ADR

Taking Advantage of Arbitration

By Lisa Renee Pomerantz

Many attorneys are unfamiliar and uncomfortable with arbitration, which is designed to be a fair, cost-effective, flexible and expeditious dispute resolution process. As a result, they may not recommend or take advantage of it when drafting a contract or handling a dispute.

Some key advantages of arbitration include:

- The parties can designate a specific neutral or criteria for the selection of a neutral, including subject-matter expertise. Once a case is filed, they can ask potential arbitrators specific questions regarding their experience, or ask to interview them.
- Discovery is generally limited to the production of documents on which a party intends to rely, or which the other party needs to present its case, which are otherwise unavailable to the requesting party, except in large or exceptional cases where depositions may be permitted.
- Motions are only permitted where a party has a substantial chance of prevailing and where the motion would significantly reduce the scope of issues in dispute.
- Conferences with the arbitrator are held telephonically, and parties are encouraged to attend. This allows party involvement in decisions regarding discovery, motion practice and the evidentiary hearing.

Lisa Pomerantz

- The arbitrator has the discretion to permit bifurcation of proceedings or a separate hearing on a potentially dispositive issue to save time and costs.
- The parties may agree to permit submission of testimony telephonically or by written witness statements and to only permit live cross-examination.
- The arbitrator has the power to require the production of evidence or testimony or the briefing of legal issues necessary to deciding the dispute. The arbitrator can also order a site inspection. These prerogatives permit the arbitrator to inform the parties of what he or she perceives as the crucial factual or legal issues so that they can focus their presentation of evidence and briefs accordingly.

Arbitration does have the potential downside of offering very limited judicial review of arbitration decisions, so it may not be ideal where the right to an appeal is perceived as important. However, the pros and cons of arbitration should be discussed with the client when drafting a dispute resolution clause or deciding whether to submit a claim to arbitration.

Note: Lisa Renee Pomerantz is an attorney in Suffolk County. She is a mediator and arbitrator on the AAA Commercial Panel and serves on the Board of Directors of the Association for Conflict Resolution.

CIVIL RIGHTS

Plyler's Mandate

By Cory Morris

In *Plyler v. Doe*, the Supreme Court was dealing with educating undocumented children in Texas.

"In 1982, the Supreme Court ruled in *Plyler v. Doe* that states must not deny the equal protection of the laws to a subclass of children based solely on their immigration status, and that undocumented children have the same right to a public school education as children who are U.S. citizens or immigrant children lawfully admitted to the United States."[1]

Three decades and three-thousand miles later, Nassau and Suffolk counties are seeing an influx in undocumented children in some of the over 100 school districts on Long Island, raising a concern about compliance with *Plyler*.[2] Even with guidance[3] from the federal government, some of these children may not be getting the education they deserve.

The Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction* the equal protection of the laws." Undocumented people, irrespective of how they arrived in this country, are such persons. On Long Island, where some districts in the mid-1990s tried to expel undocumented students or required permanent resident visas to enroll, the re-emergence of "barriers to kids enrolling" has rocked children's unsettled lives, said Patrick Young, legal director for the Central American Refugee Center, based in Brentwood and Hempstead.[4] "Suffolk and Nassau counties, on Long Island, rank third and fifth, respectively, in the United States, after counties centered on Houston and Los Angeles, in the number of unaccompanied minors they have absorbed so far this year; Miami-Dade County is fourth." Some of these areas, however, are having trouble complying with the law when it comes to providing an education for undocumented children within its jurisdiction.

Cory Morris

Take Hempstead School District for example, where 33 undocumented students enrolled in school were not permitted to attend class for months, until the students' protested. District officials reasoned that they lacked the staff or space to accommodate the students. These students were instructed by district administrators to sign in for school each day and return home because there were not enough classrooms to accommodate them.

According to a report from the New York State Attorney General's office, an additional 60 were not allowed to enroll in the school. After receiving several complaints, "the Attorney General and the New York State Education Department (SED) launched a joint review of enrollment policies and procedures of school districts in Nassau, Suffolk, Westchester, and Rockland Counties, including the district…in order to determine whether those districts were impermissibly discriminating against students or prospective students on the basis of immigration status."[5] Although the New York State Attorney General office became involved, no private lawsuit was filed.

The tactics employed by the Hempstead School District violated *Plyler*. "The [Hempstead School] district delayed the enrollment of these students through a variety of methods, including overly-restrictive policies on proof of immunization, age, and residency – in violation of applicable laws and regulations – as well as regularly telling students and/or their guardians there was simply no room at district schools for them. With respect to the last method, the district maintained a "wait list" of more than 60 students, and as of February 2015 students on the list were still awaiting enrollment with the district."

While an agreement was reached "with the Hempstead Union Free School District to ensure educational access for students regardless of their immigration status…[T]he district agreed to retain an ombudsman who will provide new internal oversight over enrollment policies within the district, to retain an independent monitor to ensure that the district enrolls students in compliance with the law, and to offer compensatory educational services to students who experienced enrollment delays for the 2014-15 school year." This one stark example is a reminder of what happened two decades ago. What about the rest of the school districts on Long Island; the hundred or so that remain within Nassau and Suffolk counties?

"[T]he State Attorney General's Office and the State Education Department will immediately conduct a compliance review of school district enrollment policies and procedures for unaccompanied minors and other undocumented students. The review, which will examine whether students are being denied their constitutional right to an education, will initially focus on districts experiencing the largest influx of unaccompanied minors from Central and South America." "The joint compliance review will help determine whether districts in Nassau, Suffolk, Rockland and Westchester counties maintain policies and procedures that exclude or impair the ability of students seeking to enroll in school solely on the basis of their citizenship or immigration status, or that of their parents or guardians." But is this oversight enough?

Some think not. "Many schools in New York State could be deterring undocumented children from enrolling, according to a survey performed by the New York Civil Liberties Union. Districts in the sampling of 139 were said to require birth certificates, social security numbers or ask about immigration status."[6]

It is obvious that advocacy from the ground up is needed. Private attorneys need to bring lawsuits against school districts that are not in compliance with *Plyler*. As *Plyler* stated three decades ago, "by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority."[7] By turning a blind eye we are foreclosing the option of a viable future for a group

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Diamond Life

By Bill Condon

As the new baseball season approaches and hope springing eternal for all teams and their fans, I'm reminded of a high school coach I had the great privilege of playing for many years ago. Angelo Plaia made it his life's goal to teach the skills and strategies of the game, but thought it even more important to convey the higher purposes of baseball that are there to be appreciated if only one looks beyond the scores and the stats.

We were ninth graders playing for Oceanside Junior Varsity, our practices and home games conducted at a rocky, typically uneven threadbare field near Oceanside Park, where the frigid winds would routinely snap off the nearby bay and harden our skin every early spring. We were playing baseball, but wore enough layers to be playing football in December, truly because we loved the game. We certainly didn't do it to meet girls; they had better things to do than chill their bones on the icy aluminum stands. If you didn't connect solidly with a pitched ball, your hands stung for hours.

One breezy, cold afternoon, though, we all laid the bats and gloves down, and were treated to a lesson that we hadn't seen coming. It began when Coach Plaia called us as a team over to first base. He was a bear of a man, built like a barrel and about as strong. It seemed that he and Babe Ruth had similar nutritional philosophies.

Bill Condon

We'd already been issued our uniform numbers - a big day for any ballplayer - and we'd been given our Plaia-issued nicknames, which he scrawled personally under the bills of our dark blue wool caps, all with the white sewn-on capital "O." Mine was "Billy C," because I played outfield and reminded him of Billy Conigliaro, one of the famous brothers that played for the Red Sox. So, we weren't quite sure what this was all about, and why it was so important that we had to forego batting and fielding practice. Coach kneeled at the first base bag and called us all into a huddle, as he began to speak in a low growl.

"This, gentlemen, is first base. There are many ways to get here: a hit, a walk, get hit by a pitch, any number of ways ... yet, it's amazing how many people never even get this far." It began to dawn on us that this was not going to be about baseball, but something else. Something bigger.

"However, before you can move forward on your journey, you've got to find some way to get HERE first. That's an important skill to have in life, gentlemen, the ability to find a way."

Coach told us it took preparation and discipline to get to first base and that, once fortunate enough to get there, it took something else to move forward: desire. "Sadly, many folks are satisfied to make it here and never get any further," he said. "That won't do on this team, gents. I need men who are ready and willing to go all the way. Anybody who has a problem with that can stay right here. The rest of you, lets walk 90 feet."

No one stayed.

I guess because it's in the middle of

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IMMIGRATION

Special Immigrant Visa – Religious Workers

By Rajat Shankar

There are five types of Employment Based (EB) Visa Categories: EB1; EB2; EB3; EB4; EB5. The Special Immigrant religious workers are one of several employment based categories under the EB4 classification.

Religious workers who can qualify under EB4 category include ministers and non-ministers in religious vocations and occupations. These individuals can immigrate to the United States or adjust their status if they are already in the United States. The regulations required these individuals: be working full time, be performing religious work be compensated for their work and work at a religious institution (churches, synagogues, or temples) certified under 501 (c)(3) of IRS Code .

Eligibility

Individuals who want to apply for Special Immigrant Religious Worker petition must meet these four criteria before they can qualify:

1) They must have been a member of a religious denomination that has a bona fide non-profit religious organization in the U.S. for at least two years immediately before filing of a petition with the United States Citizenship and Immigration Services (USCIS).
2) They must enter the U.S. to work in a compensated full time position, in one of the following occupations:
   - Solely as a minister of that religious denomination.
   - A religious vocation (professionally or nonprofessionally).
   - A religious occupation (professionally or nonprofessionally); or
   - A bona fide non-profit religious organization in the United States.

Rajat Shankar

3) They must be coming to work:
   - For a bona fide non-profit religious organization in the United States; or
   - For a bono fide organization that is affiliated with the religious denomination in the United States.

1) They must: have been working in one of the above mentioned positions after the age of 14; have worked in these positions either in their home country, abroad or in the United States (with a lawful immigration status); have worked for at least two years immediately prior to filing the petition with the USCIS.

Since the regulations require a two year work requirement, it is common for religious workers to enter the United States under the R-1 Nonimmigrant visa, work for two years and then file for a Legal Permanent Resident status (commonly known as a Green Card) under the EB4 category.

