TARSHIS CATANIA LIBERTH MAHON & MILLIGRAM PLLC

attorneys and counsellors at law

Newsletter

Issue 15

Inside this Issue:

July 2009

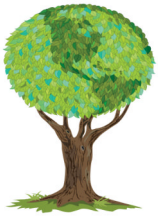
New Addition To Our Firm

Sally S. Benvie has joined our firm as an Associate. Ms. Benvie has years of experience working for a large, international law firm in New York City. She possesses a strong background in negotiating, structuring and drafting sophisticated corporate financial transactions. Sally will be will be working with our Family and Matrimonial Department as well as assisting in other areas.

Sally attended Mount Saint Mary College where she earned a Bachelor of Science with Honors in Accounting, *summa cum laude*. She received her J.D. *cum laude* from Pace University School of Law. Sally also worked for Tectonic Engineering Consultants in Highland Mills before earning her law degree.

HELP US GO GREEN!

At Tarshis, Catania, Liberth, Mahon & Milligram, we are conscious of our environment and have been looking for ways to save energy. We've revised office procedures in an effort to eliminate the use of paper and have started to replace our office lights with energy saving light bulbs.



Toward that end, we want to know if you would prefer to receive our informative newsletter via email. If you wish to have the newsletter emailed to you, please visit our website at www.tclmm.com and click on our Press Room page where you can submit your email address. Please also provide us with your name so we can update our database with the appropriate email address.

DO YOU NEED A COPY OF YOUR DEED?

Daniel F. Sullivan, Esq.

Recently, homeowners in the area have been solicited by various entities that announce that most people do not have a "certified" copy of the deed to their home. They further explain that, for a fee, they will procure an "official, certified copy" for you. It is actually not necessary to have a copy of a deed, much less a certified one, and, in fact, a copy can easily be obtained at the County Clerk's office for a small charge whenever required.

At a real estate closing, the Seller executes a deed to the Purchaser, giving a description of the real property conveyed. The deed is a written document, which is acknowledged before a notary public. It is then delivered to the Purchaser.

The deed is recorded in the County Clerk's office where the real property is located. The Recording Act provides a method by which a prospective purchaser of real property may be assured that the grantor (Seller) has title to the property to be conveyed. It is a way to stop someone from selling the very same interest in property numerous times. New York Real Property Law section 291 provides that a bona fide purchaser of real property is protected from competing claims if and only if they are the first to record their interest in the property.

The deed itself is photocopied and that copy is placed in the records of the Clerk. It is available to the public and is sorted by books (or libers) and pages of that particular book, in the order that the instrument was presented to the Clerk. The deed is stamped with a time and date and each page is numbered. The actual deed is returned to the buyer, and really only serves as a receipt to prove that the Clerk's records will show that a deed was recorded at a particular date and time and that a copy of the instrument can be viewed in a particular liber and page.

Built-In Gain Recognition for S Corporations Shortened for 2009 & 2010

Michelle F. Rider, Esq.,CPA

Business owners seeking to sell appreciated assets out of their S corporation that was converted from a C corporation are familiar with the 10 year post-conversion "waiting period" necessary to avoid the built-in gains tax. The built-in gains tax is often thought of as the tax due if the entire company is sold within the 10-year conversion time frame. However, this recognition period actually can operate to trigger tax resulting from transactions short of a full-blown sale of the business such downsizing, acting on survival decision, or disposal of unused assets to raise needed cash.

The American Recovery and Reinvestment Act (the "Recovery Act") signed by President Obama on February 17, 2009, provides temporary relief by shortening the built-in gain recognition period for S corporations for taxable years 2009 and 2010.

Under the Recovery Act, for a tax year beginning in 2009 or 2010, no tax will be imposed on the net recognized built-in gain of a converted S Corp if the seventh tax year in the 10-year recognition period precedes the year of the gain recognition (i.e. 2009 or 2010). Essentially, the Recovery Act relief allows for a shortened 7 year recognition period for gains recognized during the 2009 and 2010 tax years. If you have been holding off on selling appreciated assets out of a converted S corporation or have other reasons to sell off appreciated assets out of a converted S corporation, now may be the time to take advantage of this relief. Contact Steven Tarshis, Esq. or Michelle Rider, Esq. CPA for assistance with your corporate tax or transactional needs.

