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2016 Labor & Employment Law Update Seminar

Presented by the Labor and Employment Department

Save the Date(s)

May 4th, 2016
The Park Club, Buffalo, NY
8:30 a.m. – 12:00 p.m.

May 5th, 2016
DoubleTree Hotel, Rochester, NY
8:30 a.m. – 12:00 p.m.

The topics that will be covered are:

- ❑ New Developments in Labor & Employment Law
- ❑ Social Media Issues for Employers
- ❑ Misclassification: Independent Contractors/Exempt & Non-Exempt
- ❑ Workplace Safety Issues
- ❑ Employment Litigation Process: To Hell and Back

Contact Kelly Beauchamp at Kbeauchamp@woodsoviatt.com
if you would like to be added to the invitation list for either seminar.

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Spring 2016

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Feature Article

Woods Oviatt Gilman LLP is Pleased to Announce that Sean Jensen, Ben Keller and Michael Ostrander Have Been Named Partners in the Firm.

Sean D. Jensen

Benjamin M. Keller

F. Michael Ostrander

Sean D. Jensen is a Partner in the Business & Finance Department. He concentrates his practice in the areas of corporate law & governance, mergers, acquisitions & divestitures, emerging companies and securities law. He has represented individuals and closely-held companies in connection with acquisitions and divestitures of businesses and business divisions, including related employment arrangements. Mr. Jensen has also represented clients in connection with the negotiation of a broad range of agreements, including shareholders agreements, operating agreements, license agreements, nondisclosure agreements, distribution and representation agreements and consulting agreements. He has also represented companies in public offerings and private placements, and has advised public companies with respect to periodic reporting and compliance with SEC and exchange regulations.

Prior to joining Woods Oviatt Gilman LLP, Mr. Jensen was an associate at Goodwin Procter LLP in Boston, MA and Sullivan & Cromwell LLP in New York, NY.

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New Faces at the Firm

Kathryn E. Assini is an Associate in the firm's Default Servicing Group. She represents creditors and servicers throughout New York State in all aspects of residential foreclosure proceedings. Ms. Assini received her J.D. degree, *cum laude*, from the Western Michigan Cooley Law School and her B.A. from the State University of New York at Albany.

Kristin Corsi is an Associate in the firm's Default Servicing Group. She represents creditors and servicers throughout New York State in all aspects of residential foreclosure proceedings. Ms. Corsi received her J.D. degree, *cum laude*, from the Western Michigan University Cooley Law School and her B.A. degree, *cum laude*, from the State University of New York at Geneseo.

Andrea K. DiLuglio is an Associate in the Litigation Department where she concentrates her practice in the areas of business litigation, corporate governance, real estate litigation, creditors' rights, business divorce, and construction and surety law litigation. Ms. DiLuglio received her J.D., *magna cum laude*, from the State University of New York at Buffalo Law School and her B.S. in Business Administration, *magna cum laude*, from the State University of New York at Geneseo.

Aleksandra K. Fugate is an Associate in the firm's Default Servicing Group. She concentrates her practice in foreclosure matters, including loss mitigation. Ms. Fugate received her J.D. degree at the State University of New York at Buffalo Law School her and B.S. degree from the State University of New York at Buffalo.

Darice L. Hickey is an Associate in the Business & Finance Department. She concentrates her practice in the areas of individual income taxation, partnership taxation, and trust and estate taxation. Mrs. Hickey received her LL.M. degree in taxation from New York University School of Law. She earned her J.D. from the State University of New York at Buffalo, *cum laude*, with a concentration in finance transactions, and her B.A. in German Languages and Literatures from the University of Virginia.

Stephen J. Lapp is an Associate in the firm's Default Servicing Group. He concentrates his practice in foreclosure matters, including loss mitigation. Mr. Lapp earned his MBA and BBA in Finance, *magna cum laude*, from St. Bonaventure University. He continued his studies at Cleveland State University, Cleveland-Marshall College of Law, where he graduated *cum laude*. While at Cleveland-Marshall, Steve was the executive publications editor for the Global Business Law Review.

Mark P. Lawrence is an Associate in the firm's Real Estate Development & Finance Department. He concentrates his practice in the areas of commercial real estate financing and asset-based lending, commercial real estate transactions, and commercial real estate development. Mr. Lawrence received his J.D. degree, *magna cum laude*, from Syracuse University College of Law and his B.A. degree from the State University of New York at Binghamton.

Katarina B. Polozie is Special Counsel in the firm's Business & Finance Department. Her practice is focused in the areas of business counseling, mergers & acquisitions, and venture capital. Ms. Polozie counsels a diverse range of businesses ranging from start-up ventures to multinational corporations across a spectrum of industries on general corporate and commercial matters. Ms. Polozie received her J.D. degree from the Northwestern University School of Law and her B.A. degree, *cum laude*, from Wellesley College.

