

# Nassau Lawyer

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## NCBA Access to Justice Committee Honors National Pro Bono Week

Madeline Mullane

Marking the return to an in-person format for the first time since prior to the pandemic, the NCBA Access to Justice Committee hosted its Pro Bono Open House at Domus on October 24, 2022. The Committee—in conjunction with The Safe Center Long Island and Nassau Suffolk Law Services—held a successful and well-attended event, with over 110 people from the community able to receive one-on-one general legal consultations regarding a myriad of legal issues.

Over 50 attorneys, paralegals, and support staff joined together with representatives from Nassau County Supreme Court and the Appellate Division, Second Department to provide general guidance, consultations, and information on how to procedurally navigate the court system as a pro se litigant. Traditionally held during National Pro Bono Week, the Open House allows the public to have direct, free access to attorneys who can often provide transformative help after only a short meeting. For those who do not have the means or the understanding of the legal system, the consultation may be the catalyst to improve their situation or alleviate a source of stress and unease in their life.

While awaiting their consultation, representatives from the Nassau County Supreme Court spoke more in-depth with attendees about the courts' Access to Justice program, its origins and initiatives, and the ways it works with the public to achieve access to the court and potential relief available through its processes.



Many senior members of the community were in attendance, seeking guidance on issues ranging from elder abuse, taxes, and estate planning to real estate, contracts, and benefits. The most requested type of consultation for all attendees was wills, trusts, and estates. Real estate, landlord/tenant, and mortgage foreclosure were second most requested, with family law and related issues rounding out the top three. Some very niche consultations were requested and accommodated by the volunteer attorneys, doing their best to provide at least some perspective and guidance to all who they spoke with.

See NATIONAL PRO BONO WEEK, Page 5

## Hon. Norman St. George, Hon. Vito M. DeStefano, and Jeneen Wunder Discuss Judicial Initiatives and Offer Professional Insights to NCBA New Lawyers Committee

Byron C. Chou

On October 28, 2022, the New Lawyers Committee had the privilege of hosting a lunchtime panel of esteemed speakers consisting of the Hon. Norman St. George (Deputy Chief Administrative Judge for the Courts Outside of New York City), Hon. Vito M. DeStefano (Nassau County Administrative Judge), and Jeneen Wunder, Esq. (Principal Law Clerk to the Judge Norman St. George). The panelists discussed the New York State judiciary and its current initiatives, as well as offered insights on the successful practice of law as a new lawyer.

This in-person-only event, held in the North side Dining Room of Domus, was well-attended and provided an intimate and inviting setting, which allowed all attendees to engage with both Judges St. George and DeStefano and Ms. Wunder. It further provided the attendees with unique insight into the organizational structure of the New York State judiciary, its various districts, appellate departments, and their respective functions.

Moreover, as each speaker detailed their own personal and professional career milestones, they offered anecdotes and

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# My Tale of Wassail — The President's Hero Quest

In the month of December at Domus, we celebrate a centuries-old tradition known as the “wassail bowl.” For those of you who are unfamiliar with the term, “wassail” is a hot drink that is made from wine and mulled cider, sugar, spices, and baked apples that is traditionally served in a large bowl during the Yuletide winter festival. This beverage is an integral part of “wassailing,” an ancient Anglo-Saxon drinking ritual meant to toast someone’s good health.

Many scholars have attempted to trace the origins of this wintertime ritual. Some scholars believe that wassailing has its origins in Ancient Rome, where villagers would make sacrifices to Pomona, the goddess of fruit and trees. Others believe that it has its origins in the Anglo-Saxon pagan custom of visiting fruit gardens to sing to the apple trees to scare away evil spirits. While in Germanic legend, the ritual of wassailing is thought to be connected to the Wild Hunt, a ghostly procession in the sky led by the Norse god Odin, and a supernatural group of celestial hunters.

Regardless of its origins, wassailing has continued through the centuries, being adapted in a multitude of ways: the house-visiting wassail in which a troupe goes from house to house with a wassail bowl singing carols to their neighbors and encouraging acts of charity; the orchard-visiting wassail, where people recite incantations and sing to the trees to promote a good harvest; and the wassailing that happens among warriors, who boast of their exploits and conquests. In fact, it is reputed that the wassail bowl of the Saxon Pagan Princess Rowena caused a British king to become so drunk, that he parted with a piece of his kingdom in the hopes of marrying her.

On December 8, 2022, the members of our Association will gather in the Great Hall to hear a rendition of the *Tale of Wassail* as told by President-Elect Sanford Strenger. One year ago, while serving as President-Elect, I recited my own version of the *Tale of Wassail*—a mythological account of the NCBA President’s Hero Quest which I reprint here. While our NCBA heroes and the source of their inspirations are indeed quite real, I have fictionalized their hero quests for dramatic effect.

*It is said that in the years leading up to one’s presidency, each occupant of the office goes through a hero’s journey marked by a call to adventure, a mentorship, and overcoming a personal obstacle. At the end of their journey, each President has gained the wisdom and experience needed to strengthen the Five Pillars of the Nassau County Bar Association: (1) Leadership, (2) Strength of Mind/Body/Spirit, (3) Public Service, (4) Charitable Giving, and (5) Diversity and Inclusion.*

*The journeys of six of our NCBA Past Presidents—Marc Gann, Peter Mancuso, Steve Leventhal, Greg Lisi, Kate Meng, and Marian Rice—helped them gain a better understanding and appreciation for the importance of NCBA’s First Pillar—Leadership.*

*Gann, Mancuso, Leventhal, and Lisi, participated in an immersive self-directed learning experience with a foremost expert on Abraham Lincoln. As part of their tutelage, each President was dispatched to a unique location around the globe. Lisi traveled to the Himalayas; Mancuso journeyed to the Norwegian Archipelago nearest the North Pole; Gann trekked to the Havasu Falls, across Grand Canyon West and the South Rim; while Leventhal was dispatched to Amsterdam. During their journeys, each of our presidents took a vow of silence for three months and used their time to ponder the most impactful of Lincoln’s writings and speeches, including his House Divided Speech, Cooper Union Speech, the Lincoln-Douglas debates, his First and Second Inaugural Address and, of course, the*



## FROM THE PRESIDENT

Rosalia Baiamonte

*Gettysburg Address. The rigors of such an immersive experience sharpened their minds so clearly, it is rumored they developed the power to discern other peoples’ thoughts.*

*The journey of Past President Kate Meng took her to Northern China, where she walked the entire length of the Ming Dynasty Great Wall—over 5,500 miles! During her at-times treacherous path, Meng listened to the greatest classical composers of all time (Mozart, Beethoven, Bach, Chopin, and Tchaikovsky). She consumed audio books which discussed the greatest accomplishments of Genghis Khan, the First Great Emperor of the Mongol Empire. Meng was particularly impressed by Khan’s establishment of freedom of religion, banning torture, outlawing slavery, establishing universal law, and a universal writing system and his system of promoting people based on individual merit.*

*Meanwhile, Past President Marian Rice journeyed to Cairo to study the Great Pyramids of Giza. She joined a private expedition digging up ancient relics and treasures. She took courses in painting and drawing so that she could chronicle her adventures. In the evenings, she read a collection of historical accounts of the Reign of Queen Cleopatra, paying close attention to the manner in which she navigated Roman politics.*

*The paths of four of our Past Presidents—Andrew Simons, Rick Collins, Lance Clarke, and Elena Karabatos—helped them achieve a **Strength of Mind/Body/Spirit**, which is the embodiment of NCBA’s Second Pillar.*

*It was a journey of exploration for Simons, beginning in the Galapagos Islands of Ecuador. By day, he observed all manner of mammals, reptiles, birds and fish; and he examined the effects of climate on the ecosystem, all the while being extra careful to steer clear of poisonous mushrooms known to propagate the islands. At night, he studied the many languages of South America, including Spanish, English, German, and French. Having mastered those languages, he learned to read Sanskrit. It is rumored that he can recite from memory the epic poem known as *The Divine Comedy* written by Dante Alighieri, in its native 14th Century Italian.*

*Collins sought to reenact the biblical account of Samson, who was given immense strength which allowed him to perform superhuman feats. Upon learning that he would need to slay a lion with his bare hands, and defeat an entire army using only the jawbone of a donkey, Collins opted instead to demonstrate his prowess by training and competing in the most famous strong man competitions, including *The World’s Strongest Man*, the *Arnold Strongman Classic*, the *Strongman Champions League*, and the *Giants Live Tour*. When he was done lifting boulders, toting refrigerators, pulling trains, and towing an 18-wheel truck behind him, he scaled Mount Everest, went sky diving, and hang gliding in Rio de Janeiro.*

*Clarke’s journey begins in the spring of 2005, while he was backpacking through Europe. It was in the picturesque Italian City of Pisa, while admiring the Leaning Bell Tower, that he had a chance encounter with a very special tourist, one Colin Powell who had recently returned to private life. Clarke formed a unique friendship with General Powell and was given rare insight into the life of this statesman, diplomat, Army officer, and the first African American Secretary of State. It is not surprising that Clarke went on to blaze his own trail as the 105th President, and the first African American President of this Association.*

*Not one to shy away from any challenge, Karabatos likewise scaled the heights of Mt. Everest. It was there that she is said to have communed with Aristotle, one of the greatest philosophers ever to have lived. She embarked on a rigorous course of study of science, mathematics, logic, and reason. Many say it was this journey which contributed to her successful efforts to resuscitate this Association from financial ruin in 2019.*

*The essence of the Third Pillar—Public Service—is most notable in the journeys of Past Presidents Martha Krisel, Susan Katz Richman, and Chris McGrath. Krisel’s journey took many roads. For a time, she toiled in the sugar cane fields of Maui. In need of inspiration, she journeyed to India and spent weeks sketching*



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the Taj Mahal and marveling at this testament of love built by a grief-stricken husband in honor of his wife. But it was the following month spent in Chicago, where Krisel found her true calling, in the birthplace of Hannah Greenebaum Solomon, a trailblazing social reformer and the founder of the National Council of Jewish Women. Hannah Solomon worked tirelessly to improve the quality of life for women, children, and families, and to ensure individual rights and freedoms for all people. It is no wonder that a hallmark of Krisel's Presidency is Access to Justice.

In honor of her personal hero, aviation pioneer Amelia Earhart, Richman began her journey in Oakland California, on an Eastbound transatlantic flight aboard a replica of the very same Lockheed Vega which was piloted by Earhart. Richman read all of Amelia Earhart's best-selling books about flying, and she also studied Earhart's role in forming the Ninety-Nines, a group of licensed female pilots. Today, the 99s is known as the International Organization of Female Pilots and has 155 Chapters across the globe. During one of her stops in France, Richman climbed the Eiffel Tower, and dined at the elegant Le Jules Verne Restaurant located on the Tower's second floor, in awe of the impact a single woman can have in the world. Parenthetically, Richman is the only NCBA President to have achieved the "hat-trick," having served as President, Dean of the Academy of Law, and Chair of WE CARE (albeit not in that order).

McGrath was similarly inspired by his aviation heroes, Orville and Wilbur Wright. In fact, he took his journey to Kitty Hawk, North Carolina, where he

spent months building an exact replica of the Wright Flyer—the world's first successful motor-operated airplane invented by the Wright Brothers—and then flying it for a total of 12 seconds. Having mastered the inspiration needed to think beyond limits, McGrath next found himself deep in London's underground. He camped day and night in Churchill's Underground Cabinet War Rooms, where he perfected his methods of diffusing confrontation.

The journeys of Past Presidents William Savino, Emily Franchina and Stephen Gassman, fortified NCBA's Fourth Pillar—**Charitable Giving**.

Savino travelled to the Amazon Basin in search of a sweet-smelling cinnamon spice. Legend has it that this spice was among the very gifts which were given to the baby Jesus by the Three Wise Men, and that eating even the smallest hint of this spice fills a person with altruism and philanthropy. Many believe that a dash of Savino's exotic cinnamon is added to every wassail bowl to inspire the future generations of NCBA Presidents to prioritize charitable giving.

Meanwhile, Franchina travelled to the Valley of Kings, on the West Bank of the River Nile, in search of a rosemary plant which was thought to have been buried in the tomb of the Boy King Tutankhamun—a plant so potent, that a mere taste could bestow such power of communication and understanding as to transcend every language on earth. It is rumored that upon her return to Mineola, Franchina planted a sprig of this rosemary under the trees which flank the main entrance to Domus.

Gassman's journey included a visit to Northern France to walk along the

coastline of Omaha Beach, the landing area used by Allied forces during the D-Day invasion of WWII. While there, he reflected on the words spoken by President Franklin D. Roosevelt at his Second Inaugural Address, when he said, "The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little." So, it would come to pass that Gassman founded WE CARE, the charitable arm of the Nassau County Bar Association during his tenure as President.

The Fifth Pillar—**Diversity & Inclusion**—was strengthened by the journeys of Past Presidents Dorian Glover, Susan Kluewer, and Douglas Good. As a testament to his personal hero, Thurgood Marshall, Glover sought to retrace the footsteps of a man who would one day become the first African American Justice of the U.S. Supreme Court, and founder of the NAACP Legal Defense and Education Fund. During a chance encounter with a librarian at Howard University School of Law, Glover learned that after his graduation, Thurgood Marshall went on a pilgrimage through Africa in search of a greater understanding of the power of connecting with others through faith and symbolism. So too, Glover traveled to the Ivory Coast, Ghana, Ethiopia, and Egypt, where he found himself beholding the Great Sphinx—a mythical creature with the head of a human, the body of a lion and the wings of a falcon. Glover learned that the Sphinx has been adapted by many societies, including the Free Masons, as a symbol of protection and benevolence, two of the most dominant hallmarks of his tenure as President.

Kluewer, studied the life of her personal hero, Eleanor Roosevelt. She learned that prior to becoming First Lady, Eleanor Roosevelt advocated for expanded roles for women in the workplace, the civil rights of African Americans and Asian Americans and the rights of World War II refugees. So inspired was she, that Kluewer traveled nearly 24 hours to China, to visit the Great Wall, in honor of First Lady Eleanor Roosevelt, who was denied the right to travel to China when she was a Delegate of the United Nations. It is said that Kluewer left a prayer for the bar association on a note which she placed in a crevice of the Wall along her journey.

Meanwhile, Good embarked on a perilous 48-hour journey on an expedition ship to Antarctica. When inclement weather prevented him from communing with whales, penguins, and other wildlife, he pirated several satellite systems to access the internet, where he devoured information on the life and career of the Notorious RBG—Ruth Bader Ginsberg, a fierce advocate for gender equality and women's rights and the first Jewish woman, and second woman ever, to serve on the United States Supreme Court. Since it is illegal to take as a souvenir even the smallest pebble from Antarctica, Good took back with him an ability to achieve absolute perfect pitch standing atop the highest, coldest, and driest continent, as well as a recipe for Chocolate Allspice Dessert Nachos he got from the ship's cook.