On April 7, 2015, in *Carlos Alencar v USCIS* (D.C. No. 1-11-cv-04491), the Court of Appeals for the Third Circuit held that 8 CFR §204.5(m)(4) is ultra vires and struck down the Regulation. 8 CFR §204.5(m)(4) states that a special immigrant religious worker must perform two years of full time work in "lawful immigration status." Since the regulation is now invalid it implies that a special immigrant religious worker who was not working in "lawful immigration status" can still apply under EB4 category as long as they meet the two-year requirement. Since this is a very recent decision, it remains to be seen how the USCIS will incorporate this decision going forward.

Process

The first step in the process is for the employer to file Form I-360 Petition with the USCIS. If I-360 is approved and the applicant is in the United States, he or she is eligible to file I-485 Application for Adjustment of Status. After filing the I-485 Application, the beneficiary will be given a date for Biometrics (finger printing) and upon security clearance the I-485 petition is approved and the applicant will receive their Legal Permanent Resident Status.

If the applicant is not in the United States and I-360 is approved the notice will be sent to the National Visa Center (NVC) in New Hampshire. After the NVC receives the notification from the USCIS, they will assign a case number. Once the visa numbers becomes available the NVC will notify the applicant and/or their attorney to pay fees, complete Form DS-260, and submit the necessary documents for review.

If the NVC determines that the applicant's file is complete they will send the file to a U.S. Embassy in the country where the applicant is residing. The applicant or their attorney will be given the date and time of the interview and instructions on obtaining a medical examination. At the interview, fingerprints of the applicant will be taken and a consular office will make the determination as to whether the applicant is eligible to enter into the United States. If eligible, the applicant will be given a Visa Stamp in the passport and a sealed packet containing all the documents required for entering the United States. If the applicant is allowed to enter the United States, the applicant will enter as a Legal Permanent Resident. The applicant must enter the United States before the expiration date on the Visa Stamp.

Family members

An applicant's spouse and children may apply for immigrant visa along with the applicant. Note however, the children of the applicant must be unmarried and must be under 21 years of age. Similar to the applicant, the spouse and the minor children, must fill out the necessary documents, pay the necessary fees and undergo a medical examination.

Same-sex couples are also now eligible for the same benefits as opposite-sex couples.

Ineligibility

An applicant may be ineligible for an Immigrant visa if they engage in certain activities. These include, but are not limited to: drug trafficking, overstaying a previous visa, and submitting fraudulent documents. If an applicant attempts to obtain a visa through willful misrepresentation of a material fact or fraud he or she may become permanently ineligible to receive any type of Visa or to enter the United States.

Note: Rajat Shankar is an attorney who practices Immigration at Shankar & Associates, PC, and is the current chair of the Nassau County Bar Association Immigration Committee.

Academy Benefits New Lawyers

The Academy offered a full year's worth of MCLE credits for newly admitted lawyers at the Bridge-the-Gap program held on March 27 and March 28 at the bar center. The event was very well attended and was a big success.

TRUSTS AND ESTATES

Inheritances and Financial Aid for College

By Alison Arden Besunder

A friend posed an interesting question recently. His wife's mother had recently passed away, leaving his wife and her siblings an inheritance (an annuity). Their oldest son is in his junior year of high school and preparing to apply to colleges … and to apply for financial aid in order to be able to afford to go to these colleges. The question presented, was how and whether the inheritance would impact their child's eligibility for financial aid. Should they wait to file the claim form for the annuity until after the financial aid package was awarded, which they were able to do? Should they disclaim the inheritance entirely and let it pass to the other siblings?

The question piqued my interest to look into the intersection between financial aid for college and distributions from an estate.

There are two basic types of financial aid — need-based and merit-based. This brief article focuses on need-based aid.

Alison Besunder

Eligibility for need-based aid utilizes a static formula: Cost of attendance minus Expected Family Contribution (EFC) = need.[1] This is the amount that the college expects the student's family to pay for school. The EFC is calculated based on a snapshot of assets and income available for college. Just like with real estate appraisals, there are three methods used to calculate EFC. All three are based on the student and parent income and assets data, all of which must be reported on the Free Application for Federal Student Aid (FAFSA).

The terminology is "exempt" and "non-exempt" resources in Medicaid planning. This concept applies in financial aid too. Retirement accounts are exempt assets, as is a home. Non-retirement assets are included in the EFC calculation. Home equity, small businesses, and non-qualified annuities are not counted in one calculation, but they are in the other two. Annuities and life insurance contracts are not reported on the FAFSA, but annuities are counted on the CSS Profile, which is the other aid form used by many private colleges in addition to FAFSA. The income calculation will be impacted by the reported asset value of investments, and also the unearned income, such as interest, dividends and capital gains.

Under one of the three FAFSA calculations, home equity is capped at 1.2 times the parent's adjusted gross income. Life insurance cash values and personal assets (household goods, cars, furniture, etc.) do not count under any of the three formulas. The three aid formulas weigh income more than assets to determine what families must contribute toward the cost — it effectively expects parents to use 47 percent of their net income after taxes and other items. In other words, income counts nine times more than assets do.

Parents are assigned a "savings allowance" to arrive at an available asset value. Meaning, after yet another calculation, parents are expected to use up to 5.64 percent of the available assets as calculated on college costs annually. Students, however, are not given a "savings allowance," and 100 percent of the value of any asset in the student's name is counted and expected to be used toward the college cost. In other words, the college expects the money in the student's name to be used to pay tuition at a much higher rate than parents' own assets. This is counterproductive to a common estate planning technique of utilizing the annual exclusion gift amount to make annual gifts to children, either in an UTMA / UGMANY or a trust. This fact undercuts the wisdom of placing money in an UGMANY / UTMA

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REAL ESTATE

SCAR Proceeding Owner-Occupancy Requirement

By Andrew Lieb

The Court of Appeals recently held that a single-family home is not "owner-occupied" for purposes of qualification in a Small Claims Assessment Review (SCAR) when such home is occupied "by an owner's relative but not by the owner" "during the relevant tax period." In so ruling, the court limited SCAR proceedings' availability to fact-patterns that clearly establish occupancy by the owner.

Attorneys counseling clients who seek to utilize SCAR proceedings for their residential property tax grievances should review the court's decision, *In the Matter of Mehran Manouel, et al., v. Board of Assessors, et al.,* as it sets forth guidance in the qualification requirements for jurisdictional purposes beyond its limited issue by way of a plethora of thoughtful dicta. More so, all attorneys should review the decision because it's an artful explanation of the need for litigation counsel to find primary support for policy arguments, in legislative history and administrative interpretation, beyond a mere reliance on logic. As the court explained, "a reasonable and perhaps quite convincing argument" that is unsupported is properly "made to the Legislature" not the court.

SCAR proceedings are available to homeowners who wish to challenge their property tax assessment (i.e., assessed value of real property for a given tax year), pursuant to Real Property Tax Law §730, if the property is "owner-occupied" within the meaning of Real Property Tax Law §730(1)(b)(i).

Andrew Lieb

The Court of Appeals addressed the scope of the "owner-occupied" requirement for SCAR proceedings on Feb. 24, 2015, in *In the Matter of Mehran Manouel, et al., v. Board of Assessors, et al.* According to the court, SCAR proceedings "provide[] low-cost, expeditious tax assessment review" as contrasted with a tax certiorari proceeding in State Supreme Court, which is "cost prohibitive for many homeowners." Therefore, a determination as to qualification in a SCAR proceeding could be the difference between making a tax grievance financially viable for many single-family homeowners.

In rendering its decision, the court found the fact that the owner's relative lived in the home rent-free irrelevant to its determination. In such, the court ruled that the petitioner's policy argument, that "the owner-occupancy requirement was designed to exclude income-producing properties from SCAR," was unavailing. Instead, the court held that the statutes plain language limited SCAR proceedings to properties that are owner-occupied by way of a strict constructionist interpretation.

Real Property Tax Law §730(1)(b) states that a SCAR proceeding is available where "the property is [] improved by a one, two or three family owner-occupied structure used exclusively for residential purposes." The court looked to Black's Law Dictionary in defining the word "owner" to mean "the holder of certain superior interests in property."

The court acknowledged its precedent in *Town of New Castle* in demonstrating that the instant homeowners' case had merit irrespective of not holding for the homeowners. In *Town of New Castle*, which addressed the "exclusively for residential purposes" aspect of the SCAR proceeding restriction, the court held that such language should also "include properties used occasionally or incidentally for nonresidential purposes" by way of looking to the public policy behind the availability of SCAR proceedings. So, what the court says is the difference between *Town of New Castle* and the instant application where in the former this same court read an expansive interpretation into the statute and in the instant matter the court ruled in a strict constructionist fashion. The answer says the court is the difference in how the claims were substantiated. In *Town of New Castle*, the applicant "relied on legislative history and administrative guidance to support the conclusion that a narrow construction of the residency provision would contravene the primary purposes of RPTL 730". *In the Matter of Mehran Manouel, et al., v. Board of Assessors, et al.* not only did the legislative history and administrative guidance not support the policy arguments made by the homeowner, it actually undercut those arguments in that the statute was over "thirty years" old and when introduced "the Association of Towns of the State of New York specifically objected to the proposed bill's distinction between owner-occupied residential properties and non-owner occupied residential properties" to no avail.

Consequently, a great lesson for practitioners exists *In the Matter of Mehran Manouel, et al., v. Board of Assessors, et al.* Unless there exists support for a policy argument beyond logic, go to lobby the legislature instead of petitioning the court. Also, SCAR petitioners must reside at their owner-occupied home.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb serves as a Co-Chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer for several years.

WHO'S YOUR EXPERT

Criminal Convictions Vacated Due to Expert Testimony

By Hillary A. Frommer

In the recent months, two courts vacated criminal convictions and ordered new trials, ordered based on the testimony of expert witnesses. Actually, it is more appropriate to say that those convictions were vacated based on the lack of expert testimony at trial. A criminal defendant seeking to vacate a judgment of conviction pursuant to CPL § 440.10 bears a very heavy burden. More often than not, whether the application is made based on ineffective assistance of counsel, the discovery of new evidence, or an error by the trial court in precluding or admitting certain evidence or testimony, criminal defendants are not successful in winning new trials. For example, in *People v Billups*,[1] the Appellate Division rejected the defendant's argument that the trial court erred in precluding the defendant's expert witness from testifying, because the record established that the expert would offer nothing more than speculation. Similarly, in *People v Demetsenare*,[2] the court denied the defendant's motion to vacate his conviction upon concluding that the defense counsel's decision not to retain a specific expert witness did not constitute ineffective assistance.[3] However, Lydia Ann Salce of Saratoga County and Rene Baily of Rochester, New York, were indeed successful.


