lawyers*® "Best Law Firms" list nationally in one practice area and regionally in four practice areas.

Marian C. Rice

Allison C. Johs helped develop the Legal Tech Skills Certificate program at the Maurice A. Deane School of Law at Hofstra University. The six-week program is designed to teach lawyers, paralegals, and legal support personnel the essential skills needed to use the programs law firms already use daily—Microsoft Word, Excel, PowerPoint and Outlook, and Adobe Acrobat.

Jeffrey D. Forchelli of Forchelli Deegan Terrana LLP warmly congratulates **Jeremy M. Musella**, an attorney in the firm's Corporate and Mergers & Acquisitions and Veterinary practice groups, on being selected by *Long Island Business News* as a 30 Under Thirty award recipient. For the first time, the firm received a regional "Best Law Firms" ranking.

Joseph A. Quatela, managing partner of Quatela Chimeri PLLC, is proud to announce that **Alison Leigh Epilone** has joined the firm as a Partner, concentrating in the areas of matrimonial and family law.

The following attorneys of Rivkin Radler LLP were named to *Best Lawyers in America:* **Brian S. Conneely**—Employment-Law Management, Labor Law-Management; **Claudia Hinrichsen**—Health Care Law; **Evan H. Krinick**—Appellate Practice, Insurance Law; **Benjamin P. Malerba**—Health Care Law; **Patricia C. Marcin**—Trust and Estates; **Jeffrey P. Rust**—Health Care Law; **William M. Savino**—Insurance Law, Litigation-Insurance; **Wendy H. Sheinberg**—Elder Law, Trust and Estates. The following Rivkin Radler attorneys were designated as *Ones to Watch* in the NYS Bar: **Kaitlyn E. Flynn**—Corporate Governance and Compliance Law/Insurance Law; **Sean N. Simensky**—Banking and Finance Law.

Ronald Fatoullah, Esq. of Ronald Fatoullah & Associates presented several webinars on Medicare and Medicaid updates for 2022 which included one with Kathleen Otte, Regional Administrator for Centers for Medicare, and Medicaid Services (CMS) New York Regional Office. In addition, as the Chair of the Board of Directors for Alzheimer's Association Long Island, Ron organized a successful Pickleball fundraiser in partnership with the Mid-Island JCC in Plainview.

Janet Nina Esagoff of Esagoff Law Group has been honored as a 2021 Power Woman of Long Island, and as a 2021 Nassau County Woman of Distinction. She has also been selected for the eighth year in a row as a 2021 New York Metro Super Lawyer: Civil Litigation and installed as Treasurer of Yashar-Hadassah Chapter of Judges and Lawyers.

Craig Olivo of Bond, Schoeneck & King is pleased to announce that the firm has been recognized by 2022 *U.S. News—Best Lawyers*® "Best Law Firms" as having the most Metropolitan Tier 1 rankings among the 949 ranked firms in New York State. The firm's New York City office has been recognized by the 2022 *U.S. News—Best Lawyers*® "Best Law Firms" in three categories.

David S. Feather of Feather Law Firm, P.C. is proud to announce that the firm has been named a New York Metro Super Lawyer for the third year in a row.

Lisa R. Valente, Partner at Makofsky Law Group, P.C. was selected by New York State Assemblyman John K. Mikulin as a recipient of the 17th Assembly District's "Women of Distinction" Award for 2021. Lisa was honored on October 16 at the Island Trees Public Library in Levittown.

Karen Tenenbaum, LL.M. (Tax), CPA, tax attorney, presented two webinars for NCCPAP, Accounting & Tax Symposium 2021. The topics were "IRS Trust Fund Recovery Penalties & NYS Responsible Person Assessments" and "NYS Bulk Sales Liability." She also presented the webinar "Dealing with Tax Controversy—IRS & NYS Tax Collection" for NYSSCPA, Tax and Financial Planning for Individuals Conference. Karen discussed how to build a successful life and business with Rhonda Klch for her show "The Credit Authority" for 103.9 LI News Radio. She was a guest on the podcast Mitlin Money Mindset and spoke about NYS telecommuting, residency rules, as well as other federal and state tax issues.

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

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

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

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

We Welcome the following New Members

Attorneys

Jamie Scott Bernstein

Nickeysha Brown-Edouard

Raymond Farrell

Margaret Mary Garte

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Jonathan Pierre

Gabrielle Grace Pullo

Syed Fahad Qamer

Jasmine Yvette Radjpaul

Deepa Jayanti Shiwcharan

Tomlinson…

Continued From Page 6

Sagamore Hill, which was a beautiful and meaningful event for all in attendance. Another event that would not have had nearly as great a success as it did, was an event held at the EDNY Central Islip Courthouse, honoring women veterans. Judge Tomlinson ensured no stone went unturned in making sure the women veterans not only felt honored, but also were able to learn about valuable resources to assist our veterans.