As for my personal journey—that remains to be written by a future President... 🪄

## NCBA Access to Justice Committee Honors National Pro Bono Week...

Continued from Cover

The consensus from discussions with attendees, and comments on evaluation forms completed after their consultations, was that the event was impactful and informative. One attendee stated, "I very much appreciate all of the time, patience, and professional assistance" and that they received "invaluable help!!!" with a "complicated issue." Another said that the attorney they spoke with was a "big help."

The attorneys, many of whom came straight from work, similarly

shared positive interactions, and saw the immediate benefit in providing these consultations. Although the Open House was slotted to end at 7:00 PM, a significant number of walk-in attendees pushed consultations into the next hour, as the dedicated volunteer attorneys and support staff made sure each attendee received their own time and undivided attention.

The NCBA Access to Justice Committee meets regularly to plan and coordinate events such as Open House and will hold their next event,

the Pro Bono Recognition Reception, on March 1, 2023. It is the intention of the Committee to have another Pro Bono Open House in the spring. New ideas for ways to provide access and understanding of the courts and the legal system, as well as pro bono service suggestions, are always welcomed by the Committee, as are new members. If you are interested in joining the Committee or volunteering for a future open house, please reach out to Cheryl Cardona at ccardona@nassuabar.org.

Nassau Suffolk Law Services, The Safe Center LI, and the Nassau Bar Foundation's Mortgage Foreclosure Assistance Project are seeking new volunteers to provide Pro Bono legal services on an ongoing basis. To find out more about opportunities available within each organization, contact the directors of each program, respectively: **Reisa Brafman, Esq.** at rbrafman@nsls.legal, **Ingrid Villagran, Esq.** at ivillagran@tscli.org, and **Madeline Mullane, Esq.** at mmullane@nassuabar.org.

## The NCBA Access to Justice Committee extends its gratitude to the following volunteer attorneys for donating their time and expertise:

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**FOCUS:  
BANKRUPTCY LAW**

Jeff Morgenstern

In 2022, the Bankruptcy Court of the Eastern District of New York produced another set of interesting decisions. Here is a capsule summary of some of the highlights:

### Dischargeability of Private Student Loans

In *Homaidan, et al. v. Sallie Mae Inc., Navient Solutions LLC, et al.*,<sup>1</sup> plaintiff, on behalf of a putative class, sought a declaration that his private, nongovernmental student loans were discharged in bankruptcy, and that Navient had nevertheless improperly continued to collect them for many years.

The key issue, was whether the private loans exceeded the cost of attendance at Title IV institutions (as defined under Section 221(d) of the IRS Code), and as such, were not “qualified education loans” which are nondischargeable pursuant to Section 523(a)(8) of the Bankruptcy Code.<sup>2</sup> If so, Navient’s continued collection efforts would have violated the statutory bankruptcy discharge he was granted, entitling him to damages for the willful violation of the discharge Order.

Initially, Judge Stong found that the request for a temporary restraining order (“TRO”) was properly confined just to include the members of the putative class who had standing to seek relief (i.e., only those whose loans exceeded the cost of attendance, who were subject to ongoing collection

## Eastern District Bankruptcy Roundup

efforts, and who still had an outstanding balance).

As to plaintiff’s burden to show a “likelihood of success on the merits” the court held that the plaintiffs showed that to the extent their private loans did not meet the criteria of §523(a)(8)(B), they would be covered by their bankruptcy discharges; having received notice of the discharges, Navient would have been in violation of the discharge Orders. The complaint also alleged that Navient continued to induce loan payments despite knowing that these were discharged loans, and without making any effort to determine whether the loans made to some 322,000 putative class members were within the applicable cost of attendance or not.<sup>3</sup>

As to Navient’s argument that members of the class represented in their loan documents that the loans being taken were within the cost of attendance and could only be used for “qualified educational expenses,” the court found that such a standard, boilerplate statement was not enforceable in bankruptcy; the court also stated that if the facts showed that a private student loan exceeded the applicable cost of attendance, the borrower’s statement in the loan documents to the contrary did not change those facts.

The court found that plaintiffs showed they would suffer irreparable injury in the absence of an injunction. It found that in the absence of a TRO, class members would continue to be harassed by Navient for payments on discharged debts and might actually continue to pay them under pressure.

Next, the court found that: a) the “balance of hardships” tipped in the plaintiffs’ favor, because Navient’s collection efforts impeded plaintiffs’ right to a “fresh start” afforded by their discharges; and b) that the public interest would not be harmed by entering a TRO.

The court further held that it would enter an Order that had the effect of providing for relief outside of its own district, with respect to granting nationwide relief for alleged violations of discharge Orders in other districts. The TRO was granted and Navient was given sixty (60) days to comply.

Finally, the court declined to extend the TRO to a larger group of putative class members of borrowers who had other private loans that exceeded the cost of attendance and who attended Title VI institutions.



It should also be noted that Navient filed an appeal to the District Court on July 25, 2022, and filed a motion for a stay pending appeal. Judge Stong denied that motion on September 2, 2022.<sup>4</sup>

### Dischargeability of Breach of Marital Stipulation

*Monassebian v. Monassebian*<sup>5</sup> involved a stipulation entered into in a matrimonial case. The parties agreed to sell a jointly-owned condominium to their daughter in exchange for a release from her, but also, that they would not assist, finance or encourage their daughter to sue or seek to obtain title to the apartment. The agreement included remedies for its breach including a claim for indemnification.

The debtor breached the stipulation by locating and paying for an attorney, to enable his daughter to sue the debtor and his wife to obtain title to the apartment. His spouse sued him in state court for breaching the stipulation and obtained a judgment for \$509,407 for damages and legal fees, for the loss of equity, and the delay in selling the apartment caused by the daughter’s lawsuit.

After the debtor filed a bankruptcy petition, his spouse brought an action under Section 523(a)(15) of the Bankruptcy Code to determine if this judgment from the state court was nondischargeable.

Judge Lord noted that the current version of the statute no longer considers the debtor’s financial ability to pay, or the needs and abilities of each party, as, now under the BAPCPA of 2005, the sole issue is—was the obligation created under a divorce decree, separation agreement, or court judgment. Here, the obligation was incurred under the Stipulation of Settlement,

and even though it was ‘one step removed’ from what is typically claimed under this section, it still qualified as a nondischargeable debt.

### “In rem” Relief for Multiple Filings

In *In re Corriette*<sup>6</sup> the debtor had two (2) Chapter 13 cases dismissed and was barred from refiling for six (6) months; then he filed a third case, which was dismissed with prejudice and the court barred a refiling for 180 days.

The debtor also controlled an entity that filed multiple Chapter 11 cases to forestall a foreclosure sale on a property in Merrick. All the Chapter 11 cases were dismissed, all appellate attempts were unsuccessful, and the Bankruptcy Court imposed sanctions on the debtor and counsel for a bad faith filing.

During the debtor’s most recent Chapter 13 filing, another property in Freeport surfaced that the debtor had not disclosed in the prior filings. The debtor controlled another entity that had been blocking the owner of that property from pursuing an eviction at that premises by filing multiple bankruptcies. The debtor no longer had an ownership or leasehold interest in this property; he was only a holdover squatter with a mere possessory interest. The property owner filed a motion to lift the stay to gain possession of this property.

The court granted “In rem” relief under §362(d)(4) to bar another filing for up to two (2) years, unless the debtor in a subsequent case could show a change of circumstances or good cause for the new filing. In light of the debtor’s scheme to hinder delay and defraud creditors by way of serial filings, such “in rem” relief would be binding in any other bankruptcy case filed in the next

## ATTENTION NCBA MEMBERS!

Our October 2022 issue inadvertently published the article *Advance Directives: Do Your Wishes Matter?* under a wills and estates focus category.

The correct focus category for this article is medical malpractice.

Nassau Lawyer regrets this error and has corrected the online version of the issue.

two (2) years that affected the same Freeport property.

### Process For Extending Time to Object to Discharge

In *In re Kharlanov*<sup>7</sup> the debtor did not appear at the first meeting of creditors due to a Covid-related illness. At that time, the creditor's attorney claimed that the trustee discussed and verbally agreed with debtor's counsel to extend the time to object to the debtor's discharge for sixty (60) days from when the debtor appeared for an examination. The debtor appeared at the adjourned creditors' meeting. No stipulation or motion was filed with the court seeking an extension of the August 15, 2022, deadline for the trustee or any creditor to object to the debtor's discharge, and a discharge was granted on that day.

Thereafter, the creditor filed a motion to revoke the discharge, and also filed a complaint objecting to the discharge and to the dischargeability of the creditor's debt. Its argument was that the discharge was entered by mistake, because based upon representations by debtor's counsel (which the debtor denied), and excusable neglect, the creditor believed it had sixty (60) days from July 6, 2022, to object to the discharge bringing the deadline to September

16, 2022. The debtor claimed that a possible extension of the trustee's time to object to discharge was discussed at the first meeting, but that such an extension would only cover the trustee, and not individual creditors, and in any event, no such verbal agreement was ever made.

The court found that there was no mistake in the discharge having been entered on August 15, 2022, as the court never "so ordered" any agreement or stipulation to extend that deadline. In addition, the sixty (60) day deadline to object to dischargeability of debt or to discharge, runs from the "first date set for the meeting of creditors," which can be extended for cause by motion before the time expires, and no such motion for an extension was sought. The strict interpretation of Bankruptcy Rule 9006(b)(3) compelled a finding that the court was without authority to extend the deadline after it had run. Any such verbal agreement between counsel without a timely application to the court and its approval, could not provide a basis to extend the deadline.

The creditor's motion was denied since its reliance on an alleged verbal agreement or discussion of a possible extension of time was unreasonable and insufficient to extend the deadline.

### Willful Violation of Automatic Stay

In *Bayview Loan Servicing v. Fogarty*,<sup>8</sup> the debtor owned 99% of an LLC that owned property which was her primary residence. The house was in foreclosure and right before the sale, the debtor filed Chapter 7. The lender was notified but went ahead with the foreclosure sale anyway since the LLC did not file for bankruptcy. The LLC had signed the note and mortgage. The debtor was not an owner but was named in the action as a defendant-occupant. The sale was to a third party.

The debtor's motion in Bankruptcy Court claimed a willful violation of the automatic stay by the lender and sought damages and sanctions. The Bankruptcy Court denied the motion, but the District Court reversed since the debtor was a named defendant in the foreclosure as having a possessory interest.

The Second Circuit affirmed and remanded to the Bankruptcy Court for a hearing on damages and sanctions. It held that the lender willfully violated the automatic stay provisions of Section 362 of the Bankruptcy Code prohibiting "the continuation of an action against the debtor," and "enforcement of

a judgment against the debtor". The court's clear message was that the lender should have played it safe and moved to lift the automatic stay against the debtor's possessory interest before foreclosing on the house. 🏠

1. *Youssef v. Sallie Mae Inc. (In re: Homaidan)* 640 B.R. 810 (E.D.N.Y. 2022), stay denied, 2022 Bankr. Lexis 2426 (E.D.N.Y., 2022), leave to appeal dismissed, 2022 U.S. Dist. Lexis 160945 (E.D.N.Y., 2022); Motion for Preliminary Injunction granted in part, by Decision on 10/17/22.
2. The Second Circuit Court of Appeals had previously ruled that "for a loan to be 'qualified' under §523(a)(8), the student must attend an eligible educational institution and the loan must fund only higher education expenses." *Homaidan v. Sallie Mae Inc.* 3 F. 4th 595, at 601 n.3 (2d Cir. 2021).
3. The Navient and Sallie Mae loans in question were primarily "Direct-to-Consumer" - "Tuition Answer" loans that did not involve the college's financial aid office.
4. *In re: Homaidan*, 2022 Bankr. Lexis 2426 (E.D.N.Y., 2022).
5. 2022 Bankr. Lexis 2282 (E.D.N.Y., 2022).
6. 2022 Bankr. Lexis 927 (E.D.N.Y., 2022).
7. *Kharlanov v. Kharlanov Constr. Co. (In re Kharlanov)*, 2022 Bankr. Lexis 2593 (E.D.N.Y., 2022).
8. 39 F. 4th 62 (2d. Cir. 2022).



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# 90th Annual Holiday Party

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**FOCUS:  
BUSINESS, TAX, AND  
ACCOUNTING LAW**


**Matthew E. Rappaport and  
Louis J. Kesselbrenner**

President Richard Nixon began the American government's so-called "War on Drugs" in 1971, but the nation's discourse regarding drugs classified under Schedule I of the Controlled Substances Act (CSA) passed that same year—including marijuana—has changed dramatically ever since.<sup>1</sup>

In 1996, California passed legislation giving birth to the first legal medicinal cannabis market in the country. Today, thirty-seven states have legal cannabis laws in place, and nineteen states permit recreational use for its adult constituents. This growing coalition includes New York State; on March 31, 2021, New York passed the Marijuana Regulation and Taxation Act (MRTA),<sup>2</sup> which decriminalized possession of marijuana (up to 3 ounces for personal use) and provides a regulatory schematic for licensing businesses to grow, process, distribute, and sell cannabis products to adults within the state.

The MRTA's legalization of marijuana conflicts directly with the CSA, but it also introduces an entirely new set of statutes governing the state-level taxation of marijuana activities. On the federal level, §280E of the Internal Revenue Code of 1986, as amended,<sup>3</sup> provides that expenditures in connection with the illegal sale of drugs, including marijuana, are not deductible for any person, including corporations. The only exception is a deduction for costs of goods sold.

But §280E is a federal rule, and New York State passed legislation decoupling from the Code for §280E purposes and allowing New York marijuana businesses to deduct marijuana expenses from gross income for state income tax purposes.<sup>4</sup> This means businesses must now navigate two separate regimes: the federal income tax, which holds that marijuana-related expenses are not deductible; and the state and New York City income tax, which provide that those same expenses are deductible.

The lineage of §280E case law illustrates the difficulties cannabis

## New York's Cannabis Legislation Brings Thorny Tax Issues

businesses face when attempting to circumvent the limitations of §280E. In *Californians Helping to Alleviate Medical Problems, Inc. v. Commissioner*<sup>5</sup> a California corporation was found to operate with a dual purpose: (1) primarily, to provide caregiving services; and (2) to provide its members with medical marijuana pursuant to the California Compassionate Use Act of 1996.

In short, the Tax Court ruled that a taxpayer operating in the illegal trafficking of a controlled substance trade or business precludes deductions under §280E for ordinary business expenses related to such illegal operation. It does not preclude the taxpayer from deducting expenses, however, from a substantially different trade or business that stands separate and apart from illegally trafficking controlled substances, such as expenses related to providing caregiving services.

But the Tax Court clarified in *Olive v. Commissioner* that incidental and complimentary services having a "close and inseparable organizational and economic relationship" to the sale of marijuana subjected those services to the same §280E limitations.<sup>6</sup> The contrast between *Californians* and *Olive* shows that a taxpayer needs to run truly separate and distinct businesses from marijuana sales to qualify the non-marijuana enterprises for full deductibility of expenses.<sup>7</sup>

More recently, the court reached a similar conclusion in *Patients Mutual Assistance Collective Corp. v. Commissioner*,<sup>8</sup> when the taxpayer tried to argue it had activities constituting four separate trade or businesses: sale of marijuana products, sale of products with no marijuana, therapeutic services, and brand development.