Hillary A. Frommer

Lydia Salce was convicted of the attempted murder and assault of her husband in April 2012, and was sentenced to 16 years in prison plus five years of post-release supervision.[4] The defendant's claim was that her intoxicated husband attacked her with a knife, which he dropped while he was hitting her. The defendant claimed that she picked up the knife, started swinging it at him and ultimately stabbed him several times. According to the prosecution and the victim, the victim had a verbal altercation with the defendant who then stabbed him the back.

Other evidence introduced at trial included medical evidence that the victim had stab wounds to his back and chest which were 1 to 1 ½ inches deep and not life threatening; and testimony from the police who believed the victim's story and decided to charge the defendant, based on the extensive nature of the victim's wounds. However, the trial court refused to allow the defendant to present expert testimony that the nature of the husband's wounds "were not inconsistent with defensive action by defendant."[5] The Appellate Division disagreed with that preclusion, and determined that given the sharply contrasting versions of events, coupled with the testimony that the nature of the wounds was a determining factor in the decision to charge the defendant with the crimes, the defendant's expert witness should have been permitted to testify. The trial court's refusal to allow that testimony was an error warranting a new trial.

Judge James Piampiano of the Criminal Court in Rochester vacated the murder conviction of Rene Baily in December 2014, who was convicted of killing Brittney Sheets, a two and a half year old in her care.[6] During the 2001 murder trial, the defendant claimed that the child sustained a head injury (which eventually resulted in her death), when she fell 18 inches from a chair. The prosecution charged that the victim's injuries resulted from Shaken Baby Syndrome and it presented medical testimony to that effect. The jury ultimately agreed with the prosecution and found the defendant guilty of murder.

Fourteen years later, the defendant moved to vacate her conviction pursuant to CPL § 440.10(1)(g) on the grounds that new medical and scientific evidence concerning Shaken Baby Syndrome had evolved since the defendant's conviction undermined the jury's verdict. In other words, the defendant asserted that she had new expert testimony supporting her version of events. In order to vacate a conviction under CPL § 440.10(1)(g), the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) must have been discovered since the trial; (3) could not have been discovered before the trial through the exercise of due diligence; (4) is material to the issue; (5) cannot be cumulative of other evidence; (6) cannot be merely impeachment evidence; and (7) must be admissible.[7] A hearing was held at which the defendant presented several different experts in the fields of general and forensic pathology, biomechanical engineering, radiology, pediatrics, ophthalmology, and pediatric neuroradiology. The court found that the defendant's

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TOURO

Industrial Design: the Inadequacy of Legal Protection

By Rena C. Seplowitz

Note: This is part two of a series.

Part one of this series discussed the deficiencies in current intellectual property law for the protection of industrial design. In Part two, possibilities for some protection anchored in the Copyright Act and the Patent Act are explored.

The United States ratified the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs with the World Intellectual Property Organization (WIPO) in Geneva, Switzerland on Feb. 13, 2015. This ratification represented the last step in the process, which allows the United States to become a member of the Hague Union. On May 13, 2015, the Hague Agreement, which was enacted as Title I of the Patent Law Treaties Implementation Act of 2012, will become effective for the United States as well as Japan, which also ratified the Geneva Act in February.

Advantages of the Hague Agreement include the ability of United States design patent applicants, in some cases, to file a single international design application with WIPO or the United States Patent and Trademark Office (USPTO) for as many as 100 designs for registration internationally and, for applications filed on or after May 13, 2015, will provide a 15 year term of protection rather than the current 14 year term. Despite these advantages, the USPTO will continue to review design patent applications filed pursuant to the Hague Agreement based on the substantive provisions of the Patent Act. Thus, the ornamentality requirement in the design patent area, which excludes functional elements, remains.


Rena C. Seplowitz

Copyright law, which fosters creative expression, is also not the appropriate paradigm for the protection of industrial design. As both the Copyright Act and case law illustrate, copyrightability of artistic enhancements of industrial design depends on their separability from utilitarian design considerations. For copyright law to do otherwise, would be inappropriate, because it would confer an excessively long monopoly over works or aspects of them, which are outside the scope of copyright. A grant of a monopoly for the life of an author plus 70 years (or in the case of a work for hire or pseudonymous or anonymous works the shorter of 95 years from publication, or 120 years from creation) fosters anticompetitive behavior and in many cases, excludes these designs from the public domain long after their usefulness ceases. A substantially shorter monopoly period would provide an incentive for creating works of industrial design but not overcompensate the creator given the nature of the work, which fuses artistic elements into the structure of the useful object with a limited life span.

The Vessel Hull Design Protection Act (VHDPA), enacted as part of the Digital Millenium Copyright Act in 1998, confers *sui generis* protection for the design of vessel hulls and decks. As some commentators have recognized, it may provide a model for a broader industrial design law (*See, e.g.*, Susanna Monseau, *The Challenge of Protecting Industrial Design in a Global Economy*, 20 Tex. Intell. Property L.J. 495 (2012); Bradley J. Olson, *The Amendments to the Vessel Hull Design Protection Act of 1998: A New Tool for the Boating Industry*, 38 J. Mar. L. & Com. 177 (2007)).

Intent on preventing "hull splashing" or copycatting, Congress was concerned with the economic harm to the boating industry's investment in research and development in the aftermath of the Supreme Court's decision in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* (489 U.S. 141 (1989)). Although not without defects, the VHDPA appropriately recognizes that a boat hull or deck may represent a merger of utilitarian and aesthetic considerations, thus dispensing with a separability analysis. The statute protects "[t]he designer or owner of an original design of a useful article, which makes the article attractive or distinctive in appearance to the purchasing or using public …" (17 U.S.C. § 1301 (a) (1)). The requirement of originality, also found

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LANDLORD TENANT

Recent Landlord Tenant Case Developments

By Patrick McCormick

Three recent decisions, two from the Supreme Court, Appellate Term, First Department and the third from Supreme Court, Queens County (Ritholtz, J.) are instructive to landlord/tenant practitioners. The first involves an application by a tenant for a *Yellowstone* injunction; the second involves a tenant's renewal option contained in a commercial lease; and the third involves enforcement of a settlement agreement.

A *Yellowstone* injunction is a procedural mechanism used by tenants to maintain the *status quo* and to toll the running of a cure period so that a commercial tenant confronted by threat of termination of its lease may protect its investment in the leasehold.[1] The party requesting *Yellowstone* relief needs to demonstrate: it holds a commercial lease; it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; it requested injunctive relief prior to the termination of the lease; and it is ready, willing and able to cure the alleged default by any means short of vacating the premises.[2]

In *NY Great Stone, Inc. v. Two Fulton Square LLC.* [3] the tenant received a 10 day notice to cure, dated November 21, 2014. The cure notice alleged the tenant defaulted under the terms of the lease by failing to conduct a hydrostatic pressure test on a sprinkler system in the premises and failed to obtain comprehensive general liability insurance required by the lease. The lease at issue obligated the tenant to obtain and maintain general liability insurance for the term of the lease naming the landlord as an additional insured. This type of insurance clause is common in commercial leases. The tenant, in its application for a *Yellowstone* injunction, provided the court with a certificate of liability insurance dated December 2, 2014 evidencing coverage effective April 7, 2014 to April 7, 2015, and indicated the landlord as an additional insured. Based on the documentation provided to the court, the court denied the application for a *Yellowstone* injunction.

Patrick McCormick

The court, correctly in my view, noted that the tenant's failure to maintain proper insurance is a material default under the terms of the lease and that such a default is not curable because a prospective insurance policy does not necessarily protect a landlord against unknown claims that might arise during the period in which no coverage exists. Thus, existence of current coverage did not cure the default for failing to maintain (or perhaps not prove) the existence of coverage from the inception of the lease. The tenant argued that the default notice directed it to obtain general public liability insurance, but the court was not persuaded that the default was cured by tenant's claim that it obtained a current policy of general liability insurance as demanded by the cure notice. Accordingly, *Yellowstone* relief was denied as the tenant could not establish that it was ready, willing and able to cure the default.

The next case, *315 West 48th Street Realty Corp. v. Maria's Mont Blanc Restaurant Corp.*[4] involved a commercial lease in which the tenant operated a restaurant under two separate lease agreements that expired, at the expiration of a five year renewal term, on August 31, 2010. The landlord commenced a holdover proceeding and tenant defended alleging that its predecessor validly exercised a second renewal option for both leases to extend the term through August 31, 2015. The court noted that the tenant's claim was not properly raised at trial but, nevertheless, should have been rejected because the tenant did not establish that the second renewal option was properly exercised. The tenant apparently claimed, but no evidence was produced at the trial, that the prior tenant gave notice to the landlord of its intent to exercise the renewal option. The court also rejected the tenant's claim that the second renewal option was exercised when its predecessor exercised the first renewal option. The court noted that the leases did not authorize the tenant simultaneously to exercise the renewal options for both renewal terms and, based upon the renewal language in the leases, the court concluded that the parties intended that the second renewal option could be exercised only during the first renewal term. The court therefore found that notice of the exercise of the second renewal term claimed by tenant was not timely given and therefore was ineffec-

(Continued on page 25)

TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Construction of Will

In *In re Borowiak,* 2014 N.Y. Slip Op 50444 (Sur. Ct. Erie County), the Surrogate's Court, Erie County, found that the decedent's will failed to make provision for the disposition of his estate and, therefore, directed that it pass pursuant to the laws of intestacy.

The decedent died survived by his wife and an adult daughter. Following the admission of his will to probate, his wife, who was the executor thereof, petitioned the court for a construction that would leave his entire estate to her.

The record revealed that the instrument, which had not been drafted by an attorney, simply nominated the decedent's wife to be the executor of his estate and directed that in the event of any "accidents, Health Failures or otherwise" he not be resuscitated. The decedent's wife maintained that because the will had not been prepared by an attorney her nomination as executor should be construed to entitle her to his whole estate.

The court denied the application, finding that a reading of the will in its entirety did not justify the result requested by the petitioner. Specifically, the court noted that the decedent's will contained only two substantive provisions; the nomination of his wife to serve as the executor of his estate, and the direction that he not be resuscitated. To this extent, the court found the instrument to be a hybrid between a testamentary document, operative upon the decedent's death, and a living will, operative during his lifetime. By contrast, the court observed that a will is defined as a written instrument that nominates a fiduciary or makes provision for the administration of the decedent's estate, and is designed only to take effect upon death. Within this context, the court concluded that it was possible for a will to be intended for the sole purpose of nominating an executor.

Ilene S. Cooper

Accordingly, the court rejected the construction posited by the decedent's wife, found that the decedent's will consisted only of the paragraph which nominated his wife as the executor of his estate, and directed that the estate be distributed pursuant to the laws of intestacy.

