TARSHIS CATANIA LIBERTH MAHON & MILLIGRAM PLLC

attorneys and counsellors at law

NEWSLETTER

Issue 16

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February 2011

FOUR NEW ATTORNEYS JOINED OUR FIRM IN 2010

Joseph G. McKay joined the firm in January 2010 as Special Counsel. Mr. McKay brings over fifteen (15) years of experience to the firm in a variety of practice areas including commercial litigation, real estate transactions, municipal law, municipal litigation and civil litigation. He received his J.D. from Touro College and his B.B.A. from Pace University. Mr. McKay is a resident of Washingtonville, N.Y. and has served on the Washingtonville Zoning Board of Appeals.

Timothy G. Tuttle joined the firm in June 2010 an associate. Timothy received his B.S. in Political Science from Southern Connecticut State University and his J.D. from Hofstra University School of Law. He interned at a State Farm In-House Counsel law firm in Jericho, NY prior to coming to TCLM&M. His practice area will be concentrated in litigation.

Ari I. Bauer joined the firm in June 2010 as an associate. Ari received his B.S. in Finance/Management, *summa cum laude*, from the State University of New York at Albany and his J.D. from Fordham University School of Law. His practice areas will be general and commercial litigation.

Kruti M. Patel joined the firm in November 2010 as an associate. Kruti received her B.A. in Economics from New York University and her J.D. from Quinnipiac University. Ms. Patel also received her Masters of Letters and Law (LLM), Taxation from Temple University Beasley School of Law. Her area of law will be primarily Transactional Law including trusts and estate planning and administration, tax, contracts, commercial transactions and corporate law.

Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act 2010

Steven L. Tarshis

On December 18, 2010, President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("2010 Act") legislation into law. The 2010 Act extends the 2001 tax cuts for two (2) years. It temporarily increases estate, gift and generation skipping tax exemption amounts, and temporarily reduces the estate tax rate.

Exemptions and Rates in 2011 and 2012

The Act provides for a $5,000,000 unified estate and gift tax exemption in 2011 and 2012, and a thirty-five (35%) percent tax rate for estates and gifts exceeding the $5,000,000 exemption. The generation skipping transfer ("GST") tax exemption amount is also set at $5,000,000 and a thirty-five (35%) percent rate for the next two (2) years. The GST provides for a tax when an entire generation is skipped. For example, a gift to a grandchild. The increase in the gift tax exemption to $5,000,000 provides planning opportunities for clients who may have used all of their $1,000,000 gift tax exemption who desire to make additional lifetime gifts.

The so-called "step up in basis" rules are renewed for 2011 and 2012. If someone dies in 2011 or 2012 the step up in basis allows for a cost basis adjustment of a decedent's assets to date of death fair market value. These rules had been substantially limited for estates where a decedent died in 2010.

Utilization of Unused Exemption on First Death

The 2010 Act also provide for a portability of a deceased spouse's unused estate tax exclusion amount. Prior law provided the estate tax exemption of the first to die was a "use or lose it" proposition. For deaths occurring in 2011 and 2012, a surviving spouse may add their deceased spouse's unused exemption amount to the surviving spouse's estate tax exemption. For example, if a spouse had utilized $3,000,000 out of the $5,000,000

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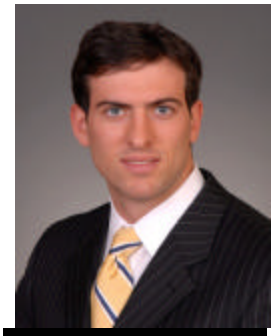
DOCUMENT RETENTION: PROTECTING YOUR BUSINESS



Aryeh Lazarus

In today's fast-paced business world, electronic information such as e-mail, instant messages, word processing documents, spreadsheets and data bases are being created and stored at an overwhelming rate. In fact, recent studies show that more than 90% of all documents produced in the last decade are in electronic format.

With the phenomenon of electronic information expanding daily, a company's or business's ability to effectively and efficiently manage all of this information can pay extreme dividends in the long run. With the severe sanctions, including criminal penalties, provided for by the law for tampering and destroying documentation, the conventional "when in doubt, throw it out" method to records management will no longer suffice.

"Spoliation" in the Electronic Era

The long-standing doctrine of "spoliation" provides the Courts with the power to impose sanctions and other penalties for the act of destroying or suppressing evidence relevant to a case. Application of the spoliation doctrine to electronic documentation was solidified by the holding in Residential Funding Corp. v. DeGeorge Financial Corp. 306 F.3d 99 (Conn. 2002). In Residential Funding, a Federal Court in the Second Circuit applied the doctrine of "spoliation" to remand a $96 million verdict where the Plaintiff failed to produce emails that resided on old back up tapes. The Courts have consistently followed the precedent established in Residential Funding and have imposed severe sanctions for failures to properly retain and manage electronic documentation.