Because selling marijuana accounted for over 99.5% of the company's revenue, the other activities "were neither economically separate nor substantially different."<sup>9</sup> As it did in *Olive*, the court found that the taxpayer's other profit producing activities were merely incidental to its only true trade or business of selling marijuana, subjecting all expenses to §280E treatment.

Vertical integration in the cannabis space—from seed to sale operations—can reduce some of the tax consequences of §280E because such enterprises can share overhead costs like rent and utilities across their different business operations. In some states, vertically integrated cannabis business models are permitted, or even

encouraged for certain licensure types. The MRTA generally limits businesses from vertically integrating, however, by prohibiting cultivators from holding a retail license or having a direct or indirect interest in any premises with an adult-use cannabis dispensary license.<sup>10</sup>

In New York State, the MRTA created the Office of Cannabis Management under the jurisdiction of the Division of Alcoholic Beverage Control to implement marijuana policy, but the New York State Department of Taxation and Finance (DTF) will still maintain jurisdiction over marijuana-related tax issues.<sup>11</sup> The DTF will enforce at least three state-level taxes unique to marijuana, all of which will apply in addition to every other existing state- and local-level tax:

1. **A 7% excise tax** on the sale of medical marijuana.<sup>12</sup>
2. **A 9% retail sales tax** on the sale of recreational marijuana.<sup>13</sup>
3. **A value-added style tax** on the sale of recreational marijuana based on potency.<sup>14</sup>

This third category of tax is unique to New York State because no other state imposes any tax based on the potency of the recreational marijuana sold. Each of the three taxes will be reported and remitted as part of a dedicated tax return submitted to the DTF.<sup>15</sup> As of this writing, practitioners still await legislatively delegated regulations the DTF might issue to clarify the administration and enforcement of these taxes, so attorneys will need to make judgment calls in difficult situations.<sup>16</sup>

One judgment call practitioners must make without the help of regulations or other administrative guidance is how to reconcile federal tax optimization with state and local tax optimization. Tax advisors will need to weigh how different legal structures might affect outcomes under the federal income tax, state income tax, state and local sales taxes, state excise tax, and the potency-based tax.

The lack of clarity about how Code §280E applies to state and local taxes will not help; in non-precedential administrative guidance, the Internal Revenue Service advised that the excise tax levied by the State of Washington on the sale of marijuana should be applied as a reduction in the amount realized on the sale of the

affected marijuana products.<sup>17</sup> This guidance reconciled Code §280E with Code §164(a) by holding that the latter's flush language called for capitalization of the excise tax into the basis of each item of inventory, so the momentary addition to basis would have the same tax effect as a deduction.

If one applies this guidance to New York's taxes imposed under the MRTA, all of those taxes should be capitalized into basis of the affected products upon sale. If practitioners can get comfortable with this position despite the limited reliance value of Chief Counsel Advisory memoranda,<sup>18</sup> they might give clients the opportunity to achieve better tax outcomes.

As New York State grants licenses for recreational marijuana businesses to operate, tax advisors for those businesses will need to consider the several different types of taxes that apply on the federal, state, and local levels. Those advisors will also have to weigh tax consequences against non-tax business concerns, a tricky balance that might not come with clear answers. 🪄

1. 21 U.S.C. §§801 et seq.
2. New York State Senate Bill S854-A (Mar. 31, 2021).
3. Referred to throughout as the "Code."
4. Tax Law §208(9)(23).
5. 128 T.C. 173 (2007).
6. 139 T.C. 19 (2012), *aff'd*, 792 F.3d 1146 (9th Cir. 2015).
7. See also *Alt. Health Care Advocates v. Comm'r*, 151 T.C. 225 (2018) (use of a separate management company not distinct enough to exempt either the management company or the operating business from §280E).
8. 151 T.C. 176 (2018), *aff'd*, 995 F.3d 671 (9th Cir. 2021).
9. *Id.*
10. The MRTA permits businesses that are licensed as a "microbusiness" to vertically integrate.
11. See MRTA §51.
12. Tax Law §490.
13. Tax Law §493(b). Section 493(c) also contains a separate retail sales tax for certain counties and localities.
14. Tax Law §493(a).
15. Tax Law §§ 490(4), 495.
16. Tax Law §490(3).
17. IRS Chief Counsel Advice 201531016.
18. See IRC §6110(k)(3).



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**FOCUS:  
CIVIL RIGHTS LAW**

**James G. Ryan, Seema Rambaran,  
and Ciara Villalona**

On June 24, 2022, the Court handed down its decision in *Dobbs v. Jackson Women's Health Organization*. The Court, in a 6-3 decision, held the Constitution does not confer a right to abortion.<sup>1</sup> In a clean sweep, the Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* and held “the authority to regulate abortion” should be “returned to the people and their elected representatives.”<sup>2</sup>

The immediate consequences of *Dobbs* were felt nationwide.<sup>3</sup> Several states with “trigger laws,” laws designed to instantaneously go into effect under certain circumstances with no further state action required, resulted in complete statewide abortion bans, with no exceptions for rape or incest.<sup>4</sup> Other states found that their laws now banned abortions at six, fifteen, eighteen, or twenty weeks.<sup>5</sup> In forever blue states, like New York and California, there was no change in access to abortions.<sup>6</sup> In some states, abortion remains legal, for now, while courts determine if new or existing bans can take effect.<sup>7</sup>

What remains to be decided; however, is the effect of *Dobbs* on other rights not explicitly stated in the Constitution, including the rights to same-sex marriage and contraception. Cases in the October 2022 Term may reveal whether rights widely considered to be “fundamental” truly are so.

**Is *Dobbs* Just the Beginning?**

Justice Alito delivered the opinion of the Court, in which Justices Thomas, Gorsuch, Kavanaugh, and Barrett joined. Justices Thomas and Kavanaugh each filed concurring opinions, and Chief Justice Roberts filed an opinion concurring in the judgment. Justice Breyer, Justice Sotomayor, and Justice Kagan filed a dissenting opinion.

Perhaps one of the most striking statements in Justice Alito's majority opinion is, “The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one in which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment,”<sup>8</sup> thereby suggesting that if a right is not

# Civil Rights in a Post-*Dobbs* Era

explicitly stated in the Constitution, then it may be at risk.

Justice Alito, addressing the concerns of the dissent, wrote:

[T]he dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. But we have stated unequivocally that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.” We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed “potential life.” Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by “appeals to a broader right to autonomy.” It is hard to see how we could be clearer.<sup>9</sup>

Throughout the majority opinion, it is repeated that the ruling addresses the right, or lack thereof, to abortions and no other rights. Justice Kavanaugh echoed Justice Alito's assertions about other precedents involving contraception and same-sex marriage.<sup>10</sup>

Justice Thomas' concurrence, however, struck a different tune. While Justice Thomas agreed that “nothing in the Court's [*Dobbs*] opinion” should be “understood to cast doubt on precedents that do not concern abortion,” he wrote “[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”<sup>11</sup> Justice Thomas omitted *Loving v. Virginia*, the unanimous 1967 decision which held anti-miscegenation statutes violated both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.<sup>12</sup>

The dissent, jointly written by Justice Breyer, Justice Sotomayor and Justice Kagan, refused to take the majority at its word:<sup>13</sup>

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation.... They are all part of the same constitutional fabric, protecting autonomous decision-making over the most personal of life decisions.... The lone rationale for what the majority does today is that the right to elect an abortion is

not “deeply rooted in history”... The same could be said, though, of most of the rights the majority claims it is not tampering with.

Depending on who is your favorite Justice, you may or may not believe the majority's promise that *Dobbs* is an isolated decision. Are *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* next on the chopping block? If any of them fall, wouldn't *Loving* also be at risk? In the October 2022 Term, the Court just might have the opportunity to set the record straight.

**Coming Up Next: *303 Creative LLC v. Elenis***

In February 2022, the Court agreed to hear an appeal from a Colorado web designer who is willing to serve LGBTQ+-identifying clients, but limits her wedding-related services to heterosexual couples.<sup>14</sup> Specifically, the Court will consider “whether applying a public accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.”<sup>15</sup>

If this case gives you a feeling of déjà vu, you are not alone. Back in 2018, in *Masterpiece Cake Shop, LTD. v. Colorado Civil Rights Commission*, the Court evaluated whether Colorado's public accommodations law, which compelled a cake maker to design and make a cake that violated his sincerely held religious beliefs about same-sex marriage, violated the Free Speech and Free Exercise Clauses of the First Amendment.<sup>16</sup>

The Court, in a 7-2 decision, held the Colorado Civil Rights Commission's conduct in evaluating the cake shop owner's reasons for declining to make a wedding cake for same-sex couples violated the Free Exercise Clause. The Court's decision was narrow and left open the broader question of whether a business can discriminate against members of the LGBTQ+ community based on rights protected by the First Amendment.<sup>17</sup>

In the three years since *Masterpiece*, the Court's composition has changed dramatically. Justice Brett Kavanaugh joined the Court in September 2018, replacing Justice Anthony Kennedy.<sup>18</sup> In September 2020, Justice Ruth Bader Ginsburg, a feminist icon, died after 27 years on the nation's highest court.<sup>19</sup> Within weeks of her passing, Justice Amy Coney Barrett was nominated by President Donald Trump and confirmed by the U.S. Senate.<sup>20</sup> In June 2022, Justice Stephen Breyer retired after 28 years of service and was replaced by Justice Ketanji Brown Jackson.<sup>21</sup>

The controversial decision in *Dobbs* highlighted the ideological shift of the Court and led to serious debates about the role of the Court in the twenty-first century. Whether *Dobbs* makes you cheer or cringe, its effects on future civil rights cases may be profound. Decisions that will be rendered this Term will act as a seismograph to measure *Dobbs*' consequences on various landmark precedents. ⚖️

- 142 S. Ct. 2228 (2022).
- Id.* at 2242-43.
- Tracking the States Where Abortion is Now Banned*, The New York Times (Oct. 13, 2022), available at <https://nyti.ms/3NzCNC6>.
- Id.*
- Id.*
- Id.*
- Id.*
- Dobbs* at 2242.
- Id.* at 2280.
- Id.* at 2309 (“I emphasize what the Court today states: Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents.”) (Kavanaugh, J., concurring).
- Id.* at 2302.
- Adam Edelman, *Thomas Wants the Supreme Court to Overturn Landmark Rulings that Legalized Contraception, Same-Sex Marriage*, NBC News (June 24, 2022), available at <https://nbcnews.to/3Uq3TOP>.
- Dobbs*, 142 S. Ct. at 2319.
- Adam Liptak, *Supreme Court to Hear Case of Web Designer Who Objects to Same-Sex Marriage*, The New York Times (Feb. 22, 2022), available at <https://nyti.ms/3sXnKsn>.
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- Masterpiece Cake Shop, LTD. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).
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**FOCUS:  
BUSINESS LAW**

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Since their inception about twenty-five years ago, merchant cash agreements have been very lucrative for the merchant cash advance providers. One reason is that the agreements were treated such that the providers were purchasing future receivables and then collecting the amount advanced plus an additional amount through daily or weekly collections. The amount collected was significantly greater than the amount advanced. Recent cases in both the Southern District of New York and the New York Supreme Court, however, have determined that the advance is not for a purchase of receivables but is actually a usurious loan.

**Background**

A merchant cash advance (MCA) is when a provider gives a merchant

## Merchant Cash Agreements—Goodbye Yellow Brick Road?

an upfront sum of cash that is repaid through a percentage of the merchant's credit and debit card sales, plus a fee. It is claimed that since the provider is purchasing future sales, the transaction is not a loan. Repayment of the MCA is by one of two ways. Either there is an automatic weekly (or daily) deduction of a percentage of the merchant's credit and debit card sales, or there is a deduction of an agreed upon fixed amount. Moreover, an interest rate is not charged for the advance. Instead, the fee is a factor rate.

There are also administrative, underwriting, and other fees that are charged and added to the amount owed.<sup>1</sup> The effective interest rates for the advances, however, are often in the triple digits. When businesses cannot make their payments, many will take out additional advances to pay the old advances, creating a cycle of debt which often results in the business folding.<sup>2</sup> "MCA agreements are financial products, often marketed to small businesses through high-pressure sales operations resembling 'boiler rooms,' that purport to purchase at a discount a portion of a business's future receivables."<sup>3</sup>

The MCA industry started in the 1990s when a small business owner developed a method to be able to borrow funds from future credit card transactions. When the 2008 financial crisis led to large banks being wary of lending money to small businesses and making lending criteria more stringent, MCAs filled the void.<sup>4</sup>

MCA providers argue that they provide monies to businesses that, as a result of the decline of smaller banks, typical lenders often will not.<sup>5</sup> However, the MCA industry has recently come under investigation by the Federal Trade Commission, the Manhattan District Attorney, and the New York State Attorney General's office.<sup>6</sup> Earlier in 2022, the FTC settled claims against MCA operators.<sup>7</sup> In addition, Article 8 of the New York Financial Services Law, effective January 1, 2022, now requires MCA providers to provide certain disclosures.<sup>8</sup>

**Three Southern District Cases**

MCA Agreements were at issue in *Fleetwood Services, L.L.C. v. Ram Capital Funding, LLC*, a case in the SDNY.<sup>9</sup> In November 2016 the plaintiff, a Texas business involved in golf course construction, development, remodeling and renovation, entered into a MCA Agreement with Ram Capital. Pursuant to the agreement, plaintiff received an advance of \$100,000 "in exchange for the purported purchase of what was defined as all of Fleetwood's 'future receivables' until Fleetwood had repaid the sum of \$149,000."<sup>10</sup>

The repayments were to be by daily automated clearing house (ACH) withdrawals from a designated account in the sum of \$1,399.00.<sup>11</sup> The plaintiff commenced an action to recover for, among other things, a violation of the Texas usury statute on the basis that the cash advance was actually a loan with an interest rate well in excess of that allowed under Texas law and New York law.<sup>12</sup> Plaintiff eventually moved for summary judgment on its causes of action.

In analyzing whether the MCA agreement is a loan or an actual purchase of future receivables, the court noted that "[t]he hallmark of a loan is that the lender 'is absolutely entitled to repayment under all circumstances,'" or put otherwise, the 'principal sum is repayable absolutely.'<sup>13</sup>

In making the analysis as to whether repayment is absolute, three factors are considered: "(1) whether there is a reconciliation provision in the agreement; (2) whether the

agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy."<sup>14</sup> These factors, however, are only a guide and not all three factors need to be present in order to determine the agreement is actually a loan. The "essential question" to be determined is whether the party advancing the funds "is absolutely entitled to repayment under all circumstances."<sup>15</sup>

An analysis of the relevant MCA agreement led to a determination that the transaction was a loan and not a sale of assets as the provider was absolutely entitled to be repaid under all circumstances and as the plaintiff bears the risk of non-payment.<sup>16</sup> "Although on its face the Agreement purports to provide for the sale of accounts receivables, that is just window dressing. The Agreement has none of the characteristics of the sale of receivables in terms of transfer of risk and rewards."<sup>17</sup>

The obligation to collect on the "receivables" was squarely on Fleetwood, which was required to remit the specified percentage regardless of whether its customers made their payments. In the event Fleetwood filed for bankruptcy the provider would have been entitled to collect the full purchase price, inclusive of the additional fees, not just the amount actually advanced. "Viewing the Agreement as a whole, the Court concludes that it is a loan and not a contract for the purchase of future receivables. It thus may be subject to usury laws."<sup>18</sup>

Within a few weeks, the issue of MCA Agreements was again before the Southern District in *Haymount Urgent Care PC v. Gofund Advance, LLC*.<sup>19</sup> In Haymount, merchants filed a putative class action asserting claims of, among other things, RICO violations. The defendant MCA companies and individuals moved to dismiss.