Removal of Fiduciary

Before the court were contested proceedings for the removal of a co-trustee and the appointment of a successor co-trustee. The record revealed that the decedent died, testate, survived by a spouse and two sons. Pursuant to the pertinent provisions of his will, the decedent created a trust for the benefit of his spouse, and nominated and appointed his wife and one of his two sons as co-trustees. The will also named the decedent's second son as successor co-trustee in the event his other son was unable to serve, and his sister-in-law (his spouse's sister) as his successor. (The decedent's second son post-deceased him in 2012). Further, the instrument gave the decedent's spouse the power to remove any co-trustee and to substitute another fiduciary by delivering to the then acting fiduciary a written demand to that effect, provided that the substitute fiduciary be a bank or trust company with fiduciary powers and had a trust department with assets of not less than one billion dollars. Upon admission of the will to probate, letters of trusteeship issued to the named trustees, who each duly qualified.

Thereafter, the decedent's spouse petitioned for removal of the decedent's son, as fiduciary, claiming that he borrowed substantial sums of money for his individual use from the trust. She further alleged that she served a written notice and demand upon him in accordance with the decedent's will, and that he refused to cease to act as fiduciary. Simultaneously therewith, the decedent's sister-in-law petitioned for her appointment as successor. The decedent's son opposed both petitions, contending, *inter alia,* that he did not borrow funds from the trust estate, but pledged the trust assets as collateral for the loan, that the powers clause of the will authorized the fiduciaries to borrow funds from themselves or others and to pledge any property as security, that the decedent's spouse agreed to the loan, and that the trust was not in jeopardy by virtue of his stewardship. Further, respondent claimed that if a successor was to be appointed, it could only be a corporate fiduciary, as provided by the terms of the decedent's will, rather than the decedent's sister-in-law.

The court opined that the testator provided a specific protocol allowing the decedent's spouse to remove her co-fiduciary, and that the decedent's son was effectively removed when he was given written notice of his removal in accordance with the provisions of the decedent's will. Further, the court held that pursuant to those provisions, his replacement must be a corporate fiduciary. Nevertheless, the court concluded that inasmuch as the will directed that at no time could the decedent's spouse act alone, the decedent's son would continue to serve until such time as a corporate fiduciary qualified to act in his place and stead.

In re Buffalino, NYLJ, Jan. 22, 2015,

(Continued on page 24)

Child Support Pro Bono Innovation Project to Begin in Suffolk

By Maria Dosso

Nassau/Suffolk Law Services Committee, Inc. (NSLS) is pleased to announce that it will begin a new pro bono project this spring. The project will focus on child support for custodial parents in Suffolk County. It will be based out of the Suffolk County office of NSLS in Islandia and will be funded, in part, by the Pro Bono Innovation Fund (PBIF) Grant. The Project will utilize the services of law students and pro bono attorneys to provide this assistance.

With the new PBIF Grant, NSLS is working to develop an innovative approach to pro bono. Since the end of January, newly hired attorney, Melissa Greenberger, who will be coordinating the Innovator Project, has spoken with attorneys, law school faculty and staff, court personnel and co-workers to get a sense of unmet legal needs in the community. As a result of these discussions, NSLS has confirmed that legal assistance in child support cases is an area of great need.

Pro se assistance

The Self Help Child Support Project will be limited to pro se services, which will include law students and/or pro bono attorneys assisting with the preparation of petitions for initial support orders, petitions for modification of an existing support order, or petitions for enforcement of an existing support order; and educating litigants on the child support process, required documentation, and what to expect at a hearing, among other services. Litigants will not be provided with direct representation in this project. The PBIF Grant requires that all of our clients must have income below 200 percent of the poverty level. It is anticipated that the Self Help Child support Project will launch sometime in June 2015.

Law students will be a big part of this initiative. Beginning this year, all candidates seeking admission to the New York State Bar must complete 50 hours of pro bono service prior to admission. NSLS has a student practice order, which means that law students can function as student attorneys under the supervision of a licensed attorney giving students the opportunity to gain practical experience while serving individuals who would otherwise not be able to afford legal assistance.

Besides working with law students, the project will recruit and engage "Attorneys Emeritus." The Administrative Board of the Courts established "attorney emeritus" in 2010 as a new status for attorneys in New York. An attorney emeritus is an attorney in good standing, who is at least 55 years old, and has practiced law for at least 10 years. The Attorney Emeritus Program seeks to connect experienced attorneys (not necessarily retired) to volunteer opportunities with legal service organizations and court-sponsored programs that address poverty-related issues. Attorneys agree to perform a minimum of 60 hours of pro bono work during the two-year attorney registration period. The legal host organization provides the attorney emeritus with malpractice insurance. An attorney who is still engaged in the practice of law may earn up to a total of 15 CLE credits in exchange for his/her pro bono work.

Direct representation

In addition to the Self Help Project, our volunteers will be interviewing client applicants for legal representation to be provided by pro bono attorneys from the firm Kaye Scholer LLP. The Child Support Magistrates can only refer low income child support petitioners to this service after their first appearance in court. The Child Support Pro Bono Project is expected to begin in May 2015. Thanks go to Judge C. Randall Hinrichs and the support of an integrated team including Family Court personnel, Legal Aid, the Suffolk County Attorney, the Suffolk County Bar Association and the firm of Kaye Scholer for this important initiative.

If you have any questions regarding these new child support projects, or are interested in becoming a volunteer, please contact Melissa at (631) 232-2400 or by email, mgreenberger@wnylc.com.

To register for the attorney emeritus program, attorneys can use their biennial registration form, or call (877)800-0396, or complete a form online at http://www.nycourts.gov/attorneys/volunteer/emeritus/rsaa/ Attorneys can also contact Matthew English at menglish13@fordham.edu or call, (212) 636-6304 at the Feerick Center for Social Justice

Melissa Greenberger, Staff Attorney NSLS

Matthew English, Attorney Emeritus Coordinator

Fall Visit to Touro by Leading New York Practice Scholar

Patrick Connors

Patrick Connors has been appointed Scholar in Residence for the Fall 2015 semester. He will be teaching New York Practice.

"Professor Connors is the authoritative scholar in New York Practice," said Touro Law Center Dean Patricia Salkin. "His years of scholarship and teaching, drafting and consulting work, will be a great asset to our law school community. Our students will benefit greatly from his experience and expertise and there is already a buzz in the community about the fact that he will be in residence at Touro Law this fall."

Professor Patrick Connors grew up in Mineola, where he resided until moving upstate for his clerkship with Judge Richard D. Simons in 1998. He first visited Touro Law in the summer of 1993, when he was a reporter for the Committee on New York Pattern Jury Instructions ("PJI"). Professor Connors served in that role until 2004, working closely with its chair, Touro Law Professors Leon Lazer, and Professor Eileen Kaufman, who was also a reporter for the committee.

Professor Connors's first contact with Albany Law School was, coincidentally, with Dean Patricia Salkin, who recruited him to present an ethics CLE in 1999. He left private practice to teach New York Civil Practice and Professional Responsibility at Albany Law School in 2000, where he continued to work closely with Dean Salkin on several programs over the next decade. Prior to joining the Albany Law School faculty he was an Adjunct Professor of Law at Syracuse University College of Law where he taught Professional Responsibility from 1991 to 1999.

"Based on my history with the school, I know Touro Law to be a vibrant school with an active student body, accomplished alumni community, and dedicated faculty," Professor Connors said. "I look forward to returning to Long Island and teaching New York Civil Practice at Touro in the fall of 2015."

The Best Kept Secret The Lawyer Assistance Foundation

The Lawyer Assistance Foundation is comprised of a group of lawyers and Dr. Jennifer N. Duffy, Forensic Psychologist, who volunteer to help others in need. Their work is totally confidential; they do not ask questions or make judgments. They are here for you, if you need help. Remember you are not alone.

The foundation has been in existence since 1991 and during that time has helped attorneys who have had professional turmoil due to illness, depression, drug or alcohol addiction. Assistance has included working in the attorney's offices, maintaining their health insurance, and seeing them through detox to recovery, to re-entry into the professional world.

The desperation and misery experienced by some of our colleagues compel us to make this effort and also to ask for your financial support, which is a tax-deductible donation. Please make your checks out to the Lawyer Assistance Foundation and mail it to SCBA headquarters. Contributions may be charged to credit cards.

This is a beautiful time of the year to give a memorial gift in honor of a loved one, while making a charitable gift to us.

– LaCova

Peter Sweisgood Award Dinner's 27th Anniversary

By Sarah Jane LaCova

The late Reverend Peter Sweisgood, who had been a member of the Benedictine Order and was a recovered alcoholic at the time of his passing, was instrumental in assisting many Long Island professionals afflicted with alcoholism. He was particularly helpful to the members of the legal profession and their families and in 1988, the SCBA's Lawyers Committee on Alcoholism and Drug Abuse (now known as the Lawyers Helping Lawyers Committee) had their first dinner meeting honoring Father Sweisgood, who shared his knowledge of recovery with our bar association members by serving on many panels and programs.

This year's dinner featured our distinguished guest Patricia Spataro, Executive Director of the New York State Bar Association Lawyers Assistance Program and our guest speaker and long time member Charlie Rosen, who shared the special needs and problems that attorneys have who suffer from this dread disease.

We would like to thank the co-chairs of the committee, Harry Tilis and Art Olmstead, for their significant contributions toward making the dinner a big success.

Note: Sarah Jane LaCova is the Executive Director of the Suffolk County Bar Association.

Photo by Arthur Shulman

Rosemarie Bruno, left, Harry Tilis and honoree Patricia Spataro at the Sweisgood dinner.

TAX

"Hot" Partnership Assets and Installment Sales

By Louis Vlahos

Installment Reporting — Sale of Corporate Stock v. Sale of Partnership Interest

Most advisers understand that if a taxpayer sells his or her shares of stock in a corporation in exchange for a promissory note, the taxpayer can generally defer recognition of the gain realized on the sale until principal payments are received on the note ("installment reporting").

Although installment reporting is subject to various limitations (for example, the note cannot be a demand note, and the seller cannot be a dealer in securities), the composition of the corporation's assets does not, generally speaking, affect either the nature of the gain (as capital or ordinary) arising from the sale of the stock, or the timing of its recognition.