In light of these recent holdings, a company or business would be remiss to ignore the risks of a haphazard management policy regarding document retention. A properly crafted, implemented and enforced document retention policy can help provide valued protection in the event of audits and document subpoenas and insulate your company from the pitfalls associated with document production in the litigation context.

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COURT DECISIONS HIGHLIGHT THE COMPLEXITY OF CONSTRUCTION INSURANCE CONTRACTS

Joseph A. Catania, Jr.

In the case, Regal Construction Corp. v. National Union Fire Ins. Co. of Pittsburgh (July 2009), the Court held that a construction manager (CM) is an additional insured on the contractor's liability policy, even though the accident arose out of the CM's operations and not the contractor's.

The general contractor's general liability and auto liability policies were endorsed to name the CM hired by New York City on a Riker's Island renovation project, "Only with respect to liability arising out of the prime contractor's ongoing operations performed for that additional insured". When the contractor's employee sued the CM for personal injuries, the CM tendered its defense to the contractor's insurance company. The twist here was that the CM, in order to prepare the site for a City inspection, had performed certain work that would otherwise have been the contractor's responsibility. It was alleged that the work performed by the CM caused the worker's accident.

The insurance company denied coverage to the CM because the endorsement naming it an additional insured required that the work arise out of "operations performed by or on behalf of contractor in the performance of work under the agreement". The agreement clearly called for the contractor, not the CM, to do the specific work involved. The contractor intended to do so, but on a different time frame. The CM, acting on its own initiative and for its own reasons, took that job upon itself.

The Court had to wrestle with the question of the scope of a general contractor's "operations" for purposes of triggering an additional insured endorsement where the actual work was done by a different agent of the owner, in this case, the CM. The Court found that it was, contractually, the contractor's obligation to perform the work. Therefore, the fact that the CM actually carried out that part of the work did not deprive it of its additional insured status. Here, the Court found a sufficient nexus between the work performed by the CM and the "operations" of the contractor because, even though the CM performed the work, it was, contractually, the contractor's work to accomplish in the first place and so the work performed by the CM "arose out of the contractor's operations" entitling the CM to coverage under the contactor's policy of insurance. This same issue can arise on projects that are traditional design, bid and billed. For example, AIA contracts and general conditions often allow the owner to perform work that would otherwise have been the responsibility of the general contractor. Does the interpretation by the court in this case provide a windfall to the insurers of the owner or the construction manager who are typically additional insureds on a contractor's policy by shifting the coverage to the contractor's insurer, even though the owner or the construction manager actually performed the work that resulted in the accident?

In another matter, the State's highest court continued its consistent and expansive reading of additional insured endorsements in favor of coverage. In Kassis v. Ohio Casualty Ins. Co., decided in June of last year, a personal injury lawsuit once again resulted in the beneficiary of the additional insured endorsement tendering its defense to the named insured's insurance company when it was sued .

This policy contained a "blanket" additional insured endorsement. These endorsements are used when the named insured is frequently asked to add other entities as additional insureds to its own policy, a circumstance well known in the construction industry, as it is required by most owner/contractor contracts. The blanket additional insured endorsement relieves the insured of the administrative burdern of obtaining a specific endorsement each and every time it is required. This is important to contractors, not only from an administrative standpoint, but also because it is the type of requirement that easily might be overlooked in the intensity of preparation of bids and commencement of the work after acceptance. If the contractor neglects to add the additional named insured by specific endorsement, it may be in breach of the contract between it and the owner, CM or General Contractor, as the case may be. The blanket endorsement automatically covers that circumstance. Typically, the endorsement limits the additional insured status to those for whom the insured is "performing operations" and, therefore, terminates once the project is completed.

The Kassis decision found that the contract language between the insured (here, a tenant) and the additional insured (the landlord), required the tenant to obtain CGL insurance "for the mutual benefit of landlord and tenant" and that this designation was sufficient to make the landlord an additional insured. It found it was the intent of the parties that the landlord should enjoy the same protection as the named insured. Thus, the blanket additional insured endorsement was triggered and the tenant's policy found to cover the landlord.

These issues frequently are of great practical consideration.

Recently, our firm handled a matter involving a general contractor, who was sued under New York State Labor Law for personal injuries sustained by an employee of a subcontractor on a construction site. There, the client's policy of insurance

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Tax Relief, Unemployment Insurance Reauthorization and the Job Creation Act 2010

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exemption amount, the remaining $2,000,000 amount over the surviving spouse's exemption. For example, a husband and wife who have utilized their combined gift tax exemption of $2,000,000 prior to 2011 will now have an additional exemption of $4,000,000 each. Note, however, that since the exemption relates to a unified credit for both gift and estate that to the extent the gift tax exemption is utilized it will reduce the estate tax exemption at death. The exclusion for gifts to individuals remains at $13,000. To the extent a donor limits his/her gifts of $13,000 for a gift of a present interest per donee, the donor does not have to file a gift tax return.