In its decision, the court initially set forth various terms contained in the MCA agreements. It then analyzed the claim that the defendants were liable under RICO "for illegally operating an enterprise that loans money to small businesses at criminally usurious rates and then uses various improper tactics to collect on those loans."<sup>20</sup> For RICO purposes, a debt is unlawful if it runs afoul of the applicable usury statute.<sup>21</sup> The fundamental question was whether the underlying transactions were actually loans. The court answered in the affirmative.

The first analysis is how the relevant agreement allocates risk.

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Additional details to follow.

“The root of [the analysis] is the transfer of risk. Where the lender has purchased the accounts receivable, the borrower’s debt is extinguished and the lender’s risk with regard to the performance of the accounts is direct, that is, the lender and not the borrower bears the risk of non-performance by the account debtor.”<sup>22</sup> The defendants argued the three factors set forth in *LG Funding* are dispositive and, applying the factors to the agreements, the transactions are not loans.

The court, however, concluded that these factors, while relevant to the analysis, are not dispositive. The court went on to analyze other features of the agreements, like the remittance amounts being fixed and not based on good faith estimates of receivables; particular revenues or accounts that were being purchased were not identified, leaving the risk of nonpayment with the merchant; the merchants were to collect the revenues from all of their accounts; a default in the MCA occurs if the merchant’s bank rejects an automated debit without the merchant giving prior notice; such a default allows the lender to immediately receive payment in full; and in the event of a default, if the lender cannot recover from the merchant’s accounts, the merchant’s principal is responsible for the entire amount under the personal guaranty that was executed.<sup>23</sup> After consideration of all of these factors, the court determined that the transactions were loans, and the motion to dismiss with respect to this cause of action was denied.

Less than a month later, the Southern District again analyzed MCA agreements in *Lateral Recovery LLC v. Queen Funding, LLC*.<sup>24</sup> As in *Haymount*, the plaintiffs in *Lateral Recovery* commenced a RICO action against their MCA company and others, claiming that the defendants were, among other things, collecting an unlawful debt. The effective annual interest rate on the relevant MCA Agreements was between 100% and 300%.

The defendants moved to dismiss. In its analysis, the court noted that the key in finding a transaction, a sale of receivables, or a loan is whether there was a transfer of risk, citing to *Endico Potatoes Inc. v. CIT Grp/Factoring, Inc* and noting *Haymount*. The court also noted that the determination should be based on, among others, the three factors set forth in *LG Funding*. The court analyzed each of these three factors, finding they each weighed in favor of a loan. The court also analyzed the repayment and remedy terms of the agreements, which also indicated that the transaction was a loan. Accordingly,

the court held that the transactions were loans, and the motion was denied.<sup>25</sup>

### Kings County Supreme Court Analysis

These three District Court cases led to a Kings County Supreme Court Justice changing a prior determination he made. In *Hi Bar Capital LLC v. Parkway Dental Services, LLC*,<sup>26</sup> the plaintiff MCA provider was initially awarded a default judgment against the merchant. The merchant’s motion to vacate the default on the ground that, inter alia, the agreement was actually a usurious loan was denied. The merchant moved to reargue.

On reargument, the court first analyzed the three factors enumerated in *LG Funding* and *Principis Capital* and referenced in *Fleetwood Services* for determining whether the agreement sets forth that the amount advanced is absolutely repayable, which would make it a loan. That analysis resulted in there not being any issues concerning the agreement.

However, the court then cited to *Haymount*, *Lateral Recovery* and *Fleetwood Services* in stating that “[r]ecently Federal courts have engaged in a more thorough and exacting scrutiny of merchant cash agreements, looking at the agreements in a holistic and comprehensive matter and the conclusions they have reached are compelling.”<sup>27</sup> After analyzing the MCA agreement at issue through the other factors outlined in the three federal cases, the court determined that “there are surely questions raised whether the agreement comports with the requirements necessary to be considered a genuine cash advance agreement.”<sup>28</sup> The reargument motion was granted and upon reargument the motion to vacate the default was granted.

### Additional Federal Cases

The analysis used in *Haymount*, *Lateral Recovery* and *Fleetwood Services*, as well as the factors in *LG Funding* and *Endico Potatoes*, formed the basis for similar determinations in *AKF Inc. v. Western Foot and Ankle Center*<sup>29</sup> (the relevant agreement was a usurious loan), *Lateral Recovery, LLC v. Capital Merchant Services, LLC*<sup>30</sup> (some of the MCA agreements at issue were usurious loans) and *New Y-Capp v. Arch Capital Funding, LLC*<sup>31</sup> (agreements at issue were usurious loans, not business-to-business contracts).

### Conclusion

These recent decisions signal that MCA agreements are to be scrutinized to determine whether the underlying transactions are actually usurious loans. Practitioners should make their

own analysis based on the factors used in these cases when a potential client comes to them seeking guidance when the potential client defaults, or is about to default, on its MCA agreement. Given the number of MCA agreements entered during the pandemic and likely to be entered in the current economic climate, this is not an unlikely scenario.

1. <https://www.nerdwallet.com/article/small-business/merchant-cash-advance>.
2. Blanco, *Controversial Cash Advances Come at a High Cost to Small Businesses*, CNN Money (Dec. 1, 2016).
3. *Haymount Urgent Care PC v. Gofund Advance, LLC*, 2022 WL 2297768, \*1 (S.D.N.Y. June 27, 2022).
4. <https://www.lendio.com/blog/mca-industry/>.
5. Michael A. Mora, *‘I’m Ruined’: Litigation Takes Aim at Merchant Cash Advance Industry*, NYLJ (September 8, 2022); <https://www.nerdwallet.com/article/small-business/merchant-cash-advance>.
6. <https://www.pymnts.com/news/b2b-payments/2019/ftc-merchant-cash-advance-investigation/>.
7. <https://www.ftc.gov/business-guidance/blog/2022/06/merchant-cash-advance-operators-settle-ftc-charges-bilking-small-businesses>; <https://www.ftc.gov/news-events/news/press-releases/2022/06/federal-trade-commission-returns-more-97-million-small-businesses-harmed-yellowstone-capitals>.
8. See, N.Y. Fin Serv. S. 801, et seq. [2022].
9. 2022 WL 1997207 (S.D.N.Y. June 6, 2022).
10. *Id.* at \*2.
11. *Id.*
12. The agreement had a governing law provision that made New York law controlling. *Id.* at \*4. Plaintiff argued that this choice-of-law provision only applies to the construction of the relevant agreement, not to causes of action outside of the contract, like a usury claim is. *Id.* at \*14.
13. *Id.* at \*9, quoting *LG Funding, LLC v. United Senior Props. of Olathe, LLC*, 181 A.D.3d 664, 665-

- 66 (2d Dept. 2020), quoting *K9 Bytes, Inc. v. Arch Cap. Funding, LLC*, 56 Misc.3d 807, 816 (Sup. Ct. Westchester Co. 2017).
14. *Fleetwood Services*, 2022 WL 1997207 (S.D.N.Y. June 6, 2022) at \*9, citing *LG Funding, supra*; see, also, *Principis Capital LLC v. I Do, Inc.*, 201 A.D.3d 952 (2d Dept. 2019).
15. *Id.*, quoting *LG Funding, supra*, at 665-66, quoting *K9 Bytes, supra*, at 816.
16. *Id.* at \*10.
17. *Id.* at \*11.
18. *Id.* at \*14. Summary judgment on the usury claim was denied, however, because there was a question as to whether Texas or New York law controlled as to the claim.
19. 2022 WL 2297768 (S.D.N.Y. June 27, 2022).
20. *Id.* at \*4.
21. 18 U.S.C. §1961(6).
22. *Haymount* at \*6, quoting *Endico Potatoes, Inc. v. CIT Grp/Factoring, Inc.*, 67 F.3d 1063, 1069 (2d Cir. 199



**Douglas M. Lieberman** is a partner in the general practice firm of Markotsis & Lieberman, P.C. He has annually been named a Metro New York Super Lawyer in Business Litigation beginning in 2014 and is a former Editor-in-Chief of *Nassau Lawyer*.



## CALL FOR NOMINATIONS

The Nominating Committee welcomes applications for nominations to the following Nassau County Bar Association offices for the 2023-2024 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 2023-2024 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:



Dorian R. Glover  
Nassau County Bar Association  
15th & West Streets  
Mineola, NY 11501

**JANUARY 23, 2023 DEADLINE FOR ALL NOMINATIONS.**

**FOCUS:  
BANKRUPTCY LAW**


**Matthew V. Spero and  
Alexandria E. Tomanelli**

The United States Supreme Court decided a bankruptcy case this year that all bankruptcy practitioners should be aware of. The Supreme Court also granted certiorari to hear an additional bankruptcy case and denied review of another.

***Siegel v. Fitzgerald: The United States Supreme Court Declares Bankruptcy Fee Hike Under the U.S. Trustee Program Unconstitutional***

In *Siegel v. Fitzgerald*, the United States Supreme Court resolved the issue of fee disparities imposed by a 2017 statute that increased U.S. Trustee fees in forty-eight states but not in Alabama or North Carolina. The Supreme Court reversed the Fourth Circuit's ruling and held that the Office of the U.S. Trustee fee hike mandated by the Bankruptcy Judgeship Act of 2017 (the "2017 Act") violated the uniformity requirement of the U.S. Constitution's Bankruptcy Clause.<sup>1</sup>

The dispute involved the disparity of U.S. Trustee fees and how they apply in bankruptcy proceedings. In 1978, the U.S. Trustee Program was created. This program transferred administrative functions of the bankruptcy courts to U.S. Trustees.<sup>2</sup> In 1986, Congress enacted the "U.S. Trustee Program" in all federal judicial districts except those in Alabama and North Carolina. A different program named the "Bankruptcy Administrator Program" was adopted in these two states.<sup>3</sup>

In 2017, the Office of the U.S. Trustee dealt with a shortfall of funding, and as a result, Congress passed the 2017 Act, which raised fees payable by Chapter 11 debtors in the forty-eight states using the U.S. Trustee Program.<sup>4</sup> The 2017 Act raised the fees payable to the U.S. Trustee starting in the first quarter of 2018 from a maximum of \$30,000 to a maximum of \$250,000. This fee hike was not applied in Alabama or North Carolina.<sup>5</sup>

*Siegel* arose from the Circuit City Stores Chapter 11 case, which was filed in the U.S. Bankruptcy Court for the Eastern District of Virginia (a U.S. Trustee Program district). While the case was pending, the 2017 Act took effect. As

# United States Supreme Court, Bankruptcy Update

a result, Circuit City paid \$632,542.00 in trustee fees across the first three quarters of 2018. If the 2017 Act had not taken effect, the debtor would have paid \$56,400.00. The debtor then challenged the fee increase as unconstitutional because it did not apply uniformly in all fifty states.<sup>6</sup>

*Siegel* filed for relief against the Acting U.S. Trustee, and in the Bankruptcy Court for the Eastern District of Virginia. *Siegel* asserted that the 2017 Act did not apply uniformly in the U.S. Trustee Program Districts and the Administrator Program Districts. In 2019, the Bankruptcy Court ruled the 2017 Act was unconstitutional because it violated the uniformity requirement imposed by the Bankruptcy Clause, which requires Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States."<sup>7</sup>

The acting U.S. Trustee appealed this decision to the Fourth Circuit. The Fourth Circuit reversed and ruled that the 2017 Act was constitutional. At this time several circuits were split over the issue, as the Fifth and Eleventh Circuits found the 2017 Act to be constitutional, while the Second and Tenth Circuits disagreed. The Supreme Court granted certiorari to resolve the circuit split over the constitutionality of the 2017 Act.

In June 2022, the Supreme Court unanimously held, in an opinion written by Justice Sotomayor, that the 2017 statutory increase to U.S. Trustee Fees violated the uniformity requirement of the Constitution's Bankruptcy Clause. Justice Sotomayor explained that the "the bankruptcy clause offers Congress flexibility but does not permit arbitrary geographically disparate treatment of debtors."<sup>8</sup> The Supreme Court found that the 2017 Act was not "geographically uniform."

**Certiorari Petition Granted in Another Bankruptcy Case—October Term 2022-2023**

***Bartenwerfer v. Buckley: United States Supreme Court to Consider Whether a Debtor Can be Held Liable for Partner's Fraud***

The Supreme Court has agreed to hear a case to resolve the issue of whether a debtor can be held liable for a debt incurred by fraud committed by the debtor's partner or agent. The Bankruptcy Code offers debtors a "fresh start" and affords debtors the opportunity to discharge past debts. Certain debts, such as debts

that are incurred by false pretenses, false representations, and/or actual fraud, are not dischargeable.<sup>9</sup>

In *Bartenwerfer v. Buckley*, debtors (a married couple) renovated a home in San Francisco. After the renovations, the couple sold the house to Mr. Buckley. Before the sale of the home, the debtors signed disclosure statements regarding the property's condition. The debtors made representations regarding water leaks, the condition of the roof and windows, and whether any additions or alterations were made to the home without necessary permits or in violation of the building codes.<sup>10</sup>

After the home was sold, Mr. Buckley, the new owner, discovered significant defects. As a result, Mr. Buckley filed a lawsuit against the debtors. Mr. Buckley asserted several claims in his action, including that the debtors failed to disclose material facts about the home. The jury ultimately sided with Mr. Buckley, found the debtors liable for not making material disclosures, and awarded Mr. Buckley damages of \$444,671.<sup>11</sup>

Subsequently, the debtors filed their Chapter 7 bankruptcy case. Mr. Buckley filed a non-dischargeability action alleging that the State Court judgment should not be discharged because it was based on the debtors' concealment of material information regarding the home.

Kate Bartenwerfer, one of the debtors, alleged that she did not know of her husband's fraud. The Bankruptcy Court entered a judgment in her favor, finding that her husband's fraud should not be imputed to her. The Ninth Circuit reversed and argued that the Bankruptcy Court applied the incorrect "knew or should have known" legal standard for imputing liability.

On May 2, 2022, the Supreme Court granted certiorari. The question presented to the Supreme Court is whether an individual may be subject to liability for the fraud of another that is barred from discharge under 11 U.S.C. §523 (a)(2)(A), by imputation, without any act, omission, intent or knowledge of her own. Arguments are scheduled for December 6, 2022.