Many advisers assume that the same tax treatment applies to the sale of an interest in a partnership or LLC. The Code [741] provides that, in the case of a sale of a partnership interest, the gain recognized to the selling partner shall be treated as gain from the sale of a capital asset, which should qualify for installment reporting. However, the code goes on to provide that any consideration received by the selling partner that is attributable to the seller's share of the unrealized receivables or inventory items ("so-called "hot assets") of the partnership shall be treated as ordinary income. [751]

Assets Excluded from Installment Reporting

The installment method of reporting is not available for the sale of certain types of assets, including (among others) marketable securities, depreciation recapture, inventory, and unrealized receivables.

IRS's Position re Hot Assets

The IRS has long taken the position that the gain from the sale of a partnership interest is not eligible for installment reporting to the extent of the selling partner's pro rata share of the partnership's "hot assets."

Until recently, there did not appear to be any direct judicial support for the IRTS's position. The Fifth Circuit's decision in *Mingo v. Comr.,* No. 13-60801 (5th Cir. 2014), earlier this month, affirmed the Tax Court and, thereby, provided the necessary support.

Tax Court and Fifth Circuit Join the IRS

The Facts

Taxpayer was a partner in firm's management consulting business ("consulting business") until tax year 2002, when firm sold its consulting business to corp.

Louis Vlahos

As an initial step in the transaction, partnership LP was formed in early 2002. It was owned by certain subsidiaries of firm. As part of the transaction, firm transferred its consulting business to LP. Among the assets firm transferred to LP were its consulting business's uncollected accounts receivable for services it had previously rendered. Firm then transferred to each of the consulting partners, including taxpayer, an interest in LP and cash in exchange for the partner's interest in firm. The value of taxpayer's partnership interest in LP as of October 2002, was $832,090, of which $126,240 was attributable to her interest in firm's unrealized receivables. On that date, firm caused its subsidiaries to sell their respective interests in LP to corp. At the same time, the consulting partners sold their respective interests in LP to corp in exchange for convertible promissory notes. At the end of the transaction, corp owned 100 percent of the consulting business.

Corp gave taxpayer a convertible promissory note for $832,090 in exchange for her interest in LP. The $126,240 attributable to her interest in partnership unrealized receivables was included in that face value. The note provided that, unless the note was converted into corp stock, corp would pay interest on the unpaid principal balance semiannually; and the outstanding principal amount of the note and any accrued and unpaid interest was due and payable on the fifth anniversary of the transaction's closing (i.e., October 1, 2007).

Taxpayer's Return

On her 2002 Federal income tax return, taxpayer reported the sale of her partnership interest in LP as an installment sale. The selling price, gross profit, and contract price were listed as $832,090. Taxpayer did not recognize any income relating to the note, other than interest income.

The IRS issued a notice of deficiency, contending that the $126,240 taxpayer had received in exchange for the partnership's unrealized receivables was not eligible for reporting under the installment method. Accordingly, the IRS concluded that taxpayer should have reported this amount as ordinary income in 2002 and paid taxes on it then.

Taxpayer challenged both of the IRS's deficiency determinations before the Tax Court. The central dispute raised by taxpayer was the legal question of whether the installment method can be used to report the portion of the partnership interest attributable to unrealized receivables, given its status as ordinary income.

The Tax Court

The Tax Court found in favor of the IRS, stating that "the gain realized on [taxpayer's] partnership interest, to the extent attributable to partnership unrealized receivables, was . . . ineligible for installment method reporting." Accordingly, the Tax Court concluded that taxpayer should have properly reported an additional $126,240 of ordinary income on her 2002 Federal income tax return instead of reporting it under the installment method.

The Court of Appeals

The Fifth Circuit reviewed the relevant provisions of the code. It noted that the Code [Section 741] specifically provides that gain from the sale of a partnership interest shall ordinarily be considered gain from the sale or exchange of a capital asset, with some exceptions. Those exceptions include gain from unrealized receivables. [Section 751] The court stated that the gain resulting from the unrealized receivables on the sale of a partnership interest should not be reported as gain from the sale or exchange of a capital asset. Because the gain from the sale of taxpayer's partnership interest attributable to unrealized receivables could not be reported as gain from a capital asset, the court continued, it was required to be reported as gain from ordinary income. The purpose of this exception, the court said, is to prohibit the transformation of ordinary income, arising from services, into capital gain (which is taxed more favorably) simply by being passed through a partnership and sold.

Thus, the court concluded that the gain attributable to the unrealized receivables — classified as ordinary income — was not eligible for installment method reporting because it did not arise from the sale of property. The installment method did not adequately reflect the income that taxpayer received from the unrealized receivables.

Planning for A Sale

Every sale transaction is about economics. In analyzing the economic results of a sale, the seller and his or her advisors need to consider the impact of taxes. The nature of the sale gain as ordinary or capital, and the timing of its recognition – either immediately, or over time under the installment method – will determine the tax consequences of the sale.

Where the seller has agreed, for valid business reasons, to accept an installment note in exchange for the partnership interest being sold, he or she has presumably considered the credit risk associated with the deferred payment of the sale price. An appropriate interest rate and collateral will make the seller more comfortable with the arrangement.

However, the seller also has to consider the nature of the partnership's underlying assets. Where the assets include unrealized receivables, based on the foregoing discussion, the seller may be facing phantom income – the inclusion, in the year of the sale, of the value attributable to the receivables notwithstanding the deferral of the buyer's payment therefore. (The same seems to be true in the case of depreciation recapture; it may also be true as to other partnership assets not eligible for installment reporting.)

It is imperative, therefore, that the seller of a partnership interest ascertain his or her share of such receivables, and the value thereof, well before the sale. Armed with this information, the seller may, for example, be able to negotiate a cash payment upfront, so as to provide sufficient liquidity with which to pay any resulting income taxes. (Query whether it may be possible to allocate this cash payment to that portion of the partnership interest that does not qualify for installment reporting?)

With the necessary information and some planning, a seller can avoid the surprise that befell the taxpayer in *Mingo,* and can thereby preserve the desired economic result of the transaction.

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

CONSUMER BANKRUPTCY

Recent Case Discusses Chapter 13 Jurisdictional Limits

Some personal guarantees are considered contingent unliquidated debts

By Craig D. Robins

A recent decision serves as a reminder that Chapter 13 is not available to all consumer debtors and that counsel must be careful in making sure that the amount of debt does not exceed the jurisdictional limitations.

The essence of Chapter 13 is the payment plan, which enables a debtor to pay back some or all of his debt over a period of three to five years. However, Chapter 13 is limited to debtors who do not have a significant amount of debt.

Judge Louis A. Scarcella, sitting in the Central Islip Bankruptcy Court, just issued a 15-page written decision in which he granted Chapter 13 Trustee Marianne DeRosa's motion to dismiss a case because the amount of debt exceeded the statutory limits. In re Stebbins. No. 14-73357-las (Bankr. E.D.N.Y. February 24, 2015). In that case, the debtor filed a petition and schedules showing $1,248,747 of secured debt on Schedule D. However, Bankruptcy Code section 109(e) provides that Chapter 13 eligibility is limited to debtors whose secured debt does not exceed $1,149,525, and whose unsecured debt does not exceed $383,175.

The trustee argued that the case should be dismissed because it was clear that the amount of secured debt exceeded the jurisdictional limitation. The debtor then amended his schedules by changing the characterization of the secured debt from non-contingent to contingent, and argued that this debt consisted of a personal guaranty obligation, and it was therefore contingent and unliquidated. Since the debts a debtor must include in the 109(e) calculation are limited to non-contingent and liquidated debts, the debtor argued that the personal guaranty debt should not be included, and that the debts did not exceed the 109(e) jurisdictional limitation.

Judge Scarcella held that the personal guaranty was indeed a liquidated and non-contingent unsecured debt (as opposed to a secured debt), and as such, the debts exceeded the jurisdictional limitations of section 109(e), which is $383,175.

Craig Robins

The debtor was the sole shareholder of a real estate holding corporation, which had defaulted on a mortgage obligation involving several properties. The debtor had personally guaranteed that obligation. The mortgagee commenced a foreclosure action against both the corporation and the debtor, and obtained a judgment of foreclosure. The debtor then filed for Chapter 13 relief just before the remaining properties were about to be auctioned.

In arguing that the personal guaranty was contingent and non-liquidated, the debtor advanced an interesting argument that the mortgagee had elected the remedy of foreclosing its mortgage lien rather than suing under the guaranty, and that any debt arising under the guaranty was therefore contingent and unliquidated because the amount of the deficiency was unknown at the time.

In reaching his decision, Judge Scarcella first confirmed that contingent and unliquidated debts are excluded from the computation. He then noted that a section 109(e) inquiry begins with the debtor's schedules, but that the schedules may be an imprecise measure of how much is owed by the debtor as of the filing date, or whether the debts have been improperly characterized as contingent or unliquidated. For this reason, he pointed out, a court may take into account materials outside the debtor's schedules. As such, Judge Scarcella considered the mortgagee's proof of claim, the judgment of foreclosure, and the language in the personal guaranty.

Then Judge Scarcella commented that based on Schedule D as originally filed, the debtor was never eligible for filing because his secured debt exceeded the section 109(e) limitation. However, the judge then evaluated the amended Schedule D in which the debtor re-characterized the secured debt as contingent.

However, the judge ruled that the debt was non-contingent.

A contingent debt is one in which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger ... liability. If the triggering event that gives rise to the liability in question occurs pre-petition, the debt is no longer contingent; rather, it is non-contingent as of the petition date.

Apparently the triggering "event" that causes a contingent liability to turn into a non-contingent obligation does not require that the liability be reduced to a judgment.

Judge Scarcella also distinguished the difference between a guaranty of payment and a guaranty of collection. He concluded that the personal guaranty here was a guaranty of payment, which is an undertaking by the guarantor to pay the guaranteed liability upon default by the principal obligor. The significance of this analysis is that under the guaranty, the debtor's liability to the corporation was not conditioned on the occurrence of any other event such as the conclusion of the foreclosure action. Default by the corporation was all that was necessary to make the guaranty non-contingent. Under the guaranty agreement, the mortgagee was not required to first pursue payment of the outstanding indebtedness from the corporation before enforcing the guaranty.

The judge noted that even though the mortgagee chose to commence the foreclosure action instead of proceeding on the guaranty it does not alter the fact that the debtor promised to pay the debt immediately upon the corporation's default. Thus, the debt was non-contingent.

In addition, Judge Scarcella determined that the debt was liquidated, which is when a claim can be readily determined. He stated that the amount of the debt could be easily calculated. That is because under the personal guaranty, the debtor was obligated for the entire balance upon default, and that amount is easily ascertainable.