Portability by itself should not be relied upon for utilization of the first to die's estate tax exemption because of the loss of the portability if the surviving spouse remarries and is later widowed again. The use of the credit shelter trust remains a necessity in estate tax planning. At the first spouse's death the credit shelter trust protects appreciating assets from estate tax at the second spouse's death. It will also provide protection of those assets from the reach of the surviving spouse's creditors. Portability does not apply to the GST tax, so in order to fully leverage the GST exemptions of both spouses for GST trust planning, it will still be necessary to create a trust at the first spouse's death.

Rates, Exemptions and Deaths in 2010

The estate tax exemption is $5,000,000 for deaths occurring in 2010 and the top estate tax rate is thirty-five (35%) percent. Estates may elect, however, to be subject to the rules in effect for most of 2010, which was the modified carryover basis system and no estate tax. For deaths occurring after December 31, 2009 and before December 17, 2010, if estates do not elect the new estate tax rules, estate tax returns will be due on September 17, 2011, and heirs have nine (9) months from December 17, 2010 to disclaim an interest in property passing to them from a decedent who dies during that period. For deaths occurring in 2010, the GST exemption is $5,000,000 and tax rate is zero (0%) percent. The lifetime gift tax exemption in 2010 remained at $1,000,000 and the top gift tax rate remained at thirty-five (35%) percent.

Additional Planning Methods Still Available

The 2010 Act does not contain restrictions on the Grantor Retained Annuity Trust ("GRAT") or Grantor Retained Uni-Trust ("GRUT"), highly effective planning techniques that take advantage of the current historically low interest rates to make gifts of appreciating assets. It also did not remove the ability to utilize various valuation discounts for transfers of closely held family businesses.

The 2010 Act also includes other important tax options including:

a. Extension of the current income tax rates (with a top rate of thirty-five (35%) percent on ordinary income and fifteen (15%) percent of long-term capital gains).

b. Alternative Minimum Tax patch for 2011 and 2012.

c. Reinstatement of many business tax breaks that expired at the end of 2009.

d. Reinstatement of ability to make tax free distributions from an IRA to a charity of up to $100,000 per year, per taxpayer for taxpayers 70 1/2 or older.

Even though it may appear that the higher exemption amounts and lower tax rates simplify overall estate and wealth planning, the intricacies of the new law require careful review of each individual plan to ensure it is appropriate by reason of these new rules and the specific circumstances for each taxpayer. The changes are temporary and will once again change if no action is taken in two (2) years.

Mr. Tarshis holds a L.L.M in Taxation and practices primarily in the following areas: Tax, Health, Business Transactions, Real Estate and Bank Financing, Business Succession, Estates and Trusts. He is admitted to practice in New York State, U.S. Tax Court, U.S. District Courts in New York and Wisconsin, the Second Circuit Court of Appeals, U.S. Tax Court and the U.S. Supreme Court.

DOCUMENT RETENTION: PROTECTING YOUR BUSINESS

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Creating such a policy is the first step in being prepared to swiftly and competently respond in the event the dreaded phone call comes in.

Creating a Document Retention Policy

Oftentimes, your business's structure will dictate the form and focus of your documentation retention policy. Recognizing where and how your electronic information is created, stored, archived and destroyed will lay the foundation for the method of implementing a document retention policy.

At the outset, it is important to understand what documents to keep by looking first to the type of record. Employment records, accounting/tax documents and electronic documentation may each require an independent policy of retention on the length of time to keep the documents. It is paramount to understand the legal requirements, as well as the business requirements, of each and tailor the policy to address the specific types of documentation and their record-keeping requirements.

For example, it is common for a generic retention policy to provide for the destruction of e-mails after ninety (90) days. However, certain regulations may require you to maintain e-mails for a period of several years. In addition, since the Statute of Limitations on certain actions can run for multiple years, documents which are relevant to any such action should be kept beyond that period. Therefore, it is important to develop a document retention policy that addresses the applicable rules and regulations and also meets the needs of your specific organization and industry.

Perhaps the most critical element of any document retention policy relates to how data, both physical and electronic, is disposed of. This includes the procedure by which paper records are to be shredded, e-mails deleted, and/or how any other electronic information is purged from the network. Likewise, it is important to identify and state actions that are associated with the policy, such as how the network will automatically delete emails more than X days old. Additionally, the policy should define and identify disposable documents and documents that don't need to be retained, such as duplicates or "trivial" documents. By disposing records in accordance with these mandates, your company's potential liability for discovery sanctions is severely limited and even possibly eliminated entirely.