***PHH Mortgage Corp. v. Sensenich (In re Gravel), 6 F.4th 503 (2d Cir. 2021): United States Supreme Court Denies Certiorari in Bankruptcy-Related Matter***

On June 13, 2022, the Supreme Court denied certiorari on a matter that involved punitive sanctions imposed on a secured creditor in three

independent Chapter 13 cases in Vermont (these three cases were later consolidated on appeal). In *PHH Mortgage*, a sub-servicer of residential mortgages faced a series of fines for violating the notice provisions of Federal Rule of Bankruptcy Procedure 3002.1.<sup>12</sup>

Rule 3002.1 requires secured creditors with claims secured by the debtor's principal residence to provide notice to the debtor, debtor's counsel, and interested parties of any changes in the debtor's monthly payment amount, including any post-petition expenses, fees, and charges.<sup>13</sup> To comply with this rule, secured parties must file a notice of any change of post-petition mortgage fees within 180 days of when the fees were incurred.

As a result of violating Rule 3002.1, the Bankruptcy Court imposed punitive sanctions on PHH Mortgage. These punitive sanctions (\$75,000 each) were applied in three independent Chapter 13 bankruptcy cases where PHH Mortgage was a secured creditor. PHH Mortgage appealed the order. The Second Circuit went on to hold that the bankruptcy court erred in imposing punitive sanctions on PHH Mortgage in three independent matters because Rule 3002.1 did not allow punitive fines.<sup>14</sup>

Several issues were presented in the petition for a writ of certiorari; however, the Supreme Court has denied review of the petition.

1. *Siegel v. Fitzgerald*, 142 S.Ct. 1170 (2022).
2. *Id.* at 1172.
3. *Id.* at 1176.
4. *Id.* at 1172.
5. *Id.*
6. *Id.* at 1177.
7. U.S. Const. art. I, §8, cl. 4.
8. *Id.* at 1780.
9. 11 U.S.C. § 523(a)(2)(A).
10. *In re Bartenwerfer*, No. AP 13-03185, 2017 WL 6553392 (B.A.P. 9th Cir. Dec. 22, 2017).
11. *Id.* at 2.
12. *In re Gravel*, 6 F.4th 503 (2d Cir. 2021), cert. denied sub nom. *Sensenich v. PHH Mortg. Corp.*, 142 S. Ct. 2829 (2022).
13. Fed. R. Bankr. P. 3002.1.
14. *In re Gravel*, 6 F.4th at 503.



**Matthew V. Spero** is a Partner in Rivkin Radler LLP's Bankruptcy, Corporate and Commercial Litigation practice groups.



**Alexandria E. Tomanelli** is an Associate in Rivkin Radler LLP's Banking, Bankruptcy, and Real Estate, Zoning & Land Use practice groups.

**FOCUS:  
BUSINESS, TAX, AND  
ACCOUNTING LAW**



**Karen Tenenbaum LL.M. (Tax), CPA**

The last few years have been challenging for many taxpayers. COVID-19, inflation, supply-chain issues and financial losses have left many taxpayers struggling. Matters have recently worsened as COVID-related tax relief measures have mostly expired and the IRS is slowly catching up on its backlog. The latest infrastructure law is also giving more money to the IRS to increase audits. These factors mean that taxpayers must understand their options if they cannot pay their taxes in full. This article provides an overview of the most common collection alternatives.

### IRS Collection Tactics

The IRS has an arsenal of tools they can use to compel individuals and businesses to pay their taxes. These include liens, levies, wage garnishment, penalties, passport revocation and criminal prosecution. Notably, in the case of businesses that owe taxes, the government can also go after the personal assets of certain responsible persons instead of just the assets of the business. This applies to IRS income taxes, social security taxes and Medicare taxes withheld from employee paychecks.

To avoid these consequences, taxpayers should consider an Installment Agreement, Offer in Compromise and/or Currently Not Collectible Status if they cannot pay their tax bill.

### Installment Agreement

An IRS Installment Agreement (IA)<sup>1</sup> allows taxpayers to pay their bills over time. However, interest and penalties will continue to accrue on unpaid tax balances. As a result, this option is often best for taxpayers who have adequate income, but who cannot obtain a loan to pay the entire bill at once.

There are several types of installment agreements, each with its own requirements. These include the following:

• **Guaranteed IA.** This IA requires that:

- The amount of tax owed is less

# IRS Collection Alternatives: Options for Taxpayers Who Cannot Pay Their Taxes in Full

than \$10,000 (not including interest and penalties);

- The taxpayer filed and paid all taxes due for the last five years;
- The taxpayer did not have had an IA with the IRS in the previous five years;
- The taxpayer can pay the full amount owed within three years; and
- The taxpayer agrees to pay the liability before the period for collecting the tax expires.

Note that a taxpayer is not required to submit a financial statement to qualify and may use the IRS's online service or phone to apply.

• **Streamlined IA.** A taxpayer may qualify if:

- The amount of tax owed is \$50,000 or less (not including penalties and interest);
- The taxpayer can pay in full within 72 months and within the time limit for the IRS to collect the tax; and
- The taxpayer enters into a direct debit agreement if there is an assessed balance of \$25,001-\$50,000.

As with guaranteed IAs, streamlined IAs do not require a financial statement and one may use the IRS's online service or phone to apply.

• **Non-streamlined IA.** The requirements are:

- The taxpayer is an individual;
- The amount owed is \$250,000 or less;
- The debt is paid within the remaining statute of limitations; and
- The taxpayer enters into a direct debit agreement if required to do so at the discretion of the IRS.

• **In-Business Trust Fund Express IA.** A business may qualify if:

- It currently has employees;
- Owes \$25,000 or less at the time the agreement is established;
- The debt will be paid in full within 24 months; and
- It complies with all filing and payment requirements.

Note that taxpayers can apply either online or by mail.

• **Routine IA.** Taxpayers that do not qualify under any of the previous categories may obtain a routine IA. The full amount must be paid within the statute of limitations for collections and the taxpayer must stay current on all payments or the IA will default. Note that individuals who owe more than \$50,000 or need more than six years to pay may be asked for additional financial information. If the debt cannot be paid in six years, the taxpayer may be given one year to modify or eliminate excessive unnecessary expenses.

• **Partial Payment IA.** This is available for taxpayers who cannot afford to pay their debt in full but do have the resources to pay a portion of it. The IRS will consider the taxpayer's assets and income less reasonable expenses to determine whether they qualify. Taxpayers must provide a financial statement and supporting documentation. Note that a partial payment IA is subject to IRS review

every two years and may be changed upon review.

### Pandemic Relief

Notably, during the pandemic, additional relief efforts were implemented for installment agreements and remain in effect including the following:

• Taxpayers with short-term payment plans have 180 days to pay instead of 120 days.

• Individuals who owe up to \$250,000 may be able to set up non-streamlined IA's without financial documentation if their monthly payment proposal is sufficient and has not yet been assigned to a revenue officer.

• For individuals who were notified of taxes owed with liabilities up to \$250,000 for Tax Year 2019 only, the IRS can offer one Installment Agreement opportunity with no lien filed.

See IRS COLLECTION ALTERNATIVES, Page 16

## APPELLATE COUNSEL



Christopher J. Chimeri is frequently sought by colleagues in the legal community to provide direct appellate representation for clients, as well as consulting services to fellow lawyers.

The firm's appellate team is highly equipped to navigate, or help you navigate, the complexities and nuances of appellate practice, including all aspects of matrimonial and family law in all departments in New York State and the Court of Appeals, as well as civil and commercial matters in the State and Federal Courts.



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# NAL PROGRAM CALENDAR

## DECEMBER 7, 2022 (HYBRID)

### Dean's Hour: Legality of 3-D Printed and Homemade Guns

*With the NCBA Civil Rights Committee, the NCBA Criminal Courts Law and Procedure Committee and the Nassau County Assigned Counsel Defender Plan*

12:30PM – 1:30PM

1 credit in professional practice. Skills credits available for newly admitted attorneys.

## DECEMBER 8, 2022 (HYBRID)

### Dean's Hour: The Curious Case of Dr. Sam Sheppard—The Perils of Prosecution by the Law (Law and American Culture Lecture Series)

12:30PM – 1:30PM

1 credit in professional practice.

## JANUARY 5, 2023 (HYBRID)

### Dean's Hour: How to Write a Paragraph

12:30PM – 1:30PM

1 credit in professional practice. Skills credit available for newly admitted attorneys.

## JANUARY 11, 2023 (HYBRID)

### Dean's Hour: No One is Immune to Eminent Domain

*Sponsored by NCBA Corporate Partner LexisNexis With the NCBA Real Property Law Committee and the NCBA Municipal Law and Land Use Committee*

12:30PM – 1:30PM

1 credit in professional practice.

## JANUARY 18, 2023 (HYBRID)

### Dean's Hour: Cybersecurity, Privacy, and Data Protection

*Sponsored by NCBA Corporate Partners AssuredPartners and IT Group New York*

12:30PM – 1:30PM

1 credit in cybersecurity, privacy, and data protection – general

*\*\*Please note this is a temporary title to enable us to open program for registration. More details forthcoming.\*\**

## JANUARY 24, 2023 (IN PERSON)

### Planned Charitable Giving: What You Need to Know

*With the NCBA WE CARE Fund*

Program 5:30PM – 7:00PM;

Networking following program.

1.5 credits in professional practice. Skills credits available for newly admitted attorneys.

## JANUARY 25, 2023 (HYBRID)

### Dean's Hour: What's the Point Spread? Introduction to Sports Betting—Economics, Regulations, and the Law

12:30PM – 1:30PM

1 credit in professional practice. Skill credits available for newly admitted attorneys.

## FEBRUARY 4-5, 2023 (IN PERSON)

### Hon. Joseph Goldstein Bridge-the-Gap Weekend

*\*Snow date: March 4-5, 2023*

Sign up for the full weekend, a day, or individual classes

Newly admitted attorneys:

7 credits in professional practice,

6 in skills, 3 in ethics

Experienced attorneys:

13 credits in professional practice, 3 in ethics

**FREE for NCBA Members. Breakfast, lunch, and written materials will be provided each day to attendees.**

**Bridge-the-Gap Chair: Michael E. Ratner, Esq.,** Nassau Academy of Law Associate Dean; Abrams Fensterman, LLP, Lake Success

## FEBRUARY 7, 2023 (HYBRID)

### Dean's Hour: Shareholder Agreements and the Connolly Decision

*With the NCBA Business Law, Tax and Accounting Committee*

12:30PM – 1:30PM

1 credit in professional practice.

## UPCOMING PART 36 CERTIFIED TRAINING CLASSES

## FEBRUARY 9, 2023 (ZOOM ONLY)

### Supplemental Needs Trustee:

### Part 36 Certified Training

*With the NCBA Elder Law, Social Services & Health Advocacy Committee*

5:00PM – 8:30PM

3 credits in professional practice; .5 in ethics

**Registration fees:** NCBA Member \$150;

Non-Member Attorney \$250

Part 36 training is excluded from the free CLE offer included with NCBA Membership

# NAL PROGRAM CALENDAR

## **MARCH 10, 2023** (ZOOM ONLY)

**Guardian Ad Litem: Part 36 Certified Training**  
8:30AM – 12:30PM

3.5 credits in professional practice; .5 in ethics

**Registration fees:** NCBA Member \$150;  
Non-Member Attorney \$250

Part 36 training is excluded from the free CLE offer included with NCBA Membership

## **MARCH 15, 2023** (HYBRID)

**How to Get the Kitchen Sink into Evidence: Evidence from Openings to Closings and Everything in Between Part 3—Witnesses**

Sponsored by NCBA Corporate Partner LexisNexis  
5:30PM – 7:30PM

2 credits in professional practice. Skills credits available for newly admitted attorneys.

Join **Former Supreme Court Judge**

**Arthur M. Diamond** for an interactive practical series that will teach you how to get things into evidence...from Voir Dire, emails, expert opinions to hearsay.

**Program Coordinator:** M. Kathryn, Meng, Esq.,  
*Past President, Nassau County Bar Association;*  
*First Dean, Nassau Academy of Law;* Meng &  
Reznak, PC., Mineola.

**Moderator:** Michael P. Guerriero, Esq., Chair,  
NCBA Condemnation Law and Tax  
Certiorari Committee

## **APRIL 3, 2023** (HYBRID)

**How to Get the Kitchen Sink into Evidence: Evidence from Openings to Closings and Everything in Between Part 4—Hearsay**

Sponsored by NCBA Corporate Partner LexisNexis  
5:30PM – 7:30PM

2 credits in professional practice.

Skills credits available for newly admitted attorneys.

Join **Former Supreme Court Judge Arthur M. Diamond** for an interactive practical series that will teach you how to get things into evidence... from Voir Dire, emails, expert opinions to hearsay.

**Program Coordinator:** M. Kathryn, Meng, Esq.,  
*Past President, Nassau County Bar Association;*  
*First Dean, Nassau Academy of Law;*  
Meng & Reznak, PC., Mineola.

**Moderator:** Lee Rosenberg, Esq., Chair,  
NCBA Grievance Committee

Hon. Joseph Goldstein  
Bridge-the-Gap Weekend

February 4-5, 2023

**FREE for NCBA Members**



"IT IS OUR HOPE  
THAT GENERATIONS  
OF ATTORNEYS WILL  
BENEFIT FROM THE  
COURSES OFFERED  
AT THIS PERENNIAL  
FAVORITE."

-- THE GOLDSTEIN  
FAMILY

## IRS Collection Alternatives...

Continued from Page 13

• For individuals and out-of-business entities, the IRS will automatically include certain new tax year balances accrued in existing IAs so these taxpayers can avoid a default of the agreement.

### Offer in Compromise (OIC)

An OIC<sup>2</sup> is a settlement agreement in which the taxpayer's liability is generally reduced to an amount that the taxpayer can afford to pay, not what the taxpayer owes. The IRS usually conducts an intensive review of a taxpayer's financial information before acceptance of an offer. To qualify, taxpayers must show one of three grounds:

• **Doubt as to liability (DATL)**—the taxpayer can establish a genuine dispute as to the existence or amount of the correct tax debt under the law;

• **Doubt as to collectability (DATC)**—the taxpayer's assets and income are less than the full amount of the tax liability; or

• **Effective tax administration (ETA)**—the taxpayer may be able to fully pay the tax, but such payment would cause an economic hardship

or there are compelling public policy or equity considerations.

Generally, the IRS will not accept an OIC on DATC grounds unless the amount offered reflects what the IRS would reasonably collect from the taxpayer (the Reasonable Collection Potential or RCP). The RCP is determined by looking at the taxpayer's net equity in assets and anticipated future income less specified amounts allowed for reasonable living expenses.

For ETA, the taxpayer must show that they can pay the balance in full but that it would cause an economic hardship and would not leave them with sufficient assets or income to meet their basic living expenses. Hardship is often accepted in cases involving advanced age or illness and where the taxpayer has minimal to no future earning potential and unknown future living expenses.

A taxpayer can also show that public policy or equity would allow the OIC, such as if they relied on erroneous advice or instructions issued by the IRS or a criminal or fraudulent act committed by a third party created the tax debt.