Finally, the judge pointed out that contrary to the position taken by both the debtor and the trustee that the debt in question was secured, it was actually unsecured. The guaranty applied to property owned by the corporation and not the debtor. Since the debtor had no ownership interest in the property, this debt was merely an unsecured debt but one which exceeded the section 109(e) jurisdictional limitation by a much greater margin.

One take-away here is to make sure that the schedules as filed do not patently demonstrate that the debtor is ineligible for filing. I wonder whether the trustee would have brought the motion to dismiss had the debtor initially taken the position that the guaranty was non-contingent and unliquidated, especially considering that he had a plausible argument to support that, even though the court subsequently determined that this argument was erroneous.

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

VEHICLE AND TRAFFIC

Canadian Collateral Consequences

By David A. Mansfield

Collateral consequences of convictions in New York State for Vehicle & Traffic Law offenses of driving while impaired and driving while intoxicated can result in the deprivation of your client's ability to travel to and be admitted into Canada. The purpose of this article is to raise awareness among members of the bar concerning this issue.

Any requests for legal advice should be directed to a local experienced immigration lawyer and be resolved by Canadian counsel.

Cary David Kessler, Esq. originally brought this matter to my attention when he told me about a situation that he encountered in his practice.

The simple days of border or airport entry into Canada with a greeting of "Welcome to Canada or bienvenue au Canada" are over. Visitors are now routinely asked if they have ever been convicted of a crime. And Canadian immigration laws will bar entry for anyone convicted of driving while impaired or driving while intoxicated, depending upon date of the conviction and completion of sentence.

The defense lawyer should ask whether your client has business, family or other contacts such as property in Canada. They should then be made aware of these consequences.

The Canadian Law of the Immigration Protection Act will bar entry for those individuals convicted of crimes committed in New York State, which are recognized by the Canadian Law.

David Mansfield

Your client's conviction for a non-criminal driving while impaired offense will result in being denied entry to Canada. Any U.S. citizen with a conviction can often apply for a temporary residence permit, which involves considerable time, advance planning and expense. Local counsel in Canada can be retained for this purpose.

Clients with a minor criminal history when more than five years have elapsed since the completion of all sentencing and rehabilitation, may petition for rehabilitation, which can be handled by Canadian counsel. But that is more involved.

Relief from Disabilities in New York State under Correction Law §701 is not binding upon Canadian immigration authorities.

Canadian travel has emerged as such a topic of interest that it has been included in the promotional materials for the New York State Bar Association's perennial favorite CLE, "DWI on Trial-Big Apple XV" scheduled for May 14, 2015, conducted by Peter Gerzenstang.

The takeaway is that defense counsel may wish to add contacts with Canada inquiry to their DWI initial interview checklist. Clients with driving while intoxicated or driving while impaired convictions should be informed that advance planning and retaining of Canadian counsel may be required to be granted entry to Canada.

Another less serious, but more common issue is the collateral consequences of non- alcohol or drug related Canadian traffic violations committed while in possession of a New York State driver license.

The Provinces of Ontario and Quebec are signatories to the Driver License Compact under Vehicle and Traffic §516. Ontario or Quebec speeding convictions or any other moving violations, based upon a reciprocal agreement, will appear on your client's New York State driving record and deemed the same as committed in New York State. These convictions will be considered in imposing revocations for three speeds committed in 18 months §510(2) (a) (iv) and suspensions for persistent violation of the Vehicle and Traffic Law under §510(3) (d).

The convictions will count as points violations toward the imposition of a Driver Responsibility Assessment fee under Vehicle and Traffic Law §503.

It is important that if you are consulted about a traffic ticket in Ontario and Quebec that you recommend consultation with local Canadian counsel to learn if the matter can be plea bargained to a less serious offense or can be reduced or dismissed. You should stress to your client that the offense is treated the same as if they were issued the summons in New York State.

For further information, consult the New York State Department of Motor Vehicles website. http://dmv.ny.gov/tickets/about-nys-driver-point-system

Attorneys representing clients at the Suffolk County Traffic and Parking Violations Agency must make their clients aware that the agency has become very aggressive about imposing $50 late fees on each overdue fine and doubling the amount of the fine after 30 days. And they will triple the fine after 60 days as authorized by Suffolk County Local Law §818-78.

Your discussion with your client regarding disposition and confirming written correspondence should stress that late payment of fines will be very expensive.

And the statutory language of the enabling legislation should be highlighted in your disposition letter to your client.

The agency has also taken steps to enter judgments on delinquent fines with additional costs and collateral consequences to your client.

The difficulty of overcoming the statutory presumption that a person holding a portable electronic device is presumed to be using that device within the meaning of §1225-d is illustrated by *People v. A.N.*, 44 Misc. 3d 269, 985 N.Y.S. 2d 835, 2014, N.Y. Slip Op. 24119. The Rye City Court case found that the defendant's credible testimony that he did not make a call or send a text near the time he was stopped and the stipulated lack of use on the phone bill was insufficient to the court to overcome the presumption.

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

AMERICAN PERSPECTIVES

Mandatory Voting, an Idea Whose Time has Come?

By Justin Giordano

Australia and Belgium are the only two industrialized western countries that mandate that all of its eligible citizens vote. Eligible voters are those citizens that are at least 18 years of age and have registered to vote. In Australia, the larger of the two aforementioned countries, the law requiring mandatory voting is certainly not new, in fact it's been in place since 1924. The registration rate is higher than 80 percent and the penalty for not voting is a fine. On rare occasions when the perpetrator is a repeat offender there is even the possibility of serving jail time. Of course the penalty is rather minimal, in the neighborhood of $15 for first time offenders and an increase for repeat offenders or those who do not have a valid excuse for not having voted. As expected, the result has been a 95 percent voting turnout of eligible voters on election day.

Justin Giordano

On the other hand the percentage of eligible voters who are registered to vote in the United States is a around 74 percent or 150 million people. Out of that number a paltry 35 to 40 percent vote in the mid-term elections and 50 to 65 percent in presidential election years. The most recent mid-term elections had approximately 37 percent of the electorate turn out to vote while the 2012 presidential election saw 64 percent of those same eligible voters vote. The percentage turnout also varies quite considerably from state to state. For example in the last presidential election (2012) the state with the highest voter turnout was Minnesota with 75 percent, while the state with the lowest turnout was Utah with 53 percent. Evidently the gap among states from highest to lowest is considerable, some 22 percent. The same is true for the gap between the American and Australian voting rate as the aforementioned statistics attest.

Every election cycle, but especially during presidential elections, there are considerable efforts via quite aggressive campaigns to get people to register and vote. These campaigns are not only conducted and financed by governmental agencies but by private groups and organizations as well. For example, in the last few election cycles one of the most well known was "Rock the Vote." It principally aimed at getting younger people to register and vote. However they are not alone by far. "Hip-Hop the Vote" and "Pray the Vote" are just two of the many other organizations that have joined the fray. Creativity has often been at the core of these campaigns. For instance, one of the latest of these organizations votergasm.org seeks to encourage young people to vote by a reward of sex. Their "patriot-level commitment," as this campaign frames it, means you agree to have sex with another voter on Election Day. On the other hand, for non-voters, sex is to be withheld from them for a full week. It goes without saying of course that this is strictly on a voluntary basis. Nevertheless this unorthodox campaign claims to have enlisted some willing 30,000 so-called patriots.

Generally speaking a good number of these entities working so assiduously to increase the voting turnout

(Continued on page 30)

Stellar Celebration of Women's History Month

The Women in the Courts Committee celebrated Women's History Month at the Cohalan Court Company on March 20, committed to celebrating women whose stories have been woven into the fabric of our nation's history.

The keynote speaker was the Honorable Sandra L. Sgroi, Associate Justice of the Appellate Division, who shared the importance of female role models. She highlighted the historical impact of Sacagawea, who served as an interpreter and guide to the Lewis and Clark Expedition during the Western United States exploration.

Co-chairs Hon. Marian R. Tinari and Cynthia S. Vargas coordinated the popular event and Hon. Isabel E. Buse served as the event Chair.

Photos by Ode-Jean-Claude

Clockwise from left, at the Women in History Month celebration were Women in the Courts Committee Co-Chairs Cynthia Vargas, left, and newly appointed District Court Judge Marian R. Tinari; SCBA Executive Director Jane LaCova, who was one of the honorees; Hon. Sandra Sgroi, who spoke at the event and members of The Hamptones, a group of dedicated young students in grades four through eight from Our Lady of the Hamptons Regional Catholic School, who perform at community events.

Disclosure of Social Media Account *(Continued from page 1)*

furthermore, that her private postings are confidential.

Courts must evaluate disclosure demands "on a case-by-case basis with due regard for the strong policy supporting open disclosure," while balancing competing interests such as the demanding party's need for the information, its possible relevance, the burden imposed on a party or nonparty by ordering disclosure, and the potential for confusion or delay, such as expanded litigation or mini-trials on collateral issues.[1] *Perez v Fleischer,* ___ AD3d ___, 2014 NY Slip Op 08101 [3d Dept 2014], citing *Andon v 302-304 Mott St. Assoc.,* 94 NY2d 740, 745, 731 NE2d 589, 709 NYS2d 873 1st Dept 2000]).

"[U]nlimited disclosure is not required, and supervision of disclosure is generally left to the Supreme Court's broad discretion."[2] *Mironer v City of New York,* 79 AD3d 1106, 1108, 915 NYS2d 279 [2d Dept 2010].

Thus, in *Vyas v Campbell,* 4 AD3d 417, 771 NYS2d 375 [2d Dept 2004]), the court declined to compel disclosure of the defendant's business diary in a personal injury action arising out of a motor vehicle accident upon the speculative argument that something in the diary might support the hypothesis that the defendant was suffering from fatigue at the time of the accident.

The same considerations apply to requests for disclosure of social media information. The party seeking disclosure will be required to specify the type of evidence sought with reasonable particularity and, in cases where disclosure is challenged, there must be a showing that the evidence is relevant. A party will not be permitted to conduct "a fishing expedition" into a plaintiff's social media account based on the mere hope of finding relevant evidence.[3] *See McCann v Harleysville Ins. Co.,* 78 AD3d 1524, 910 NYS2d 614 [4th Dept 2010].

A defendant seeking discovery of information on a social media website such as Facebook® must make a showing that the requested disclosure will provide relevant evidence, or that it is reasonably calculated to lead to the discovery of information bearing on the plaintiff's claim. [4] *See Richards v Hertz Corp.,* 100 AD3d 728, 953 NYS2d 654 [2d Dept 2012], citing *Patterson v Turner Constr. Co.,* 88 AD3d 617, 931 NYS2d 311 [1st Dept 2011].