If one loses or misplaces the recorded deed it is of no consequence. The ownership of the real property is proven by what is in the County Clerk's records. It is not like a title certificate for a motor vehicle, and does not have to be presented when the property is sold.

If you require information regarding the ownership of your real property, the closing statement sent to you after the closing by your attorney will have most of the information that one would need. A copy of the title insurance policy will clear most title issues that may arise. One does not need to obtain a copy of the deed for a fee from the entities that solicit unsuspecting owners through the mail. If you need information on your property, a call to a real estate attorney will answer your questions.

Legislative & Regulatory Update

It's been a busy 6 months!

By Kathy Walsh

The first 6 months of Calendar Year 2009 has seen a flurry of revisions and changes. Employers should be aware that these changes impact their businesses as well as their employees and potential employees. Many of these changes were a long time coming but it seemed as if the flood gates opened and everything was finalized at once. Below are just some of the legislative and regulatory changes that have been enacted within the first 6 months of 2009:

* **FMLA—January 2009** The new regulations allow employers more control over when employees can take leave. As expected, the new regulations cover the enacted leave benefits for family members both seriously injured or ill service members and National Guard and Reserve members who have been called to service. These are the first significant revisions to the FMLA regulations since the law was enacted 15 years ago and will affect all employers subject to the FMLA. It further goes on to address light duty, employee notice, medical certifications and fitness for duty certifications.

* **Corrections Law Posting Mandate—February 2009** The law requires a copy of NYS Corrections law Article 23-A to be posted in the workplace. This article relates to persons previously convicted of a crime. It also requires employers to give a copy of Article 23-A to applicants for whom a criminal background check involving a consumer report has been requested in addition to the notices already required by the federal Fair Credit Reporting Act.

* **COBRA Subsidy—February 2009** The economic stimulus package signed by President Obama includes a subsidy of COBRA premiums for up to nine months for certain employees involuntarily terminated between September 1, 2008 and December 31, 2009 and their spouses and dependents. Among other things, it provides a 65% subsidy of COBRA premiums for eligible beneficiaries which will be paid for by the employer. The employer bearing the burden of the subsidy can receive an offset of its payroll taxes.

* **MTA Tax - March 2009** The Metropolitan Commuter Transportation Mobility Tax (MCTMT) is a new tax imposed on certain employers and self-employed individuals engaging in business within the Metropolitan Commuter Transportation District (MCTD). The MCTD includes New York (Manhattan), Bronx, Kings (Brooklyn), Queens, Richmond (Staten Island) , Rockland, Nassau, Suffolk, Orange, Putnam, Dutchess, and Westchester counties. The tax applies to employers required to withhold New York State income tax from employee wages and whose payroll expense exceeds $2,500 in any calendar quarter and individuals with net earnings from self-employment allocated to the MCTD that exceed $10,000 for the tax year. (This includes partners in partnerships and members of an LLC treated as a partnership.) The tax rate for is .34% of an employers payroll expense for employees employed within the MCTD and for individuals, .34% of net earnings from self-employment.

* **New I-9 Form— April 2009** Employers will no longer be able to accept expired documents for employment eligibility verification. Prior to this change, employees could submit expired passports and other documents, but that's being stopped because expired IDs are easier to forge. Also, three "List A" documents will be removed: the "Temporary Resident Card" (form I-688) and "Employment Authorization Cards" (Forms I-688A and I-688B). The United States Citizenship and Immigration Services no longer issues those cards, and any that are in circulation have expired by now. Instead, people are issued Form I-766, which remains on the list.