By entering into an OIC with the IRS, the taxpayer agrees to the following terms:

• The taxpayer will pay the offer amount agreed upon in the OIC;

• The taxpayer will file tax returns and pay taxes for the following five years;

• The taxpayer agrees that the IRS will keep any tax refunds, payments and credits applied to the taxpayer's tax debts prior to the submission of the OIC;

• The taxpayer agrees to forfeit any tax refunds that would have been payable during the pendency of the OIC.

Note that due to the pandemic, the IRS stated that it will provide relief for taxpayers having difficulty meeting the terms of previously accepted OICs.

### Currently Not Collectible (CNC) Status

Another option for taxpayers is Currently Not Collectible (CNC) status, which provides temporary relief from collections. To qualify, taxpayers must show that they cannot pay both their taxes and basic living expenses. While the taxpayer's account is in CNC status, the IRS generally won't try to collect, but will still assess interest and penalties and may keep and apply tax refunds to the tax debt.

The IRS will conduct a periodic review of the taxpayer's financial situation and may remove them from CNC status if it is determined that they


can pay some or all of their liability. Further, the IRS may ask taxpayers to:

• File any past-due returns;

• Complete a Collection Information Statement (Form 433-A or Form 433-F, and/or Form 433-B), and provide supporting documentation; and/or

• Continue to make Estimated Tax Payments and Federal Tax Deposits on time.

### Conclusion

This is just a partial list of collection alternatives when taxes cannot be paid in full. The best option for a taxpayer depends on their individual circumstances. 

1. <https://www.irs.gov/payments/payment-plans-installment-agreements>.  
2. <https://www.irs.gov/payments/offer-in-compromise>.



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# COLLEGE & GRADUATE SCHOOL DISCIPLINE

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**FOCUS:  
LAW AND AMERICAN  
CULTURE**


Ira S. Slavit

Chalk up yet another successful presentation by Diversity and Inclusion Committee Chair, Rudy Carmenaty, in his American Culture and the Law series. On the evening of November 3, 2022, Mr. Carmenaty presented “American Visionary: The Prescient Legacy of Louis Brandeis” to a rapt audience at Domus.

The program was jointly presented by the Jewish Lawyers Association of Nassau County, Brandeis Association, and Yashar, the Attorneys’ and Judges’ Chapter of Hadassah. Dinner was graciously provided by NCBA President Rosalia Baiamonte, a proud alumnus of Brandeis University.

Mr. Carmenaty is a masterful storyteller. He brings the subjects of his presentations to life, weaving biographical information with contemporaneous historical tidbits to give the audience a fuller appreciation and understanding of his subject’s character and accomplishments.

Mr. Carmenaty’s tribute highlighted why Justice Brandeis was not only a tour de force during his lifetime but was a visionary in how attorneys would practice law, how courts would interpret the law, and what key issues and controversies would recur in American life.

For instance, Brandeis crafted the role of attorney as counselor to guide clients in matters such as government regulation and business practices. Previously, attorneys played more of a role either initiating or defending litigation, thus not coming into the picture until after the damage or injury had occurred. Brandeis was, according to Mr. Carmenaty, the first lawyer to take on cases pro bono.

What has become known as the “Brandeis Brief” pioneered how lawyers present their cases to judges. Rather than containing only dry legal arguments, the Brandeis Brief incorporates extra-legal sources such as medical and sociological statistics and research to support the legal arguments.

His brief in *Muller v. Oregon* included data and references to articles, accounts from social workers, factory inspection reports, and interviews with actual workers that established how extended working hours impaired workers’

## Diversity and Inclusion Committee Presents Tribute to Louis Brandeis

health to support his argument that a statute limiting the daily working hours for female laundry workers was constitutional.<sup>1</sup>

Brandeis’s concern for the rights of individuals manifested itself in his work and judicial decisions (often in dissents that became the underpinnings of future majority opinions) concerning monopolies, unfair business practices, insurance industry fraud (which he called that “legalized robbery”), and Women’s suffrage.

In 1914, he published *Other People’s Money and How the Bankers Use It*, a compilation of articles in effect declaring that the bankers were taking all the rewards and assuming none of the risks. This landmark tome was eerily prescient of the Crash of 1929 as well as the one which took place in 2008 when the banks were deemed too big to fail.

Brandeis was a life-long inspiration to the late Justice Ruth Bader Ginsburg.

Mr. Carmenaty devoted a substantial part of his presentation to Brandeis’s relationships with his contemporaries on the U.S. Supreme Court and with other prominent individuals.

He spoke of Brandeis’s unique connection with Oliver Wendell Holmes and the outright hostility to Brandeis by the virulently anti-Semitic Justice James Clark McReynolds. He detailed the long-standing relationship Brandeis had with Woodrow Wilson, the president who nominated Brandeis to the U.S. Supreme Court and for whom Brandeis had served as his chief economic advisor.

One hundred twenty-five (125) days elapsed from Brandeis’s nomination to his Senate confirmation, the longest wait that anyone had endured up until that time. His was the first nomination for which the Senate held a public hearing; all prior nominees had been confirmed or rejected, usually within a single day. Mr. Carmenaty discussed how much of the opposition to Brandeis stemmed from anti-Semitism.

At one point Mr. Carmenaty caused the audience to shudder. That was when he referenced the case of *Erie Railroad Co. v. Tompkins* and the *Erie* Doctrine. Brandeis wrote the majority opinion in that case that forever burns in the collective consciousness of first-year law students.

Brandeis was a fervent champion of free speech and of the right to



privacy, believing that the 4th and 5th amendments of the U.S. Constitution conferred a right to individual privacy.<sup>2</sup> The right to privacy was first conceived a landmark article published in the Harvard Law Review in 1890, entitled *The Right to Privacy*, that Brandeis wrote with Samuel D. Warren II, his law partner and Harvard Law School classmate.

One must wonder if Brandeis’s legendary prescience was so great that he foresaw the advent of social media (or at least wonder what he would have written had he lived in a time pervaded by social media). He wrote:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry, as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. ... The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Mr. Carmenaty extensively traces the history of Zionism and Brandeis’s leadership in the cause of establishing a Jewish state. Brandeis was elected president of the Provisional Executive Committee for Zionist Affairs, taking on a pivotal role in increasing the influence of American Jews in the movement following World War I.

When the United States formally recognized the newly created State of Israel in 1948, the Secretary of State at

the time was Dean Acheson, a former law clerk of Justice Brandeis. Brandeis once said, “The greatest menace to freedom is an inert people.” This motif may well account for some of his devotion to Zionism.

The richness of Mr. Carmenaty’s presentation and written materials is elevated by numerous impressive quotes from Brandeis which were amassed. They are well-worth reading and heeding. One such quote, ostensibly about the law, could be seen as being representative of the person Brandeis sought to be and was. Brandeis said: “If we desire respect for the law, we must first make the law respectable.”

As Mr. Carmenaty’s program made clear, Brandeis’s personal and professional accomplishments all flowed from the fact that his character was of the highest caliber.

Justice Brandeis retired from the Supreme Court on February 13, 1939. He died on October 5, 1941, from a heart attack.

Always a teacher of sorts as both an attorney and as a jurist; Brandeis’s most profound tangible legacy can be found in two worthy and esteemed educational institutions which bear his name. They are Brandeis University in Waltham, Massachusetts, and the Louis D. Brandeis School of Law at the University of Louisville in his native Kentucky. It is certain that Louis Brandeis would have had it no other way. ⚖️

1. 208 US 412 (1908).

2. In dissent in *Olmstead v United States*, 277 US 438 (1928).



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**FOCUS:  
EDUCATION LAW**



Scott Limmer

New regulations proposed by the Department of Education<sup>1</sup> to define the responsibilities of colleges and universities under Title IX<sup>2</sup> have sparked controversy.

Existing rules require public (and most private) universities and colleges to protect students and employees from sexual harassment. While the existing rules are relatively uncontroversial, the new rules face legal challenges as they expand the meaning of “sexual harassment” and extend protections to students who have nontraditional gender identities.

**Defining Sexual Harassment**

The regulation of sexual

# Proposed Regulations Raise Difficult Questions Regarding Sexual Harassment and Sexual Identity Discrimination in Education

harassment in education is modeled upon federal laws that regulate employment. Federal laws prohibit employers from discriminating against employees on the basis of sex.<sup>3</sup> Courts have long held that sex discrimination includes sexual harassment—that is, workplace harassment that occurs because of the employer’s sexual advances or demands of an employee.

Federal courts have generally imposed liability on employers when (1) a manager demands sexual favors in exchange for employment opportunities (such as keeping a job or receiving a raise or promotion) or (2) sexual harassment creates such a hostile work environment that employees must labor under oppressive, abusive, or intimidating conditions. An occasional remark (such as “that’s a sexy dress”), even if offensive, will typically not create a hostile work environment. Rather, the harassment must be either pervasive or severe to be actionable.<sup>4</sup>

Since Title IX prohibits sex discrimination in colleges and

universities, analogous employment law decisions suggest that Title IX also prohibits sexual harassment. Courts have therefore recognized that a professor violates Title IX by conditioning a good grade on the receipt of sexual favors.<sup>5</sup> “Quid pro quo” harassment—offering to exchange a benefit for sex—is unlawful both in the workplace and on campus.

The Department of Education has proposed a new definition of sexual harassment that applies to a campus environment. The proposed rule defines “quid pro quo harassment” as conditioning the provision of a benefit or service (such as a grade) on a person’s participation in unwelcome sexual conduct.<sup>6</sup> In addition, specific acts of unlawful conduct are defined as sex-based harassment, including committing a sexual assault, engaging in domestic violence or dating violence, and stalking.<sup>7</sup> The so-called Cleary Act requires colleges and universities to monitor and make public reports about those on-campus offenses.<sup>8</sup>

**When Is a College Environment Hostile?**

More problematic is the definition of “hostile environment harassment” as: “Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity (*i.e.*, creates a hostile environment).”<sup>9</sup> A subjective evaluation presumably means that a student felt harassed, while an objective evaluation means that a reasonable student under the same circumstances would have felt harassed.

That definition represents an attempt to shoehorn rules that govern workplace conduct into campus environments. Yet campus environment is significantly different from a workplace environment. Private employers can generally prohibit employees from making offensive remarks (or from speaking at all), since private employers are not bound by the First Amendment. Public universities, on the other hand, must respect the First Amendment right of students to express opinions, provided that the opinions are not meant to threaten or intimidate

others. The differences between a workplace and a college campus make it challenging to police sex-based language or conduct of students that might be perceived as offensive.

As courts interpret federal employment law, offensive language does not create a hostile work environment unless it is either extraordinarily offensive or repeated so often that it challenges the ability to work.<sup>10</sup> It is not clear how those rules translate into the larger environment of a college campus. Calling someone a “bitch” once or twice might be offensive, but from an objective standpoint, it would not likely hinder a reasonable student’s ability to obtain an education. Yet schools might fear a loss of Title IX funding if they do not punish every student who arguably contributes to a hostile educational environment by occasionally uttering an offensive sex-based word.

Because the rules have both a subjective and an objective component, every subjective complaint is likely to trigger an investigation by schools that fear a loss of funding. If a student politely but repeatedly asks another student for a date, the school will likely initiate an investigation if the recipient of those requests claims that the invitations prevented them from concentrating on their studies. No standards are established to determine whether that response to unwelcome invitations is objectively reasonable. If the objective reasonableness of a student’s response is a matter of opinion, the evaluation of the student’s response is not objective in any meaningful sense.

In addition, the new rules allow any student to make a complaint of sexual harassment, not just the student who might be seen as the victim of the harassment.<sup>11</sup> Thus, even if the person who was repeatedly asked out on a date does not feel harassed, a friend might subjectively regard the conduct as harassing and might make a complaint that triggers an investigation and a possible disciplinary proceeding.

**Gender Identity Discrimination**

The Supreme Court has recognized that gender identity discrimination is discrimination on the basis of sex.<sup>12</sup> In the context of employment discrimination, an employer that discriminates against male employees (but not female

## NCBA Attends Columbia Law School Alumni Association Luncheon



On October 28, Members of the NCBA including Christopher J. DelliCarpini, Rudy Carmenaty, Hon. Linda K. Mejias-Glover, and NCBA Past President Dorian R. Glover attended the Columbia Law School Alumni Association 2022 Winter Luncheon.



employees) because they are attracted to men is treating employees differently because of their sex. The same is true of an employer that allows female employees to wear a dress but does not allow male employees to do so.

The proposed Title IX rules specifically define sex discrimination to include “discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”<sup>13</sup>

While that concept should be uncontroversial, it can be problematic in its application.

The proposed rule, for example, would require a school to permit a student to participate in programs and activities “consistent with the person’s gender identity.” That rule may require a school to allow a biologically male student who identifies as a female to use a woman’s restroom. Women who object to sharing the restroom with a transgender student who is biologically male might be accused of (and subjected to discipline for) sexual harassment.

The proposed rule may also be in conflict with state laws that require individuals to use public bathrooms that correspond to their sex at birth. Such laws have been proposed more often than they have been enacted, in part because North Carolina’s “bathroom law” triggered an economic boycott that caused state businesses to lose billions of dollars in revenue. Bills to enact such laws are nevertheless pending in several states.<sup>14</sup>

### Athletic Competition

How the rule against gender identity discrimination will affect athletic competition is unclear. The same issues that surround access to restrooms arise when transgender students seek access to locker rooms.

Some state attorneys general argue that prohibiting discrimination against transgender student athletes would destroy the integrity of women’s sports. In their view, allowing a biologically male student who identifies as female to participate in women’s sports might give a team an unfair advantage. Men are not necessarily taller, stronger,

or faster than women, but the fear is that a tennis or basketball player who is biologically male will have an advantage over opponents who are biologically female. The Department of Education has not yet proposed rules to address the difficult issue of athletic competition.<sup>15</sup>

### Pronoun Choice

Gender identity implicates the choice of pronouns. Whether a transgender person prefers the pronoun “he” or “she,” or whether a person who identifies as nonbinary prefers a neutral pronoun like “they,” is usually a matter of personal choice. Whether a student has the right to impose that choice on others—to demand that other students and professors respect their chosen pronoun—is a question the proposed rules do not directly address.

To the extent that a student believes the refusal to use a preferred pronoun creates a hostile educational environment, schools may feel compelled to discipline students for using a different pronoun. The Equal Employment Opportunities Commission takes the position that the repeated and deliberate failure to use a transexual employee’s pronoun of choice can be an act of sexual harassment.<sup>16</sup> Applying that reasoning in the context of education could lead schools to mandate that students use the pronouns preferred by other students.

Disciplining students for their choice of pronouns may implicate their right of freedom of speech or religion. Students at a public university cannot be punished for engaging in protected speech. Students do not generally have a constitutional right to engage in offensive speech for the purpose of harassing or intimidating another student, but expressing the opinion that a student who is biologically male should be referred to as “he,” particularly when the opinion is driven by the student’s religious beliefs, is not necessarily an act of harassment or intimidation.

Unfortunately, schools have not always appreciated the subtle differences between protected expression of opinions and unprotected

speech that is meant to intimidate. Schools often find it easier to ban all speech that might be regarded as offensive.