Bruce D. Reinoso is Senior Counsel in the Family Wealth & Estate Planning Department. He concentrates his practice in the areas of estate planning and elder law. Mr. Reinoso serves as one of the trust managers for the Western New York Pooled Supplemental Needs Trusts and was one of the principal drafters of the pooled trust agreements established by People, Inc. and Legal Services for the Elderly, Disabled and Disadvantaged of Western New York, Inc. Mr. Reinoso received his J.D. degree, *cum laude*, from the University at Buffalo Law School, a Masters in Music Composition from Duke University and his B.A. degree in Music from the University of North Carolina at Chapel Hill.

Danielle B. Ridgely is an Associate in the firm's Business & Finance Department. She concentrates her practice in the areas of corporate and individual income taxation, partnership taxation, corporate mergers and acquisitions, corporate divisions and recapitalizations, like-kind exchanges, estate planning, employee benefits and ERISA matters, and pension plan design and administration. Ms. Ridgely received her LL.M. in Taxation from Georgetown University Law Center, where she graduated with distinction. She received her J.D. from Regent University School of Law and her B.S. in Business Economics from Grove City College.

Miranda L. Sharlette is an Associate in the firm's Default Servicing Group. She represents creditors and servicers throughout New York State in foreclosures including loss mitigation. During law school she was Executive Editor of the Environmental Law Journal and Associate Editor of the Buffalo Journal of Gender, Law and Social Policy. Ms. Sharlette received her B.A. degree in Psychology and Anthropology, *magna cum laude*, from Le Moyne College and her J.D., *magna cum laude*, from the University at Buffalo Law School.

Steven A. Suozzi is an Associate in the Business & Finance Department. He concentrates his practice in corporate finance, mergers and acquisitions, corporate law and governance, securities law and other business-related legal matters. Mr. Suozzi received his B.S. degree from the University of Dayton and his J.D. degree from Cornell University Law School.

Danielle M. Wanglien is an Associate in the firm's Real Estate Development & Finance Group where she concentrates her practice on commercial real estate transactions, commercial real estate financing and development, commercial leasing, affordable housing and condominium and cooperative law. Ms. Wanglien received her B.A. degree from Rollins College and her J.D. degree from the University at Buffalo School of Law.

Partners *From page 1*

Mr. Jensen received his J.D., *magna cum laude* from New York Law School, and his B.S. (Civil Engineering) with honors from Lehigh University.

Benjamin M. Keller is Partner in the firm's Real Estate Development and Finance Group where he concentrates his practice in commercial real estate transactions, commercial real estate financing, commercial real estate development, and commercial leasing.

Prior to joining Woods Oviatt Gilman LLP, Mr. Keller was an associate in New York City at the law firms DLA Piper LLP (US) and Milbank, Tweed, Hadley & McCloy LLP.

Mr. Keller received his J.D. from Harvard Law School and a B.A., *summa cum laude*, from University of Pittsburgh.

F. Michael Ostrander is a Partner in the Litigation Department. He concentrates his practice in the areas of business litigation and employment law.

Mr. Ostrander received his J.D. from the University of Buffalo Law School and a B.A., *cum laude* from the State University of New York College at Geneseo.

A Re-evaluation of the Benefits of Long-Term Care Insurance

Richard A. Marchese, Esq.
Partner

Since my last article on this topic in March of 2014, there have been several developments. First of all, John Hancock withdrew from the New York State Partnership for Long-Term Care ("The Partnership") effective April 27, 2015. As you recall, the main benefits of the Partnership Plan are the total asset protection policies that allow for individuals who have exhausted policy coverage to become Medicaid eligible, without any review of their assets, or any review of prior gifts made by the individual or their spouse. Such policies can really pay off for clients of high net worth who become in need of extended long-term care, either at their residence, or in a skilled nursing facility. According to The Partnership website, the only remaining insurers to offer the Partnership Plan, as of this date (January 31, 2016) are Genworth, Massachusetts Mutual, and MedAmerica. As you will read below, this exclusive club has now apparently lost a member, leaving only two remaining.

Secondly, as many readers know, Genworth sought and received approval last year from state insurance regulators to increase premiums for long-term care policy holders who purchased their policies before 2011. The rate increase was a whopping 60% (according to the *New York Times*, Genworth had sought a rate increase of 80-85%)! This understandably came as a shock to many (I had several clients call me in disbelief of the notices they received), especially those who had mistakenly thought that their premiums were "locked in" for life. Virtually every long-term policy I have read always reserves the right of the insurer to increase premiums for the class that is insured. The language below is from a Genworth policy for a client of mine whose premium increased by 60%.