…… and, this isn't everything and we have just begun the summer months. It's a lot for an employer to handle. That's why seeking advice from one of our experienced Employment Attorneys can help you wade through the quagmire of legislation. Our attorneys in this practice group have extensive experience in such areas as affirmative action compliance, state and federal employment litigation, wage and hour disputes, sexual harassment, Family Medical Leave Act and Americans with Disabilities Act claims. We can also advise on drafting agreements, handbooks and policies. Please contact our employment attorneys, Richard M. Mahon, II, Esq. or Julia Goings-Perrot, Esq. with any questions

WHAT HAVE WE BEEN UP TO?

RECENT SETTLEMENTS AND VERDICTS

* The City of Newburgh, represented by our firm, was granted a default judgment in its case against a developer who failed to pay back a loan given by the City. The developers could not show there was a reasonable excuse for not answering the City's lawsuit. The result was the developer has to pay back the loan as well as interest amounting to in excess of $1.25 million.

* We obtained a personal injury award for one of our clients of $1.2 million dollars. The client, a 19 year passenger in a vehicle that was in an accident, sustained brain injuries.

* Representing another individual, the firm defeated a defendant's request for a pre-verdict decision in a case of a client who fell on ice and fractured her femur at a hotel establishment.

* The firm was successful in obtaining a discontinuance of a malpractice case against one our clients prior to trial. Plaintiff alleged medical malpractice for an ankle injury that was subsequently dismissed based on our attorney's pre-trial research and extensive preparation.

* In the representation of a hospital, a medical group and an individual physician, the firm defeated a claim of medical malpractice. Plaintiff, in this case, was a 58 year old female who presented to the Hospital with an extremely low sodium level. After several days she experienced an unexpected and unanticipated increase in her body's chemistry which eventually lead to her death. Plaintiffs had asked the jury to award them nearly $20 million dollars, but received nothing. The jury returned the verdict in favor of our client after 28 minutes of deliberation.

Safe Harbors on the Hudson and Horizons on the Hudson FitGirls

On May 17, 2009, Michelle Rider, Esq. participated in the Safe Harbors on the Hudson 3rd annual Off-Broadway 5K with a team of 10 girls from our newly - formed Horizons on the Hudson FitGirls chapter. FitGirls is a program that started in the Boston area in which 4th and 5th grade girls are coached to prepare for a 5K while at the same time conducting a book group discussion. The program promotes fitness, literacy and philanthropy. The HOH FitGirls chapter is the first in our community of this kind. The group won a trophy from Safe Harbors for having the most participants from any of the local schools, and one of the girls placed third in the 14 and under age group!

Pictured are co-leaders Michelle Rider and Terry Vidi and 6 of the HOH FitGirl Participants

How to Handle the Transition from Owner to Employee

Michelle F. Rider, Esq., CPA

In handling clients' business sales, the issue of "seller's remorse" frequently rears its head both prior to and following the sale. It is extremely difficult for long-time business owners to cut the cord of ownership, even when their hearts tell them that it's the right time or price at which to sell. This sentiment is complicated when, as is often the case, the former business owner stays on for either a short or long term as an employee or consultant for the new owner.

Inevitably, the new owner will not run the business the way that the seller did. Often, the skills, vision and strategic direction of the before- and after-owners can be dramatically different. If you are the seller, it is important to remember that the buyer of your business saw something valuable in your business but probably also saw something that, in his or her mind, was an unexploited opportunity. Thus, it is very natural for the new owner to try and take the business in new directions or try out new strategies.

Continued on page 6

Insurance Policies: When, How and What You Tell Your Insurer Can Be Important

Joseph A. Catania, Jr., Esq.

Most people think of their "insurance company" as their agent or broker. They are not necessarily one and the same. Most people also think of their insurance company as a single entity such that, if they give it information, that information applies to all of the various policies issued by the same company. Unfortunately, that is not true, and more than once this mistaken belief has trapped the unwary personal or business insurance consumer.

A recent holding of New York's highest court, the Court of Appeals, Sorbara Const. Corp. v. AIU Insurance Co, 11 NY 3rd 805; 868 N.Y.2d 573(2008) makes the point. There, a contractor gave notice, in timely fashion, to its worker's compensation insurer of an employee's injury on the job. The contractor had both worker's compensation insurance and excess liability insurance through the same insurance company.