The context as well as the content of speech determines whether it is protected by the First Amendment. Schools that go overboard in punishing students for their use of pronouns may be violating the right of students to hold and express opinions that are not popular in the academic community.

### Conclusion

The proposed regulations under Title IX raise more questions than they answer, leaving many educational institutions in danger of violating them. Only time will tell if the proposed rules become official and what the result will be. ⚖️

1. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (July 12, 2022) [hereinafter “Proposed Rules”], <https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.
2. Title IX of the Education Amendments Act of 1972, codified at 20 U.S.C. ch. 38.
3. E.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.
4. Policy Guidance on Current Issues of Sexual Harassment, EEOC (Mar. 19, 1990), <https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment>.
5. See, e.g., *Papelino v. Albany College of Pharmacy*, 633 F.3d 81, 89 (2d Cir. 2011) (quid pro quo sexual harassment in an educational setting “occurs when ‘some benefit or adverse action,’ such as a change in a grade, is made to depend upon providing sexual favors to someone in authority”).

6. Proposed Rules, *supra* n. 1 (Proposed Rule 106.2) (definition of sex-based harassment).
7. *Id.*
8. 20 U.S.C. §1092.
9. Proposed Rules, *supra* n. 1 (Proposed Rule 106.2) (definition of sex-based harassment).
10. See *Policy Guidance*, *supra* n. 4.
11. Proposed Rules, *supra* n. 1 (Proposed Rule 106.2) (definition of complainant).
12. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).
13. Proposed Rules, *supra* n. 1 (Proposed Rule 106.10).
14. Dan Avery, *LGBTQ Rights Fight Reignited 4 Years After N.C.’s ‘Bathroom Bill’ Controversy*, NBC News (Dec. 9, 2020), <https://www.nbcnews.com/feature/nbc-out/lgbtq-rights-fight-reignited-4-years-after-n-c-s-n1250390>.
15. Proposed Rules, *supra* n. 1, at 41537 (“The Department instead plans to issue a separate notice of proposed rulemaking to address whether and how the Department should amend §106.41 in the context of sex-separate athletics, pursuant to the special authority Congress has conferred upon the Secretary to promulgate reasonable regulations with respect to the unique circumstances of particular sports.”).
16. *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, EEOC (June 15, 2021), <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>.



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**FOCUS:  
LAW AND AMERICAN  
CULTURE**



Rudy Carmenaty

On December 8, 1980 shots were fired in the driveway of the Dakota Apartments in New York City. When the smoke cleared, former Beatle John Lennon laid murdered. The impact of this violent act was deafening. It not only took a life; it silenced a voice which spoke to millions. For an entire generation, Lennon's assassination was the day that the music died.

Lennon was more than a rock star. His songs became anthems, and his music shaped the soundtrack of the baby-boom. He also had an almost mystical hold on his admirers. Beatlemania transcended all prior known instances of mass frenzy. Unable to hear themselves play above their screaming fans at concert venues; the Beatles ceased all live touring after 1966.

Lennon was not only iconic; he was also an iconoclast. Throughout his life, he marched to the beat of his own drum. In 1966, Lennon gave an interview that would come to haunt him in which he said:

*"Christianity will go. It will vanish and shrink. I needn't argue about that; I know I'm right and I will be proved right. We're more popular than Jesus now. I don't know which will go first—rock & roll or Christianity. Jesus was all right, but his disciples were thick and ordinary. It's them twisting it that ruins it for me."*<sup>21</sup>

Many took offense, and Beatle records and paraphernalia were burned at bonfires. Lennon himself was burned in effigy. Ultimately, the controversy subsided, but it was not forgotten.

After the Beatles broke-up in 1970, Lennon channeled his energies into protest. His songs became overtly political with such tracks as "Give Peace

## The Day That the Music Died: John Lennon, New York City, December 8, 1980

a Chance" (1969), "Imagine" (1971) and "Happy Xmas (War Is Over)" (1973). Lennon used his music to promote his progressive views and his fame to mainstream the values of the counterculture.

Lennon's whole life revolved around his second wife, the Avant-garde artist Yoko Ono. Lennon divorced his first wife when he fell in love with Ono. Ono became both his muse and his artistic collaborator. In 1971, the couple moved to New York City. At this time, the singer was engaged in an ongoing immigration battle seeking permanent residency status in the United States.

Lennon's activism attracted unwanted attention from the Nixon administration. He became the 'bête noir' of President Richard Nixon, who feared that Lennon might hurt his prospects for reelection in 1972.<sup>2</sup> That year's election, with the passage of the Twenty-Sixth Amendment, would be the first in which eighteen-year-olds had the vote.

The Immigration and Naturalization Service, at Nixon's behest, sought Lennon's deportation. The government's case hinge on Lennon's conviction for marijuana possession in England in 1969.<sup>3</sup> Lennon ultimately won the right to stay in this country, winning his case in the Second Circuit Court of Appeals.<sup>4</sup>

At the same time Lennon was securing his green card, Ono gave birth to the couple's only child together—Sean Ono Lennon—in 1975. With his immigration troubles behind him, Lennon dropped-out of the music scene retreating from public view. It would turn-out to be a five-year break from the recording industry as Lennon devoted himself to the care of his infant son.

The Lennons lived at the Dakota Apartments at 1 West 72nd Street overlooking Central Park. The pandemonium of Beatlemania had faded, but Lennon was still a star. It was not uncommon for his adoring fans to flock outside the Dakota, hoping to catch a glimpse of their idol. Lennon would often oblige by signing autographs or posing for pictures.

Now age forty, the always contemplative Lennon was reinvigorating his once-dormant music career. He released the single (*Just Like*) *Starting Over*, followed by *Double Fantasy*, a duet-album with Ono.<sup>5</sup> On December 8, 1980, Lennon spent the day being photographed by Annie Leibovitz for *Rolling Stone*, interviewed on radio, and at the Record Factory, a NYC recording studio.<sup>6</sup>



It would turn out to be the final day of Lennon's life. That afternoon, just before leaving the Dakota, Lennon signed a copy of *Double Fantasy* for one Mark David Chapman. Paul Goresh, an amateur photographer and Lennon fan, caught on film their initial encounter.<sup>7</sup> Their next meeting would prove fatal as Chapman had flown from Hawaii expressly to kill Lennon.

Chapman was a disturbed individual who subsequently was diagnosed as a "paranoid schizophrenic."<sup>8</sup> Once a Beatles fan, Chapman, after a religious conversion, came to despise Lennon for the latter's mocking of Christianity. His preoccupation with Lennon was matched only by his obsession with the coming-of-age novel *The Catcher in the Rye* by J.D. Salinger.

In the parlance of Salinger's book, Lennon, in Chapman's estimation, was a 'phony.' On the one hand, Lennon's songs spoke in utopian terms: *Imagine no possessions* and *Imagine all the people Sharing all the world*.<sup>9</sup> At the same time, Lennon lived the extravagant lifestyle of a multi-millionaire.

Lennon and Ono arrived at the Dakota at 10:45 p.m. In hindsight, it would have been safer for them to have disembarked from their limo in the building's enclosed courtyard. Instead, they stepped out onto 72nd Street which required them to walk from the street through an archway. As Lennon and Ono passed Chapman, for a brief moment victim and killer made eye contact.<sup>10</sup>

Chapman called out "Mr. Lennon" and fired five shots from a .38 caliber revolver.<sup>11</sup> Four hollow-point bullets hit Lennon in the back, as he managed to stagger into the lobby of the Dakota bleeding profusely.<sup>12</sup> Lennon would be pronounced dead-

on-arrival after being taken to nearby Roosevelt Hospital. The coroner's report noted Lennon had lost eighty percent of his body's blood supply.<sup>13</sup>

Crowds congregated in front of the Dakota on word of the shooting and for days after the building's entrance became a shrine for grieving devotees. Ono called for a vigil the following Sunday. On December 14, 1980, at 2:00 p.m. New York time, over 50,000 people gathered in Central Park as radio stations from around the world went off-the-air in solemn observance.<sup>14</sup>

Chapman did not flee the scene. He waited for the police to take him into custody, making no effort to resist arrest. Among his possessions was a paperback edition of *The Catcher in the Rye*. He was charged with second-degree murder and instructed by his attorney, Jonathan Marks, to enter a plea of not guilty by reason of insanity.<sup>15</sup>

Chapman then informed Marks he wanted to drop the insanity defense and plead guilty instead. Chapman was adamant and said that God had told him to do so.<sup>16</sup> Marks opposed Chapman's change of heart, questioning his competence. Justice Dennis Edwards ruled that Chapman had made his decision of his own volition.<sup>17</sup>

Permitting Chapman to enter a guilty plea, Justice Edwards sentenced him to twenty years to life, and ordered psychiatric treatment for Chapman during the term of his incarceration.<sup>18</sup> Chapman has applied for parole numerous times since first becoming eligible and he has been denied on every occasion thus far.<sup>19</sup>

Lennon's murder was the denouement of the 1960's. Ironically, the Beatles captured the public's imagination in 1964 following the

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assassination of President Kennedy. They achieved their peak influence in 1968, the year Martin Luther King and Robert Kennedy were killed. That Lennon would himself also die at the hands of an assassin, seemed to truly mark the end of an era.

Chapman's actions have never been satisfactorily explained. After all, though a peace activist Lennon was not per-se a political figure. Why him? Even if one could anticipate the events of December 8, how can one account for why this misguided wretch decided to kill John Lennon.<sup>20</sup>

Was Lennon a victim of the cult of celebrity that so permeates modern society? No doubt Chapman was fixated on Lennon. The prosecutor in the case observed: “*we would have proved that essentially, he wanted to draw attention to himself, to make people see how important he was. He was basically looking for fame.*”<sup>21</sup>

Chapman was also quite dogmatic when it came to his religious beliefs. He has frequently stated that his actions were motivated by Lennon's controversial statements that the Beatles were more popular than Christ. This anger welled-up inside of Chapman for years looking for an outlet. That religion may have been the motive is quite troubling.

But the one unifying theory that perhaps best explains the method behind Chapman's madness concerns

*The Catcher in the Rye*. Chapman came to closely identify with the book's protagonist -Holden Caulfield. So much so, that in his own twisted mind, Chapman envisioned himself as a protector of the innocent on the order of Salinger's fictional character.

The novel's title, as evidenced below, is derived from the metaphor of children running through a field of rye, and Caulfield catching them before they fall off a cliff. At his sentencing, Chapman's only comment before the Court was to read a passage quoting Caulfield:

Anyway, I keep picturing all these little kids playing some game in this big field of rye and all. Thousands of little kids, and nobody's around—nobody big, I mean—except me. And I'm standing on the edge of some crazy cliff. What I have to do, I have to catch everybody if they start to go over the cliff—I mean if they're running and they don't look where they're going I have to come out from somewhere and catch them. That's all I do all day. I'd just be the catcher in the rye and all. I know it's crazy, but that's the only thing I'd really like to be. I know it's crazy.<sup>22</sup>

Taking the words of a psychotic individual at face value is always tricky, but this motif does seem to

offer the only ‘rationalization’ for Chapman's actions.

The desire for fame and the need to have Lennon atone for his comments on Christianity, found their full-expression by Chapman assuming the mantle of Caulfield. By murdering Lennon, who he saw as some sort of malignant pied piper and a phony, Chapman would somehow be saving ‘innocence’ itself.

Whatever Chapman's motivation, the violent death of John Lennon was as senseless as it remains perplexing. Beyond the immediate toll on Lennon's family, it resulted in the death of a cultural luminary whose art influenced the world of popular song. Lennon was only forty and on the verge of a comeback when he was killed. If he had lived, who knows what music he could have made. 🪄

1. Jordan Runtagh, *When John Lennon's 'More Popular Than Jesus' Controversy Turned Ugly*, Rolling Stone (July 29, 2016) at <https://www.rollingstone.com>.
2. Daniel Kanstroom, “*The knotty issue of immigration as revealed in John Lennon's deportation case*” Washington Post (August 2, 2016) at <https://www.washingtonpost.com>.
3. Michael Wildes, *Meet the lawyer who saved John Lennon and Yoko One from deportation*, Independent (September 16, 2016) at <https://www.independent.com>.
4. See *Lennon v United States* (527 F.2d 187, 1975).
5. *Double Fantasy* would go on to win the Grammy for Album of the Year in 1981.
6. Kenneth Womack, *What happened on John Lennon's Last Day*, Smithsonian (November 30, 2020) at <https://www.smithsonianmag.com>.

7. *Id.*
8. *Who Killed John Lennon? The story of the Beatle's shocking murder*, (December 8, 2020) at <https://www.radio.co.uk>.
9. From the lyrics of *Imagine*.
10. Michael Kaplan, *Mark David Chapman and the assassination of John Lennon*, *supra*.
11. Mark David Chapman at <https://www.crimenuseum.org>.
12. *Who Killed John Lennon? The story of the Beatle's shocking murder*, *supra*.
13. *Id.*
14. Womack, *supra*.
15. Mark David Chapman, *supra*.
16. *Id.*
17. E.R. Shipp, *Chapman, in a Closed Courtroom, Pleads Guilty to Killing of Lennon*, NY Times (June 23, 1981) at <https://www.nytimes.com>.
18. Terry Coleman, *Lennon's Killer to serve 20 years*, Guardian (August 25, 1981) at <https://www.guardian.com>.
19. Louella-Mae Eleftheriou-Smith, *John Lennon killer Mark Chapman denied parole for ninth time*, Independent (August 29, 2016) at <https://www.independent.co.uk>.
20. Robert Altman's *Nashville* (1975) depicts the assassination of a country-western singer by a deranged fan, who eerily foreshadows Chapman.
21. Shipp, *supra*.
22. J.D. Salinger, *The Catcher in the Rye*, 173 (paperback edition 1991).



**Rudy Carmenaty** is the Deputy Commissioner of the Nassau County Department of Social Services. He also serves as Co-Chair of the NCBA Publications Committee and Chair of the Diversity and Inclusion Committee.

## Judicial Initiatives and Offer Professional Insights to NCBA New Lawyers Committee...

Continued from Cover

tips on becoming a more effective advocate gleaned from their years of practice. The meeting was moderated by Michael Berger, Esq. and Byron Chou, Esq., Co-Chairs of the New Lawyers Committee.

The presentation started with Judge St. George explaining the administrative structure of the New York State Unified Court System, expertly navigating attendees through its dense and formidable hierarchy, which was especially helpful for those attendees who are only at the prelude of their legal careers, while also providing color to such information by detailing how his role and the roles of Judge DeStefano and Ms. Wunder factored into the system.

Judge St. George highlighted several priorities and goals of the judiciary, including the “Resolving Old Cases” initiative (a rebranding of the formerly infamous “Standards and Goals” initiative) and the judiciary's continued dedication to ensuring access to justice in its varied forms, including timely resolution of cases. In order to do so, the court will continue to push litigants to actively attempt alternative dispute resolution

via mediation, arbitration, neutral evaluation, and in-court settlement conferences.