In the process, Judge Tomlinson personally reached out to women veterans to be honored, worked with the VA hospital, as well as made personal trips to ensure every detail was perfect. Also, an avid proofreader (a nod to her days as an adjunct English professor), nearly every message, correspondence, newsletter, etc. being sent out of the FBA EDNY Chapter was personally proofread by Judge Tomlinson.

Judge Tomlinson had an unwavering commitment to promoting civic education and inspiring students across Long Island through her membership in the Federal Bar Association and on the United States Court of Appeals for the Second Circuit's Civic Education Committee. In fact, it was not uncommon to walk into Judge Tomlinson's courtroom and see a class of students seated and learning about the court system.

Judge Tomlinson would also often ask the attorneys to give the students a brief synopsis of the case they were appearing for. She would also regularly judge moot court competitions held by the Nassau County Bar Association, Judge Bianco in connection with the FBA EDNY Chapter, as well as participate in the Bench in your Backyard program where local middle school students would have the opportunity to learn about the federal court system.

Judge Tomlinson's contribution to the bench and bar have been nothing short of monumental. Those who knew her always suspected that perhaps her days consisted of 25 or more hours because she gave her all to everything, she became a part of or volunteered for.

She could easily be described as down to earth, highly respected, well-liked, and humble, believing no task to be too big or too small for her to handle. Despite being a Federal Magistrate Judge, she did not think twice about rolling up her sleeves and getting involved in even the smallest of details.

In her personal life, Judge Tomlinson was an avid golfer, extremely active in the church community, and enjoyed watching the Jets—as much as anyone could. She also often spoke about cooking and the sometimes-mixed reviews of her cooking. She touched the lives of all who knew her. Despite everything she had going on in her professional life and despite her personal health battles, she never slowed down, never let it impact her always positive attitude, and she continued to show warmth and compassion towards everyone.

Rest in peace, Judge Tomlinson. In your remarkable seventy-three years, you accomplished more than most people could in two lifetimes and you will be missed.

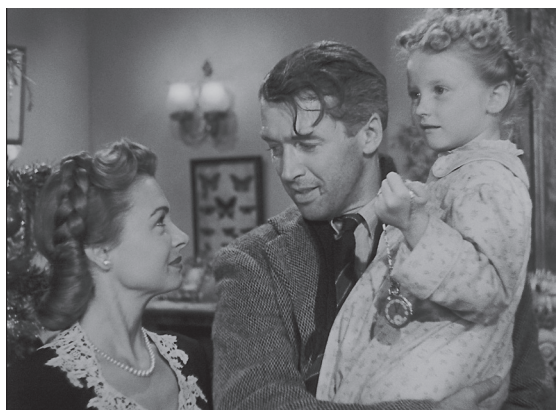
Capra…

Continued From Page 13

Potter that Paramount is able to reassert rights for a film it originally had nothing to do with.

If Capra had benefited from the results of *Stewart v Abend*,[15] maybe the situation wouldn't seem so crass. Frank Capra, who died in 1993, did however see his reputation restored from the repeated airings of *It's a Wonderful Life*. If the film had remained protected, perhaps his critical rehabilitation would not have happened. As for the movie, it continues to warm the heart. Only not as often as it used to.

1. William O. Douglas, Frank Capra: The Carl Sandburg of Hollywood, in The Films of Frank Capra 1 (1st Ed. 1977).
2. Frank Capra, One Man, One Film in the American Film Institute's A Salute to Frank Capra 8 (1st Ed. 1982).
3. Jeanine Basinger, Capracorn, in the American Film Institute's A Salute to Frank Capra 11, supra.
4. John Cassavetes quoted in the American Film Institute's A Salute to Frank Capra 13, supra.
5. Michael Wilmington, 'Why We Fight' was Capra's Best War Effort, Chicago Tribune (November 18,m 2001) at https://www.chicagotribune.com.
6. It Happened One Night (1934), Mr. Deeds Goes to Town (1936), You Can't Take It with You (1938).
7. Pub.L. 60–349
8. 17 U.S.C. §§ 101-810.
9. Jay Serafino, How It's a Wonderful Life Went From a Box Office Dud to Accidental Christmas Tradition, (November 30, 2020) at https://www.mentalfloss.com.
10. 495 U.S. 207 (1990).
11. Thuronyi, supra.
12. Lou Lumenick, 25 years ago this month, 'It's a Wonderful Life' left the public domain, (June 20, 2018) at https://www.lumenick.com.
13. Id.
14. Thuronyi, supra.
15. Stewart v Abend concerns the story that was the basis of Alfred Hitchcock's Rear Window, another film classic starring James Stewart.



Taxable…

Continued From Page 10

statute of limitations for examination; and, the return will establish the taxpayer's treatment of the valuation of assets includible in the gross estate, which is important for both determining the amount of estate tax due and the income tax basis of assets transferred.