Over a year later, an action was brought against the owner of the property under the Labor Law for the worker's very serious injuries. The construction company, now appreciating the severity of the employee's injuries, notified the same insurance company under the excess liability policy it had issued to the contractor. The insurance company denied coverage under the excess policy, claiming that the contractor had failed to provide notice of the occurrence "as soon as practicable", as required by the policy language.

The contractor and the insurance company took the dispute to court. The contractor argued that it had told the insurance company about the accident when it provided notice under the worker's compensation policy. Even though both the compensation policy and the excess policy were issued by the same insurer, the Court of Appeals held that each policy imposes a separate contractual duty to provide notice. The court reasoned, the notice to the carrier under its worker's compensation policy was insufficient to satisfy the notice requirement under the excess general liability policy and, therefore, the insurance company did not have to provide coverage under that policy because of the contractor's failure to abide by its obligations to give timely notice under the policy.

In this case, the Court also reaffirmed the New York rule that it didn't matter whether or not the insurance company suffered any prejudice because of the late notice under the excess general liability policy. Indeed, in all likelihood it did not suffer any prejudice, as it clearly knew about the accident and could have done whatever investigation it desired at the time it was first told about the accident.

It is cases such as this which prompted the New York State Legislature to change the insurance law in matters involving a disclaimer based on late notice. Under current law, for policies issued after January 1, 2009, the outcome in this case might have been different. The insurance company still would have had a right to disclaim, but only if it showed that it suffered substantial prejudice because of the late notice to it.

BUSINESS TIP:

Whenever there is an occurrence affecting you or your business that might give rise to a claim, it is imperative that you place all applicable or potentially applicable insurers on notice separately. Consult the notice language of each policy of insurance. Often these policies contain specific addresses to which notices should be sent. The circumstances of the occurrence should be detailed in writing and sent to the insurance company, referencing each policy by the name of the insured, the policy numbers and policy effective dates. The description of what occurred should include the names of the principal actors, the date or dates of the occurrence and a description of what happened as best you know at the time. This information should be sent certified mail, return receipt requested, so that you have proof of notice given to the insurance company. DO NOT rely on providing notice to your insurance agent alone. On the other hand, it is good practice to provide that same information to your insurance agent with the following admonition: "Please see to it that the enclosed notice of occurrence is timely forwarded to any and all of my (or the companies', as the case may be) insurers under all applicable policies". Once again, that communication should be in writing and certified, return receipt requested. This redundancy won't hurt.

When it comes to insurance policies and coverage issues, the devil is often in the details. For help with this and other legal issues affecting you or your business in this complex legal environment, don't hesitate to call TCLMM for advice and counsel.

Independent Contractors vs. Employees
You think you know the difference?

Julia Goings-Perrot, Esq.

Many businesses, large medium or small, have or desire a flexible workforce. This flexibility may be in the form of part-time work, workers setting their own schedule, semi or completely autonomous, etc. Businesses often classify these types of workers as in dependent contractors. Independent contractors are responsible for their own tax withholding and do not receive any benefits from the employer (such as health insurance) or from the government based upon employer contributions (such as unemployment benefits), among other things.

Since independent contractors do not enjoy many of the protections provided by law for employees and because of perceived abuses by employers, federal and state government agencies are taking a closer look at whether an employer is correctly classifying their workers.

The first thing to remember is that it does not matter how the employer classifies the worker, even if the worker has agreed or there is a written contract. The government will look deeper into the actual relationship and duties of the worker to determine whether the worker must be treated as an employee with all the related protections.

Both federal and state agencies have developed criteria to assist employers (and auditing government agents) to determine the correct classification of a worker. These criteria are very similar among the agencies, and boil down to 3 distinct categories:

1. **Behavioral:** Does the company control or have the right to control what the worker does and how the worker does his or her job?
2. **Financial:** Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.
3. **Type of Relationship**: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

The key is to look at the entire relationship, consider the degree or extent of the right to direct and control, and, finally, to document each of the factors used in coming up with the determination.