Citing the statistic that ninety-five percent of cases are resolved before trial, Judge St. George reminded those in attendance to approach each case with an eye towards a fair and equitable settlement as early as possible. He analogized cases being settled as opposed to being litigated to the Marvel Comics' supervillain, Thanos' catchphrase, “I am inevitable,” which also holds true for litigation—that the vast majority of cases inevitably end up settling without a trial. By acknowledging this fact and working towards that end, attorneys as well as the court can ensure swift justice for all.

Judge St. George shared insight into other initiatives, including those seeking to ensure equal justice in the courts. Notably, since the COVID-19 pandemic and the advent of the virtual courtroom, the judiciary has ensured such equal access to justice by providing kiosks and rooms within the courthouses for pro se litigants and those without computers to appear for virtual hearings.

Judge DeStefano echoed Judge St. George's dedication to ensuring excellence by sharing several anecdotes sourced from his own venerable career in law. He emphasized the importance of professionalism and ethical conduct within one's practice, citing to the Rules of Professional Conduct Rule 3.3: Conduct Before a Tribunal; Rule 5.1: Responsibility of Law Firms, Partners, Managers, and Supervisory Lawyers; and Rule 5.2: Responsibilities of a Subordinate Lawyer.

Judge DeStefano imparted upon the new lawyers the importance of finding a mentor to help guide their formative years in the practice of law; the advice and guidance of a good mentor is invaluable in one's early years of practice; and bad advice will come back to haunt you. Moreover, the judge impressed upon all that as lawyers, we are here to serve the public, and that we should always seek out opportunities to be servant leaders.

Judge DeStefano also noted the importance of continued learning and keeping abreast of recent decisions

and development. He further encouraged all to “reach for the brass ring” in order to achieve professional excellence and success by sharing a personal story from his early years of private practice. Ms. Wunder rounded out the presentations by emphasizing the importance of being attentive to details. Whether in motion practice, client advocacy, or visual presentation, details matter and are noticed.

The event was as inspiring as it was invigorating; it provided an opportunity for new and some not-so-new lawyers alike to receive updates about the court system and obtain invaluable insights into the practice of law. The co-chairs, attendees and the Committee wholeheartedly thank the speakers for their time, wisdom, and sage advice.

The New Lawyers Committee's next meeting is scheduled for January 17, 2023, at 5:30 PM at the North Dining Room at Domus. All are invited to this planning meeting where the Committee plans to discuss and schedule future programs, CLEs, and social events. 🪄

# Judiciary Night October 20, 2022

On October 20, 2022, the leaders and members of the NCBA honored the esteemed judiciary of Nassau County. This year's honoree, Hon. Anthony F. Marano (Ret.), former Presiding Justice of the Supreme Court of the State of New York, Appellate Term, Second Judicial Department for the Ninth and Tenth Judicial Districts, was presented with the Hon. Marie G. Santagata Gold Gavel Award by NCBA President Rosalia Baiamonte.

During the program, Judge Marano received personal accolades from Hon. Norman St. George and Hon. Vito M. DeStefano, and a Nassau County Citation proudly presented by Hon. Thomas A. Adams.

Photos by Hector Herrera



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## IN BRIEF

**David M. Yaron** is pleased to announce the opening of Yaron Injury Law located at 500 Duffy Avenue, Suite 510 in Hicksville. Mr. Yaron may be reached at DYaron@YaronInjuryLaw, (516) 400-4280, or via Instagram at (@DYaronlaw).

Lamb & Barnosky, LLP Partner **Lauren Schnitzer** will participate in a presentation on the topic “Legal Rights of Transgender and Gender Nonconforming Students” for the Nassau County Bar Association’s Women in the Law Committee on December 6, 2022. In November, the firm was named to the *Best Lawyers® U.S. News & World Report* “Best Law Firms” list. **Alyssa Zuckerman** has been named to the *Long Island Business News* 40 under 40 Class of 2022 and will be honored on December 1, 2022.

**Robert Barnett**, Partner at Capell Barnett Matalon & Schoenfeld LLP, has been appointed as an adjunct professor at Hofstra University’s Frank G. Zarb School of Business in the graduate school’s Accounting Department. Partners **Gregory L. Matalon** and Robert Barnett presented at the New York State Society of CPA’s (NYSSCPA) Trust and Estate Administration Conference on the fundamentals of estate administration. In addition, Barnett also spoke for the NYSSCPA’s Passthrough Business Entities Conference on the topic of S Corporations and Tax Basis. Partner **Yvonne Cort** was co-chair of the annual holiday “Neturkeying” event, for the NYSSCPA, Nassau Chapter, Attorneys and Accountants Joint Committee.

**Richard N. Tannenbaum** has been named to the *Super Lawyers* New York Metro 2022 List.

**William T. Burdo** of Levine & Grossman in Mineola was named to the *Super Lawyers* New York Metro 2022 List.

**Alan J. Schwartz** of Alan J. Schwartz, P.C. was selected to

the *Super Lawyers* New York Metro 2022 List.

Bond, Schoeneck & King’s Garden City office has been recognized by the 2023 *Best Lawyers® U.S. News & World Report* “Best Law Firms” list in six categories. Its New York City office has been recognized by the 2023 U.S. News Best Lawyers: Best Law Firms in three categories.

**Marc Hamroff** of Moritt Hock & Hamroff is pleased to announce that the firm has received national recognition in the 2023 Best Law Firms rankings by *Best Lawyers® U.S. News & World Report*.

**Stephen J. Silverberg** is pleased to announce that the Law Office of Stephen J. Silverberg has been named to the *Best Lawyers® U.S. News & World Report* “Best Law Firms” list for 2023.

**Jeffrey D. Forchelli**, Chairman and Co-Managing Partner of Forchelli Deegan Terrana LLP (FDT), is pleased to announce the firm’s regional “Best Law Firms” ranking, and the launch of its Condemnation Practice Group to be chaired by **Jason M. Penighetti**. FDT has been ranked a Tier 1 firm on Long Island in Litigation—Labor & Employment. In early November, Jeffrey D. Forchelli created two endowed professorships at Brooklyn Law School.

**Bernard Hyman**, Managing Partner of Certilman Balin Adler & Hyman, LLP, is pleased to announce that the firm has been newly recognized as a Tier 3 firm on Long Island in the area for Elder Law for 2023 by *Best Lawyers® U.S. News & World Report*.

**Jothy Narendran, Sophia A. Perna-Plank** and **Maria Girardi** of Jaspan Schlesinger were featured in the *New York Real Estate Journal* as top Women in Professional Services. Partner **Lawrence Tenenbaum** was honored by the *Long Island*



Marian C. Rice

*Business News* with a Leadership in Law award.

**Jacqueline Harounian** has been appointed as the Co-Chair of the Matrimonial Committee of the New York State Women’s

Bar Association. She has also joined the Board of Directors at Mondays at Racine Cancer Care Foundation.

**Michele Pincus** of H2M architects + engineers has been promoted to Deputy Market Director.

**Ira S. Slavitt** of Levine & Slavitt, PLLC, received a Leadership in the Law award in the Partner category from *Long Island Business News*.

Vishnick McGovern Milizio LLP (VMM) managing partner **Joseph Milizio** is pleased to announce that the firm has been named to *Best Lawyers® U.S. News & World Report* “Best Law Firms in America,” for the second consecutive year. The recognition follows the renaming of partner **Joseph Trotti** to “Best Lawyers in America” and partner **Constantina Papageorgiou** and associates **Meredith Chesler** and **Phillip Hornberger** to “Best Lawyers: Ones to Watch.” **Mateen Hashmat** has joined the firm as an associate to its Personal Injury practice.

Partner Joseph Trotti, head of VMM’s Litigation Department and Matrimonial and Family Law practice, published on November 3 an article titled “In family law, don’t focus; use a wide-angle lens” in *ABA Journal*. On October 24, Trotti volunteered at the NCBA Volunteer Lawyers Project’s “Access to Justice Committee Open House” pro bono event, which served over 100 Long Islanders. On November 3, VMM’s Business & Transactional

Law head of practice Joseph Milizio led a webinar titled “Exit & Succession Planning for Business Owners: Being Prepared for the Future,” hosted by the *Long Island Herald’s* “Herald Inside LI.” VMM was proud to sponsor the *Herald’s* 2022 Family Business Awards, held on October 26.

**Thomas Levin, Patricia Galteri**, and **Steven T. Cheng** of Meyer Suozzi English & Klein, P.C. were honored during the *Long Island Business News* Leadership in Law event.

**Karen Tenenbaum** of Tenenbaum Law, P.C. is proud to announce that the firm was listed by *Long Island Business News* as a Top Tax Law Firm and nominated by the *Long Island Press* as a Best Law Firm on Long Island 2023. Karen moderated the NYSSCPA, NYS & Multi-State Committee presentation on “An Update on NYS Audits and Collections.” Tenenbaum spoke on both the Federal panel and the NYS panel for the NCCPAP Accounting and Tax Symposium 2022. On the Federal panel, Tenenbaum and her legal team gave a presentation on IRS Collections. For the New York State panel, they gave a presentation on NYS Collections, Sales Tax, and Residency. Tenenbaum and her legal team also gave a presentation to the NYSSCPA, Nassau Chapter entitled “Non-Filers: Strategies and Tips to Correctly Represent.”

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 40 years, Ms. Rice is a Past President of NCBA.

Please email your submissions to [nassaulawyer@nassaubar.org](mailto: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.

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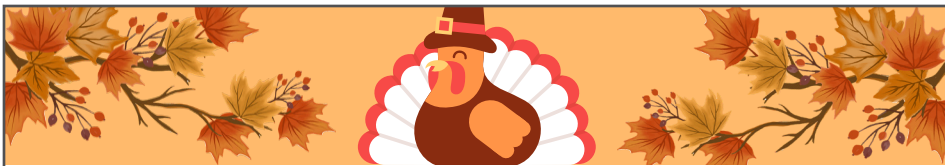
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**NCBA Committee Meeting Calendar December 6, 2022– January 11, 2023**

Questions? Contact Stephanie Pagano at (516) 747-4070 or spagano@nassaubar.org. Please Note: Committee meetings are for NCBA Members.

Dates and times are subject to change. Check [www.nassaubar.org](http://www.nassaubar.org) for updated information.

**TUESDAY, DECEMBER 6**

WOMEN IN THE LAW  
12:30 PM  
Melissa P. Corrado/  
Ariel E. Ronneburger

**WEDNESDAY, DECEMBER 7**

REAL PROPERTY LAW  
12:30 PM  
Alan J. Schwartz

**THURSDAY, DECEMBER 8**

INTELLECTUAL PROPERTY  
12:30 PM  
Frederick J. Dorchak

**TUESDAY, DECEMBER 13**

LABOR & EMPLOYMENT LAW  
12:30 PM  
Michael H. Masri

**WEDNESDAY, DECEMBER 14**

ASSOCIATION MEMBERSHIP  
12:30 PM  
Jennifer L. Koo

**WEDNESDAY, DECEMBER 14**

MEDICAL LEGAL  
12:30 PM  
Christopher J. DelliCarpini

**WEDNESDAY, DECEMBER 14**

GENERAL SOLO SMALL LAW FIRM PRACTICE MANAGEMENT  
12:30 PM  
Scott J. Limmer/Oscar Michelen

**WEDNESDAY, DECEMBER 14**

MATRIMONIAL LAW  
5:30 PM  
Jeffrey L. Catterson

**THURSDAY, DECEMBER 15**

ALTERNATIVE DISPUTE RESOLUTION  
12:30 PM  
Suzanne Levy/Ross J. Kartez

**THURSDAY, DECEMBER 15**

DIVERSITY & INCLUSION  
6:00 PM  
Rudolph Carmenaty

**TUESDAY, DECEMBER 20**

PLAINTIFF'S PERSONAL INJURY  
12:30 PM  
David J. Barry

**WEDNESDAY, DECEMBER 21**

EDUCATION LAW  
12:30 PM  
Syed Fahad Qamer/  
Joseph Lilly

**WEDNESDAY, DECEMBER 21**

ETHICS  
5:30 PM  
Avigael C. Fyman

**TUESDAY, JANUARY 3**

WOMEN IN THE LAW  
12:30 PM  
Melissa P. Corrado/  
Ariel E. Ronneburger

**WEDNESDAY, JANUARY 4**

REAL PROPERTY LAW  
12:30 PM  
Alan J. Schwartz

**WEDNESDAY, JANUARY 4**

SURROGATES COURT ESTATES & TRUSTS  
5:30 PM  
Stephanie M. Alberts/  
Michael Calcagni

**THURSDAY, JANUARY 5**

PUBLICATIONS  
12:30 PM  
Rudolph Carmenaty/  
Cynthia A. Augello

**THURSDAY, JANUARY 5**

COMMUNITY RELATIONS & PUBLIC EDUCATION  
12:30 PM  
Ira S. Slavitt

**TUESDAY, JANUARY 10**

ENVIRONMENTAL LAW COMMITTEE/MUNICIPAL LAW AND LAND USE  
12:30 PM  
John L. Parker and  
Kenneth L. Robinson:  
Environmental Law  
Judy L. Simoncic:  
Municipal Law and Land Use

**TUESDAY, JANUARY 10**

LABOR & EMPLOYMENT LAW  
12:30 PM  
Michael H. Masri

**WEDNESDAY, JANUARY 11**

ASSOCIATION MEMBERSHIP  
12:30 PM  
Jennifer L. Koo

**WEDNESDAY, JANUARY 11**

MEDICAL LEGAL  
12:30 PM  
Christopher J. DelliCarpini

**WEDNESDAY, JANUARY 11**

MATRIMONIAL LAW  
5:30 PM  
Jeffrey L. Catterson

**NEW MEMBERS**

**We Welcome the Following New Member Attorneys:**

- Rebecca Eva Alesi
- Saman Aslam  
*Catalano Gallardo & Petropoulos, LLP*
- Liza Katherine Blaszyk  
*Frazer & Feldman, LLP*
- Amanda Bluver  
*Tenenbaum Law, PC*
- Jacob M. Bonheur
- Angelique Bouzalakos
- Lisa Nathanson Busch  
*Weitz & Luxenberg, PC*
- Claire Campuzano
- Ashley Cohen
- Ida Como  
*Silvagni and Como Attorneys at Law, PLLC*
- Angela Criscuolo  
*Catalano Gallardo & Petropoulos, LLP*
- Emily DeGennaro
- Jason Egielski  
*Catalano Gallardo & Petropoulos, LLP*
- Mark Anthony Farrell
- Abigail Sarah Glattman
- Elissa Goldberg
- Evan Goldschlag
- Jackalyn Gonzalez
- Daniel Grabowski  
*Catalano Gallardo & Petropoulos, LLP*
- Joshua B. Greenberg
- Zachary T. Griesel
- Jiah Kim
- Tiffany Ann Lacy
- Sarina Marie Larsen
- Cheryl Monticciolo  
*Ingerman Smith, LLP*
- Timothy David Mudric III
- Rebecca Noy
- Justin Joseph Provido
- Kayla Schmidt  
*Catalano Gallardo & Petropoulos, LLP*
- Laura Scholl
- Mathew Shooshtary
- Milberg Coleman Bryson  
*Phillips Grossman, LLC*
- Richmund C. Sta Lucia
- Benjamin Underwood
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