"We can change the premiums. Premiums will not change due to a change in your age or health. We can change premiums based on premium class; but only if we change them for all similar policies issued in the same state and on the same form as this Policy."

The lesson here is obviously to read your insurance contract and understand the circumstances under which premiums may increase. Please note that Genworth did offer existing policy holders several options to allow their premium to stay the same, including reducing their inflation protection, extending the "elimination period" (the number of days you have to pay privately for care before the policy kicks in), and reducing the benefit coverage period.

The third recent development has been the decision by MedAmerica to withdraw from the long-term care insurance market, which it first entered in 1988, effective February 15, 2016. Traditionally one of the most rate competitive insurers (and also an insurer that has offered unisex pricing), MedAmerica's withdrawal is certainly a blow to the long-term insurance market here in New York, but is also an opportunity for other insurers to fill the void caused by their absence. MedAmerica will continue to service and honor policies for existing policy holders.

All of these insurer decisions were obviously driven by the economic realities over the past seven or so years of historically low interest rates (cited by MedAmerica), which, when coupled with faulty actuarial assumptions (people with compromised health conditions are able to live well into their eighties and nineties) and very high (98%) retention rates have jolted the long-term care insurance market. These realties have also led insurers to cut back on cost-of-living increases offered with their policies, and have led to very tight underwriting. So where do we go from here? What is the advice for people who have purchased policies, or for those who are considering long-term care insurance?

In my opinion, existing policy holders should stay the course if at all feasible. Even with the possibility of future rate increases, the insurance, if ever needed, will pay off and should provide significant financial relief to those facing long-term care expenditures. The average cost of a nursing home in Monroe County, for a semi-private room, is now well over $400 per day. I joke with my clients that this is equivalent to staying at the Waldorf Astoria, but this is the reality. The other reality is that medications, therapy and diagnostic testing have extended life expectancy well beyond what it was even 20 years ago. The elderly require and ask for patient-centered care, which all of us deserve, but such care is expensive. Long-term care insurance certainly provides a hedge against such costs.

For people considering purchasing such policies, don't wait too long to decide, as insurers may not want to take on the risk as one's health starts to decline. And read the contract carefully! Ask your agent about the risk of premium increases, about cost-of-living adjustments, and exactly what the qualifying factors are for the insurance benefit to "kick in."

For those who do not have, or are unable or unwilling to purchase insurance, if you are concerned about the costs of long-term care, and wish to formulate a plan to protect your assets, please consult with your Woods Oviatt attorney. And certainly those who have such insurance should also be consulting with an attorney to help coordinate their insurance protections with their overall estate plan. The myriad laws, regulations and policy directives that govern the Medicare and Medicaid programs are very complex and, in many respects, are not at all intuitive and fall in the face of common sense and fairness. For example, the nuances in the laws governing how the New York State Medicaid Program treats annuities are remarkable (and very complex even for seasoned practitioners). Experienced attorneys should be able to help guide you with planning that is in accordance with your wishes and goals. Legal advice, coupled with the benefits afforded by insurance, remain the best available options to help protect assets for yourself, your spouse and your loved ones should the need ever arise for long-term care. ●

Richard Marchese is a Partner in the firm's Family Wealth & Estate Planning Department. He can be reached at Rmarchese@woodsoviatt.com or (585) 987-2859.

Charitable IRA Rollover for 2015 and Forever!

Robert W. Kessler, Esq.
Partner

In 2006, Congress passed a law that temporarily permitted an individual over 70 1/2 to make up to $100,000 of charitable gifts directly from his or her IRA in satisfaction of the required minimum distribution (RMD). This law was extended annually through 2014, and on December 18, 2015, the President signed this year's bill to extend the charitable rollover for 2015 AND BEYOND. We will not have to agonize each year waiting to see if a bill would pass.

This law was extended annually through 2014, and on December 18, 2015, the President signed this year's bill to extend the charitable rollover for 2015 and beyond.

Many retirees have been particularly motivated to apply their charitable IRA gifts to satisfy their RMD. In order to take advantage of the tax-free distribution of up to $100,000 from your IRA, you must be 70 1/2 or older, and the distribution can only go outright to public charities, not private foundations or donor-advised funds. By making a qualified charitable distribution, you would not have to report the RMD as taxable income (and possibly avoid the 3.8% surtax on investment income) that you might otherwise have to pay from your RMD. No income tax charitable deduction is allowed.