Conclusion

Planners should understand that for both NYS residents and non-residents, the rules governing decedents' estates are different between the Internal Revenue Code and the New York Tax Law. Some of the differences are so significant that they merit their own special planning considerations. The most notable divergences are the NYS estate tax cliff and the lack of portability of the NYS exemption, both of which merit deep thought about how planners approach drafting and structuring. As the federal government weighs whether to change the federal estate and gift tax rules as a revenue-raiser for domestic spending initiatives, attorneys might need to re-examine the playbook and adapt strategies to the shifting times.

1. I.R.C. § 2031(a).
2. I.R.C. § 2038.
3. *See, e.g.,* I.R.C. § 2036(a).
4. I.R.C. § 2041.
5. 1959-1 C.B. 237.
6. P.L. 115-97 (Dec. 22, 2017), § 11061(a).
7. *Id.*
8. I.R.C. § 2010(c)(2)(A).
9. I.R.C. § 2056(a).
10. Even so, the Generation-Skipping Transfer (GST) Tax exemption is still not portable, so an "A/B" Trust would Still have utility on the federal level to address GST Tax concerns.
11. N.Y. Tax Law § 954(a).
12. *Id.* This article does not delve into greater detail on the QTIP election, other than to note that NYS follows the federal regulations on the subject.
13. N.Y. Tax Law § 954(a)(3).
14. I.R.C. § 1014(a).
15. N.Y. Tax Law § 960(a).
16. N.Y. Tax Law § 960(b).
17. NYS DTF Advisory Opinions TSB-A-11(1)M (Oct. 12, 2011), TSB-A-15(1)M (May 29, 2015).
18. N.Y. Tax Law § 960(b).
19. N.Y. Tax Law § 971(a)(2).

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Stigma…

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opportunity for networking, and pressure to drink at firm events as things that hold them back from seeking help.

Many lawyers and law students worry about questions around treatment for substance abuse disorder or mental illness. These questions may arise on applications for admission to the bar, legal malpractice application or even employment interview questions.

Stigma Has a Price

With stigma and the ensuing reluctance to receive treatment comes a reduced quality of care and treatment of patients with disorder; shame and concerns about social, economic, and legal consequences of disclosing a disorder may deter help seeking, continuing lack of treatment resulting in continued high rates of malpractice and grievance complaints. This puts the profession's reputation in jeopardy.

Helping Reduce the Stigma

1. Challenge the way you look at people with mental health or substance use disorder.
2. Educate yourself about the effects of mental illness and substance use disorders.
3. Educate your firm and your HR department on the issue.
4. Change the language you and those around you use around substance use disorders and mental illness:
5. Learn the signs of substance use disorder and mental illness and find out what the best way to intervene in a friend or colleagues' situation might be.
6. Keep LAP programs (Lawyers Assistance Programs) well-funded and active in your state and local bar associations.

Ways to Help a Colleague

Even though you may not be able to see a mental health issue or a problem with substance abuse, like you can see a physical disability or ailment, these conditions are just as real as the issues you can see. Learn to notice the behavior that may be associated with these issues and try to talk to your colleague.

1. If you notice behavior that may be associated with mental Illness or substance abuse disorder, talk to your colleague.

   Examples include:

   Drop in attendance of performance

   Change in physical appearance

   Secretive or suspicious behavior

   Unexplained change in personality or attitude

   Tremors, slurred speech or impaired coordination

   Sudden Mood Swings, irritability and angry outbursts.
2. Maintain your empathy and understanding. The person you are talking to may very well be ill.
3. Contact your local LAP for resources and support.

What LAP Does

1. We provide educational opportunities to the profession. Check your local bar association website for upcoming events sponsored by LAP.
2. We meet with law students and educate them on the dangers of substance abuse and how to get treatment.
3. We provide participants with tools to use, other than alcohol or drugs, to deal with the stress of the profession. Things like yoga, meditation, and stress reduction techniques.
4. We sponsor monitoring programs for attorneys struggling with or recovering from substance abuse disorders.
5. Every state offers Lawyer Assistance Programs (LAPs), which provide help to legal professionals who are struggling with addiction, substance abuse, as well as mental disorders like anxiety and depression.[3] It is geared specifically toward working professionals who need specialized care. They can learn how to manage stress, get emotional support, and even go through treatment for problems with alcohol, cocaine, painkillers, and other substances.
6. Here at the Nassau County LAP, our Director, Beth is an active participant with the NYS Task Force for Attorney Well Being which seeks to find ways to change the culture around these issues in our state and to find solutions for helping to reduce the stigma and provide better support to lawyers struggling with substance abuse, depression, anxiety, and other similar issues.

Please—if you or your firm are able, donate to the LAP program directly through the Nassau County Bar Association website.

1 SAMHSA National Findings Report 2018: Key Substance Use and Mental Health Indicators in the United States.
2 https://bit.ly/3CxLhmm
3 https://bit.ly/32hVR4p

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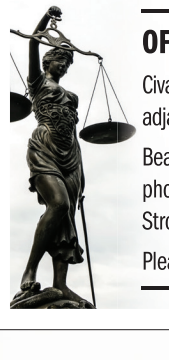

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