Our employment law department will be happy to assist both employers and employees in determining the correct employment status. You may contact the TCLM&M attorney with whom you normally work, or Julia Goings-Perrot.

Continued from page 4

How to Handle the Transition from Owner to Employee

The important message for selling business owners is to prepare themselves for this experience, both economically and emotionally. Be clear about what you are willing to do for the new owner and for how long. Issues like level of supervision and direction, nature of tasks assigned, in-person vs. telephonic availability and termination rights are critical terms of any post-closing consulting or employment arrangement. The nature of the arrangement must be analyzed to determine whether you will be viewed as an employee or an independent contractor by the taxing authorities. Furthermore, if a portion of the purchase price is in the form of an "earn-out" where you will be paid a portion of the purchase price only if the business performs, you may want to insist on having a say in certain critical operational decisions during the earn-out period.

Do not let the emotional aspect of your desire for post-sale control cloud the terms of the economic deal you are making to serve as a consultant or employee. Very often, the seller will be willing to stay on through the transition – and buyers usually want this – to ensure success of the business. Too often, the terms of that assistance are loose or undefined. This can lead to misunderstandings and bad feelings by all parties post-sale. When there are other ongoing economic arrangements between buyer and seller, such as seller financing or lease arrangements, these bad feelings can flow over and effect those economic arrangements. It is important that you do not, out of sentimental attachment to the business or a desire to "keep things simple", fail to properly clarify and document your post-closing arrangements.

Contact Michelle Rider, Esq., CPA or Steven Tarshis, Esq. for assistance with all of your transactional needs.

CONTRACT LAW UPDATE

Pouring the Foundation for an Enforceable Indemnification Clause

Michael E. Catania, Esq.

Generally speaking, an indemnification right is the ability of one party to recover from another monies paid to third parties for injuries or other liabilities. A contractor's ("C") right to indemnification from one of its sub-contractors ("SC") usually arises from an "indemnity clause" in the contract between the two parties. This contractual provision allows a C to recover monies it is forced to pay as a result of a lawsuit brought against it by a SC's employee. Construction law indemnification in New York, however, cannot be discussed without reference to New York's Workers' Compensation Law Section 11 as it is one of the major reasons why a C must concern itself with indemnification in the first place.

Section 11 prohibits employees from seeking recovery from their direct employer for job-related injuries. Specifically, an employer in NY who secures workers' compensation for its employee is insulated from suit by the injured employee because the employee will receive workers' comp benefits.[1] However, an employee injured at a job site, in addition to receiving workman's compensation, may be able to bring suit against the person or entity that hired his employer, i.e., a property owner or contractor. When this happens, does an owner or contractor have a legal right to look to the S.C. who employed the injured worker for indemnification? Yes, provided the plaintiff suffered from a "grave injury."

A "grave injury" as defined in Section 11, includes only injuries which result in death, blindness, loss or amputation of an arm or leg or the loss of multiple fingers. The list contained in the Section 11 is exhaustive and strictly interpreted. For example, in Castro v. United Container Machinery Group, Inc., 96 N.Y.S.2d 398 (2001), the New York Court of Appeals, the state's highest court, ruled that a loss of multiple fingertips did not qualify as a "grave injury" as the fingers were still in place.

What about the C who is sued by an employee of one of its sub-contractors for a job-site injury where the injury does not fall under the "grave injury" exception outlined above? The C may be liable to the plaintiff for his injuries without any statutory or common law rights of indemnification as to plaintiff's employee. What strategies are available to the contractor to remedy this situation? Can it create a contractual right of complete indemnification from its sub-contractors where such a right does not exist at law, i.e., where there is no "grave injury." Are such clauses enforceable in New York? Until recently, the answer was an emphatic no.