Lastly, in the event litigation arises, it may be necessary to prevent certain documentation from being destroyed in accordance with the policy. It is important to establish guidelines and processes for specific exemptions to the document retention policy in the wake of pending or anticipated litigation. Once again, depending on the business structure, size and method of document retention, provisions of this sort will differ greatly.

Enforcement

The mere existence of a policy is insufficient to provide adequate protection in the wake of litigation. It is necessary that you audit the program regularly to ensure the program has been implemented correctly. Additionally, as the legal and business requirements are ever-changing, it is crucial that the policy stays up-to-date and is modified accordingly to effectively address these changes.

While creating and implementing an effective records retention policy, including one for electronic information, can be difficult, it is an extremely helpful tool in managing your business information. Under the policy, you will understand how and where the information is stored which will allow you to retrieve it should the need ever arise. Furthermore, an appropriately conceived and managed retention policy permits your business to conserve resources by freeing up valuable storage space and avoiding preservation of boundless amounts of information, while still fulfilling your legal obligations. Armed with this policy, you will insure that your company will not be implicated in the next line of cases that enforce the harsh reality established by Residential Funding.

No matter the size of your company or business, or the industry which you serve, the attorneys at TARSHIS, CATANIA, LIBERTH, MAHON & MILLIGRAM, PLLC, can help you craft a document retention policy that is customized to effectively and efficiently manage your business needs and protect your legal interests.

CONTRACT LAW UPDATE

Michael E. Catania, Esq.

The Federal Court decision of Industrial Window Corp, v. Federal Insurance Co. should serve as a warning to all N.Y. contractors: read the documents referenced in your contract.

It is common for a contract to have what is called an "incorporation clause." An incorporation clause binds the contracting party to the terms contained within the project's prime contract, i.e., the contract between the owner (or PM/CM) and the general contractor. Whether you actually read the referenced Prime Contract is irrelevant, as you are assumed to have knowledge of its contents [1]. Just image the following scenario:

You are a framing subcontractor who has been awarded a sizeable bid on a New York City Construction Project. Your contract requires you to submit, and have approved, a construction plan to the MTA. The MTA, however, has concerns that your machinery may exceed the load bearing capacity of nearby subway structures. No problem, you work closely with your GC and come up with a MTA acceptable, but more expensive, wall installation method. As for the additional cost, some $100,000, you make sure to have a change order for the new installation approved by the GC. You complete the job, and with the approved change order in your hands, go looking for your $100,000. If the GC refuses to pay you, for whatever reason, you should have no problem recovering from the project's owner/surety, right? Not so fast. What about the prime contract? Did you read it? Did you comply with its terms and conditions in addition to those contained in your contract?

I Industrial Window did not and, as a result, it never knew that the prime contract required all change orders to be signed off by the contractor and owner. As a contractor's failure to comply with such a contractual provision is fully enforceable in N.Y., the Court barred Industrial Window from recovering from the owner or its surety for the extra work [2].

As Industrial Window found out the hard way, failure to read incorporated contract documents can result in a significant financial lose. This principle is applicable to General Contractor's as well. Many "prime contracts" incorporate the Owner's surety agreement with the bonding company. If a GC wants to go after a surety for monies owed, and never complied with the terms of the surety contract referenced in its agreement, its claim may be barred.

Learn from Industrial Windows mistake. Obtain and read the contracts and documents incorporated by reference in your agreement. If you have questions, the attorneys at Tarshis, Catania, Liberth, Mahon & Milligram, PLLC can answer them.

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[1] Sorenson v. Bridge Capital Corp., 52 A.D.3d 265 (1st Dept. 2008).

[2] F. Garofalo Electric Company v. New York University, 270 A.D.2d.

RECENT SETTLEMENT

The firm's Construction Litigation Dept. secured a 180K settlement from a dissolved Construction Management Firm by pursuing the company's principle, bankruptcy court, under theories of alter ego and trust fund violation

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contained, in somewhat obtuse language, an exclusion of coverage for what is usually the most prominent risk faced by the contractor – absolute liability for injuries sustained by workers on the site under New York's "scaffold" law. It was only through deft argument, both legal and practical, that the carrier for the subcontractor was persuaded to take over the defense and indemnity of the client, who would have otherwise faced very significant exposure for legal fees and damage award.

The law of contractual risk shifting in construction and commercial settings is nuanced and complex. At TCLMM, we can help our construction and business clients navigate these issues and avoid circumstances that hold the potential of great harm.

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- Estate Administration & Probate
- Financing and Banking Law
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- Matrimonial & Family Law
- Municipal Law
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  - Development & Permitting
- Tax Law