To warrant an order compelling discovery, defendant must establish a factual predicate for the request by identifying relevant information in plaintiff's social media account — that is, information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims." [5] *Tapp v New York State Urban Dev'mt Corp.,* 102 AD3d 620, 621, 958 NYS2d 392 [1st Dept 2013], quoting *Patterson v Turner Constr. Co.,* 88 AD3d at 618.

Although the law regarding the scope of discovery of electronically stored information is developing, there is no dispute that social media information may be a source of relevant information that is discoverable.[6] *See Reid v Ingerman Smith LLP,* 2012 US Dist LEXIS 182439, 116 Fair Empl. Prac. Cas. (BNA) 1648 [ED NY 2012]

In determining issues that are raised regarding disclosure of social media information, the court must decide, on a case-by-case basis, whether such information is material and necessary in the prosecution or defense of the action (*see* CPLR 3101[a]; *see also Ren Zheng Zheng v Bermeo,* 114 AD3d 743, 744, 980 NYS2d 541 [2d Dept 2014]). If it is determined that disclosure is appropriate, the court should consider whether full disclosure or partial disclosure of a social media account is warranted, and it should specify the procedure to be followed to effectuate disclosure.

Some trial courts have suggested that a two-prong analysis be used to decide discovery issues involving social media accounts: first, the court should determine whether the social media content is "material and necessary" and, second, the court should utilize a balancing test to explore whether the production of the content of the social media account would result in a violation of privacy rights.[7] *See,* e.g., *Jennings v TD Bank,* ___ Misc3d ___, 2013 NY Slip Op 32783[U] [Sup Ct, Nassau Co 2013]; *see also Fawcett v Altieri,* 38 Misc3d 1022, 960 NYS2d 592 [Sup Ct, Richmond Co 2013]).

Each disclosure request should be examined to see whether there is a reasonable expectation of privacy as to each aspect of the social media account.

To illustrate, a Facebook® account holder can use privacy settings to restrict access by others to the account. Thus, an account holder has the option of posting comments, photos, videos and other material for public viewing or for viewing by only those who have been accepted as "friends." In addition, an account holder can send a private message to another account holder, similar to an email. The levels of privacy vary among the different available uses of the social media account. Thus, wholesale access to a party's social media account may not be appropriate in cases in which some disclosure is warranted.

While the courts of this state have recognized that the postings on a Facebook® account, if relevant, are not shielded from discovery merely because a party used the available privacy settings to limit access (*Patterson v Turner Constr. Co., supra* at 88 AD3d 618), some courts have not restricted disclosure access to social media accounts.

In *Romano v Steelcase Inc.,* 30 Misc3d 426, 907 NYS2d 650 (Sup Ct, Suffolk Co 2010), a case in which plaintiff claimed that her damages included loss of enjoyment of life, the court permitted disclosure of plaintiff's Facebook® account and directed plaintiff to provide "a properly executed consent and authorization" permitting defendant access to plaintiff's social media records, including records that had been deleted or archived. Similarly, in *Jennings v TD Bank,* ___ Misc3d ___, 2013 NY Slip Op 32783 (U) (Sup Ct, Nassau Co 2013), plaintiff was directed "to produce any and all current and historical Facebook pictures, videos or relevant status postings from her personal Facebook account since the date of the alleged incident, including any records previously deleted or archived . . ."

Other courts, however, have recognized that not all social media communications are relevant to a party's claims (*see Patterson v Turner Constr. Co., supra*, 88 AD3d 617). In an apparent effort to protect a litigant's privacy, some courts have directed that a party's social media postings be submitted to the court for an *in camera* inspection to assess the materiality and relevance of the materials.[8] *See e.g. Richards v Hertz Corp., supra,* 100 AD3d 728, 953 NYS2d 654 [2d Dept 2012]; *see also Nieves v 30 Ellwood Realty LLC,* 39 Misc3d 63, 966 NYS2d 808 [App Term 1st Dept 2013]; *Loporcaro v City of New York,* 35 Misc3d 1209 (A), 950 NYS2d 723 [Sup Ct, Richmond Co 2012]

Recently, in *Melissa G. v North Babylon U.F.S.D.,* ___ Misc3d ___ (Sup Ct, Suffolk Co 2015), the court considered defendant's request for disclosure of "complete, unedited account data" for plaintiff's Facebook® account. In support of the application, defendant submitted evidence that the public content of plaintiff's social media account contained photographs of plaintiff engaged in a variety of recreational activities that appeared to be inconsistent with her claim of "loss of enjoyment of life" and other damage claims. The court, in noting that "[t]he fact that an individual may express some degree of joy, happiness, or sociability on certain occasions sheds little light on the issue of whether he or she is actually suffering emotional distress" (*Giacchetto v Patchogue-Medford U.F.S.D.,* 293 F.R.D. 112, 115, 2013 US Dist LEXIS 93341 [ED NY 2013]), acknowledged the need for restricting disclosure of plaintiff's social media account. Recognizing that there is a reasonable expectation of privacy when a person uses the one-on-one messaging option that is available through Facebook® accounts, the court held that the private messages sent by or received by plaintiff were not subject to disclosure without a showing that material and necessary information to the defense were contained within such messages.

In addition, in adopting the usual procedure in discovery matters in which counsel for the producing party serves as the judge of relevance in the first instance (*see Rozell v Ross-Holst,* 2006 US Dist LEXIS 2277, 97 Fair Empl. Prac. Cas. (BNA) 1104 (SD NY 2006]), the court directed plaintiffs' counsel to review the photographs and videos, status postings and comments posted on plaintiff's Facebook® accounts, to print out and retain a complete copy of same, and to disclose all postings that are relevant to plaintiff's damage claims.

So in the fictitious case involving Julie, where the defendant makes a showing that plaintiff's Facebook® page contains photographs that contradict her claims, there is ample authority for the court to compel disclosure. As the law develops in the field of disclosure of social media accounts, practitioners should consider the potential impact that such disclosure may have on their cases. Plaintiffs' counsel, for example, may consider whether clients should be advised to deactivate their social media accounts prior to the commencement of an action. Similarly, defense counsel may consider whether it is appropriate to undertake an early investigation of social media websites to ascertain if material has been posted that may have an impact upon the plaintiff's claims. Given the widespread use of social media accounts in today's society, its potential impact on the outcome of an action should be considered by every practitioner.

Note: Anne Molloy is the Principal Law Clerk for Supreme Court Justice William B. Rebolini, having previously served as law clerk for the Hon. John J. J. Jones, Jr. and the Hon. Harvey Sherman. She also gained significant trial experience in state and federal courts as an associate trial attorney for law firms handling personal injury, wrongful death, medical and dental malpractice, employment discrimination and civil rights cases. Anne is a former Assistant Brookhaven Town Attorney and a former Adjunct Associate Professor at Suffolk Community College. She also served as a director of the Suffolk County Women's Bar Association and director of the Brehon Society of Suffolk County.

Barbara Mehrman *(Continued from page 8)*

become a great advocate for them when their problems may have fallen on deaf ears with other administrators. Over the years, Touro grew, earning greater and greater respect in the Long Island legal community with a beautiful campus and graduates that have become leaders, as elected office holders, judges, prosecutors, private practitioners and in public and private agencies representing those most in need. Barbara became a great ambassador for the Touro Law Center. Many of the Touro graduates who have become leaders of today are protegés and mentees of Barbara's.

Barbara was a pioneer at Touro where she served as Assistant Dean for Career Services for 18 years until 2006. At that time she became Assistant Dean Emeritus continuing to promote Touro Law to the legal and business communities. Throughout the years she and Dean Glickstein would so often be seen at functions promoting the cause and raising the profile of Touro. She retired as Assistant Dean Emeritus in 2011.

As an aside, this writer was recruited by Barbara to teach at Touro in 2003 where I have hung my hat ever since. (I guess Barbara, like everyone, was entitled to one mistake).

Barbara was a single mom of four children who persevered overcoming whatever obstacles that life placed in her way. Although she never did go to college, Barbara did earn a degree getting credits for life experience, something of which she had plenty. She has been described by those who knew and loved her as tough, loving, stubborn, realistic, practical and maternal, all character traits that she would probably agree with.

Even though Barbara was in failing health in recent times she would never allow it to dampen her spirit. Telephone conversations with friends would revolve around the weather, gossip, upcoming events, things of that nature. Typically, one time in such a conversation Barbara was asked "What's new with you?" Her response, "Oh yes, this morning I fell and broke my hip," as if it were no big deal.

Barbara leaves behind a lasting legacy of her contributions to the improvement and growth of Touro Law Center, the Suffolk County Bar Association, the Academy of Law and numerous students and lawyers whose lives she touched.

Barbara also leaves behind a personal legacy of four children, Dorothy, Susan, Kevin, and Chris, as well as nine grandchildren and three great grandchildren. She will be missed by all of us.

I'd like to thank Touro Dean Emeritus Howard Glickstein, Associate Dean Ken Rosenblum, SCBA Executive Director Jane LaCova and SCBA Past President Craig Purcell for their insights and contribution to this Remembrance.

Note: John L. Buonora is a past SCBA president and retired Chief Assistant District Attorney for Suffolk County. He is currently an Adjunct Professor and Director of the Criminal Prosecution Clinic at Touro.

International Transactions *(Continued from page 9)*

among other things, statutory vacation periods and severance in the event of termination of an employee. Employment in the US, however, is usually "at-will" and absent an agreement to the contrary, there is no requirement for notice of termination to employees or the payment of severance.

Employment issues also arise when determining whether to send employees to work in a foreign country or hire local employees. In making a determination, it is important to research applicable immigration requirements and the ease of obtaining a visa. When foreign companies seek to relocate their foreign employees to a US location, the requirements for obtaining a visa for such employees often determines which employees can work in the US. The type of services an employee would be providing, the length of the proposed stay, and position with the company are factors that would determine the type of visa available, if any, to such employee. On the other hand, if US employees are to be sent to work overseas, their taxes will become more complicated in that they would be required to file tax returns in the foreign country, but also in the US. While they may be able to use foreign tax credits and foreign income exclusions on their US tax returns, such US employees working abroad would still be required to file US tax returns.

Foreign laws and custom

Foreign laws and custom in transactions can affect the ease and efficiency of a transaction. For instance, when closing a deal in the US, the purchaser will typically wire the funds directly to the seller at the time of the closing. In England however, a purchaser would usually transfer funds to their solicitor before the closing and the buyer's solicitor would be in a position to confirm to the seller's solicitor they are in funds and give an undertaking to transfer funds at the closing of the transaction. Whereas it would be very unusual in England for the buyer to transfer funds directly to the seller or the seller's solicitor, in the US it would be unusual to have the purchase price delivered by the purchaser to purchaser's lawyer at or before the closing. Knowledge of such practices helps to expedite the path towards and ultimately closing of the transaction.