The Court of Appeals, in Itri Brick and Concrete Corp., v. Aetna, 89 N.Y.2d 76 (1997), held that where an indemnification agreement between a C and its SC contemplated a complete, rather than partial, shifting of all liability from the C to the SC, it is unenforceable. The Court found that as full enforcement of the agreement would afford the GC indemnification for its own negligence, in addition to that of the sub-contractor, it was a violation of General Obligation Law Section as against public policy. G.O.L. 5-322.1 makes any contractor agreement involving the construction, repair and/or maintenance of a building which purports to indemnify or hold harmless one party for liability for damage arising out of bodily injury to persons resulting from the negligence of that same party void and unenforceable as it is against public policy. In layman's terms, it would not be fair to let a C, usually in the better position to dictate the contract, shift the burden of its own negligence onto other contractors.

A recent decision opens the door for valid partial indemnification clauses that allow the C to recover from its SC for money it may have to pay a plaintiff because of SC's and/or other contractor's negligence only? Theses are called "partial indemnification" agreements and were upheld by the Court of Appeals in the recently decided case of Brooks v. Judlan Contracting, Inc., 11 N.Y.3d 204 (2008). The laborer in Brooks worked for a SC on a highway overpass construction project. A cable, allegedly installed by the C, became loose and caused the laborer to fall and injure himself. The laborer, bared from bringing suit against his employer under the Workers' Compensation Law, instead brought an action against the C. Because he did not sustain a "grave injury", the C could not seek common law or statutory indemnification from the SC. However, the contract between C and SC contained a "partial indemnification" clause under which C sought recovery from SC for damages C may have to pay the laborer because of SC's negligence. Specifically, the indemnification clause provided for recovery from the SC to the fullest extent "permitted by law". The SC argued that such a clause was broad enough to encompass the C's own negligent conduct, and was therefore void as against public policy. The Court of Appeals rejected this argument and upheld the indemnification clause. Therefore, the SC in Brooks was liable to the C for its own portion of fault.

continued on last page

[1] Whether, and to what extent, a particular worker is actually deemed by the courts an "employee" is a complex question and warrants separate treatment.

TARSHIS CATANIA LIBERTH MAHON & MILLIGRAM PLLC
attorneys and counsellors at law

One Corwin Court
Newburgh, New York 12550
(845) 565-1100

100 Red Schoolhouse Road Suite C-12
Chestnut Ridge, New York 10977
(845) 426-7799

Presorted
Standard
U.S. Postage Paid
Newburgh, NY
Permit no.
8604

www.tclmm.com

Attorney profiles, legal articles and much more.

Continue from page 7

What, if any, impact does a legally enforceable "partial indemnification" agreement have on the overall exposure of a C for injuries sustained by one of its SC's employees? Assume a jury awards $100,000 in damages to a plaintiff in a construction accident case. Further, assume the jury apportions liability among the defendants at 30% for the SC and 70% for the C. Although the C would remain responsible to the plaintiff for the entire $100,000 judgment, the indemnification agreement permits the C to recoup $30,000 back from the SC.

Attorneys at Tarshis, Catania, Liberth, Mahon & Milligram, PLLC, not only have the expertise and experience to successfully litigate construction law cases, they also have the knowledge and resources to anticipate future business litigation pitfalls and to draft contracts to address them in its client's best interests.

WE OFFER A FULL RANGE OF COMMERCIAL AND LITIGATION LEGAL SERVICES INCLUDING:

- Arbitration & Mediation
- Bankruptcy, Creditors' Rights & Corporate Reorganization
- Business, Corporate, Partnership & Limited Liability
- Construction Litigation
- Criminal Defense Vehicle & Traffic Law
- Employment and Labor Law
- Environmental & DEC Issues
- Estate Planning & Elder Law
- Estate Administration & Probate
- Financing and Banking Law
- General & Commercial Litigation
- Health Law
- Intellectual Property Law
- Malpractice and Professional Negligence Defense
- Matrimonial & Family Law
- Municipal Law
- Personal Injury Litigation
- Physician, Hospital & Health Care Organization Law including Compliance, Licensure & Joint Ventures
- Real Estate:
  - Commercial & Residential Leases & Closings
  - Development & Permitting
- Tax Law