Whether engaging in an inbound or outbound international transaction, understanding the nation in which business is to be conducted should be part of a company's initial due diligence. Indeed, a true "global marketplace" is only as successful as the parties who understand it.

Note: Stella Lellos is a partner in the Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana LLP corporate and commercial department. Her practice concentrates on private company mergers and acquisitions, leveraged buyouts, corporate finance transactions and general corporate representation of U.S.-based and international companies.

Pro Bono *Attorney of the Month* *(Continued from page 5)*

owed other Foreclosure Project attorneys, and later began representing the project's clients on his own. Mr. Corcoran praised the Foreclosure Project and, specifically its coordinator, Mr. Smolowitz, saying, "I give all the credit in the world to Barry. Whenever I've called or emailed him with a question, he's responded right way. I'm constantly amazed by how responsive he is. He's been very supportive and encouraging."

Mr. Smolowitz similarly holds Corcoran in high regard. He describes Corcoran as "diligent, reliable, dedicated, and invested." According to Smolowitz, Corcoran is extremely organized "and can always be counted on to take a case."

Mr. Corcoran believes the project provides an important service to its clients. Although many of the project's clients do not obtain loan modifications, he believes they too benefit from the legal assistance they receive. As he explained, "The clients are under a tremendous amount of stress and strain. We're able to put their minds at ease by answering their questions, by helping them collect and organize the necessary documents, and by simply being with them at court during what is, for many of them, an overwhelming process."

Mr. Corcoran works and lives in the Northport area. His wife of 26 years, Domenica, works with students with special needs as a para-professional in the Dix Hills School District. They are the proud parents of four children, James (a psychology graduate student at Florida Institute of Technology), Katherine (a college junior attending SUNY Binghamton on a soccer scholarship), Andrew (a freshman at SUNY Cortland), and Christopher (a junior at Kings Park High School). When he's not working, Mr. Corcoran, who worked as a cook through college, still likes to cook and also enjoys boating and fishing on the Long Island Sound.

The Pro Bono Project is extremely grateful for Mr. Corcoran's generosity, dedication and professionalism. It is with great pleasure that we honor him as Pro Bono Attorney of the Month.

Note: Ellen Krakow is the Suffolk Pro Bono Project Coordinator at Nassau Suffolk Law Services.

The Suffolk Pro Bono Project is a joint effort of Nassau Suffolk Law Services, the Suffolk County Bar Association and the Suffolk County Pro Bono Foundation, who, for many years, have joined resources toward the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a non profit civil legal services agency providing free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home resident.

The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Ellen Krakow, Esq.(631) 232-2400 x 3323.

Trusts and Estates Update (Continued from page 16)

at p. 27 (Sur. Ct. Suffolk County).

Document Production

Before the court in *In re Klein,* was a contested discovery proceeding in which the petitioner sought the return of certain artwork and furnishings from the decedent's long-time companion. The respondent opposed the relief, claiming that the decedent had given the subject property to her as gifts, and moved to compel the production of the documents related to gifts the decedent had given to others. In response to this demand, the petitioner produced many documents, including the decedent's gift tax returns, but redacted the amounts of all gifts given by the decedent to others, including other confidential information, such as social security numbers. In response, the respondent moved to compel the production, *inter alia,* of unredacted gift tax returns, and all documents related to the purchase and ownership of the artwork in issue. The petitioner opposed, contending that the redacted portions of the returns were irrelevant to the issue of whether the respondent received the artwork as a gift.

The court agreed with the petitioner, holding that given the confidential nature of tax returns, a party seeking such disclosure must demonstrate that the information contained in the returns are indispensable to the litigation and unavailable from other sources. Within this context, the court held that to the extent that the returns reflected gifts to the respondent and information about the subject artwork, they were relevant to the underlying proceeding and should be produced. In all other respects, production was unwarranted. Although respondent maintained that the redacted portions of the returns could demonstrate the decedent's propensity for gift giving, and whether the decedent had a practice of making substantial gifts, the court concluded that she failed to sufficiently explain how this information related to the issue of whether the decedent had made a gift to her of the artwork. Further, the court held speculative the respondent's claim that information derived from the returns, related to other donees of gifts from the decedent, could provide her with the ability to ascertain whether they had knowledge of the gifts made by the decedent to her.

Finally, although finding the information relevant, the court denied the respondent's request for the production of documents related to the purchase, ownership and insurance coverage of the artwork, based upon the petitioner's representation that he had produced all such documents and had no other such documents in his possession, custody or control.

In re Klein, NYLJ, Dec. 24, 2014, at p. 22 (Sur. Ct. New York County).

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is past-Chair of the New York State Bar Association Trusts and Estates Law Section, and a past-President of the Suffolk County Bar Association.

Diamond Life (Continued from page 11)

the field, the wind always seemed to blow stronger at second base, and the wind always seemed to be blowing against you.

"Second base, guys," bellowed Plaia. "One way to look at it is you're halfway home. Another way is to realize that you're ONLY halfway home and you've still got a lot of work left to do."

Coach Plaia went on to explain that one only gets this far because they have what it takes to get beyond initial success, to get an edge and move ahead. He also reminded us that often only one advances due to sacrifice (sometimes literally) of somebody else; in the baseball sense, a teammate.

Second base is about opportunity. You have to ask yourself, how do your opponents plan to stop you? Are they giving you the opportunity to take an aggressive lead, or perhaps even steal (legally, of course)? The point was, to get into scoring position you needed to pay attention to detail. Know your surroundings and sense opportunity. When the batter reacts to the pitch, what will you do? You've got to figure that out in advance, and be ready to act when opportunity knocks.

"Is there any sorrier word than *almost*?" asked our coach, as we stood at third base. To be sure, many a man wakes up on third base, mistakenly thinking that they've hit a triple. It's usually not that easy.

"To even be here, you've already been successful, but you still have not accomplished your ultimate goal," Coach said. "It's good, but it's not enough."

The goal, he explained, is to complete your journey by finding a way to get back where you started, but with the accomplishment of having contributed to the success of your team. After all, the team, as a family, is what the journey is all about, anyway, isn't it?

We walked the final 90 feet as a team. Coach looked down at the flat, rubber slab and nodded knowingly.

"This is where you want to be, boys," he said. "Nobody is gonna give it to you, you have to achieve it. If you do, then you'll always look back on your journey and smile. The two best feelings you'll have in life are when you earn something, and when you give something. So, if you're willing to give your teammates the opportunity to help you move ahead and you find a way to earn your way around all the bases, you will have achieved both. You'll be happy... and thankful. And, you'll be willing to give your right arm to get the chance to do it again!"

Thankfully, in baseball, as in life, the next opportunity is always right around the corner. I've always remembered that. With that, he had us lap the field twice to give his words a little more time to sink in.

We lost Coach Plaia a few years ago, but he leaves a legacy of dozens of young men who, hopefully, took his words to heart. He gave us the wisdom of a lifetime and he earned our undying respect. I'm pretty sure that made him very happy. While the journey is only 360 feet, it can sometimes take a lifetime to complete. It's always nice to be able to look back and smile.

Note: Hon. Bill Condon is an Oceanside High School 1977 graduate.

Plyler's Mandate (Continued from page 10)

of young people who unwittingly made Long Island their home.

While the tactics of the Hempstead School District were blatant, other Long Island school districts may innocuously deprive undocumented children of an education. "Many of the children are barred because their families cannot gather the documents that schools require to prove they are residents of the district or have guardianship." Although some would argue this is legitimate, these are "obstacles that contravene legal guidance on enrollment procedures the State Education Department issued in September, [2014]." The impasse has baffled parents, who say their scant resources have proved no match for school district bureaucracies. Required by law to attend school, children are nevertheless stuck at home, despite unrelenting efforts by their parents and others to prove that they are eligible. While school districts are well resourced, what if any recourse does a parent have to a representative or advocate for their child?

Advocacy and private representation is required to level the playing field. "Representatives Steve Israel, a Democrat, and Peter T. King, a Republican, both from Long Island, recently introduced legislation that would give districts emergency financing for new enrollees, an effort that Mr. Israel said was intended to relieve towns of the burden 'to raise taxes or cut other services because the federal government is pursuing humanitarian impulses.'"[8] Even with this funding "[s]chool districts [may] continue to be confused about their obligations under *Plyler v. Doe*." In contrast, innocent children have little guidance, resources and access to justice if denied an education within our jurisdiction. How can we provide an equal opportunity without equal representation?

Note: Cory Morris is a civil rights attorney, holding a Masters Degree in General Psychology and currently the Principal Attorney at the Law Offices of Cory H. Morris. He can be reached at http://www.coryhmorris.com.

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2. Erase Racism, *8 Key Facts about Long Island School districts* (Erase, 2010), accessible at: http://www.eraseracismny.org/storage/documents/education/ERASE_Racism-long-island-district-facts.pdf.
3. Russlyn Ali, Assistant Secy for Civil Rights, U.S. Dep't Educ, Charles P. Rose, General Counsel, U.S. Dep't Educ, and Thomas E. Perez, Assistant Attorney General, Civil Rights Div., *U.S. Dep't Justice, Dear Colleague Letter on the Rights of All Children to Enroll in Public Schools*, May 6, 2011, http://www.justice.gov/crt/about/edu/documents/plyler.php.
4. Benjamin Mueller, *Requirements Keep Young Immigrants Out of Long Island Classrooms*, N.Y. Times (Oct. 21, 2014), http://www.nytimes.com/2014/10/22/nyregion/rules-and-paperwork-keep-long-islands-immigrant-children-from-classroom.html.
5. Eric. T. Schneiderman - Press Release, *A.G. Schneiderman Secures Agreement With Hempstead Union Free School District To Ensure Equal Educational Opportunities For Students Regardless Of Immigration Status*, New York State Office of the Attorney General (Mar. 3, 2015), http://www.ag.ny.gov/press-release/ag-schneiderman-secures-agreement-hempstead-union-free-school-district-ensure-equal.
6. Soni Sanha, *supra* note 5.
7. *Plyler v. Doe*, 457 U.S. 202, 222 (1982).
8. Benjamin Mueller, *Requirements Keep Young Immigrants Out of Long Island Classrooms*, N.Y. Times (Oct. 21, 2014), http://www.nytimes.com/2014/10/22/nyregion/rules-and-paperwork-keep-long-islands-immigrant-children-from-classroom.html.