Now that the rollover is permanent, clients will have another option each year. When a client is informed of their RMD each year, they should meet with their tax advisors and consider rolling over all, or some portion, of their RMD directly to charity. For clients who do not need or do not want the RMD, they can instruct their IRA custodian to distribute the RMD directly to one or more of their favorite public charities. One should allow sufficient time to complete gifts that now can be done during the year, not all of them in December. ●

Robert W. Kessler is a Partner in the Family Wealth & Estate Planning Department and can be reached at Rkessler@woodsoviatt.com or (585) 987-2849.

You've Been Named Executor; Now What?

R. Thompson Gilman, Esq.
Partner

Most Executors (the fiduciary handling a decedent's estate) have the experience only once or twice in their lifetimes. It is not a duty you receive training for. Sometimes the duties can require quite a lot of time and effort. Here is a quick summary of what to expect.

The Executor must keep detailed records of all cash and assets received, and payments and distributions, and be prepared to account for every penny at the end.

The formal duties begin with the issuance of Letters Testamentary from Surrogate's Court. The estate attorney prepares and files the requisite documentation, usually within about two weeks after the decedent's death.

A tax identification number is assigned by the IRS (again, the attorney's job to arrange.)

The Executor opens one or more estate accounts (cash, securities), notifies all the decedent's financial institutions about his or her death, and provides them with the new tax identification number.

The Executor collects the mail and identifies debts and bills that need to be paid. The Executor confirms that the decedent's personal tax obligations are current, and arranges for the filing of the final personal returns.

The Executor must understand all the terms of the Will very clearly for proper administration. Specific bequests are paid once all debts, expenses, taxes and administrative expenses are paid or provided for.

Partial distributions to "residuary" beneficiaries can be made during the course of administration. The attorney supervises and advises on every step, and obtains receipts for all payments to beneficiaries.

The Executor may be required to obtain appraisals of real estate and tangible personal property for proper tax reporting and also for equalizing distributions among beneficiaries.

Generally, distributions are made after seven months, after the original appointment (Letters Testamentary), since that is the statutory period for evaluating debts and claims that need to be paid before benefits to beneficiaries.

The Executor does not have the responsibility to collect life insurance, annuities and IRAs payable directly to beneficiaries, but does need to obtain date-of-death values for everything, both for the Court Inventory (due six months after appointment), and for estate-tax reporting (due nine months from death, if applicable).

Fewer estates are subject to estate tax than in the past, due to higher exemptions (now $3,125,000 for New York estate tax [increasing to $4,187,500 on April 1, 2016], and $5,450,000 for Federal estate tax), but for taxable estates, very precise details are mandatory for proper and timely tax-return preparation and payment. In these cases, final estate settlement does not occur until the Estate Tax Closing Letter(s) are received from the tax authorities.

For non-taxable estates, a Release of Lien of Estate Tax may be required for real estate in the estate.

The Executor must make payments in the proper order (this becomes hugely important in insolvent estates):

- Funeral expenses
- Attorney and Executor fees
- Liens
- Family "exemptions"
- Judgments
- Payments having statutory preferences (tax obligations, Medicaid reimbursements)
- Specific bequests
- General bequests and
- Residuary shares

The Executor must keep detailed records of all cash and assets received, and payments and distributions, and be prepared to account for every penny at the end. If all parties are adult and competent and all creditors are paid in full, an "informal" accounting may suffice. If there are charities, minors, or incompetent beneficiaries sharing in the residuary estate, or if there are creditor claims unpaid, then a formal Surrogate's Court account must be prepared and provided to the interested parties.

The estate is also a separate taxpayer for income tax reporting and fiduciary income tax returns are required to be filed for the period of estate administration (and there are various tax elections on which the attorney and/or CPA advises the Executor).

The estate attorney takes a very active role. We guide Executors on every aspect of the estate administration process from start to finish. Receiving word that your relative or colleague has appointed you Executor can be worrisome about what it means and where to start, but with diligence, good record keeping, and an attorney knowledgeable in the field providing ongoing guidance, you can get the job done in an efficient and timely manner; and don't forget, Executors are entitled to compensation ("Executor's commissions") for their time and effort expended on the tasks. ●

Tom Gilman, Esq. is a Partner in the firm's Family Wealth & Estate Planning Department. He can be reached at Tgilman@woodsoviatt.com or (585) 987-2848.

NY Corporate Tax Reform for the Nonresident Shareholder

Danielle B. Ridgely, Esq.
Associate

Nonresidents are subject to New York's personal income tax on income sourced in New York State. The New York State Budget, the state's most significant corporate tax reform since the 1940s, substantially impacts nonresident and part-year resident shareholders[1] of New York S Corporations in the calculation of their New York source income.

A nonresident shareholder's New York source income in a New York S Corporation consists only of the portion of the nonresident shareholder's pro rata share of S Corporation income that is derived from or connected with New York sources. In other words, when a nonresident shareholder receives a Schedule K-1 from its New York S Corporation, only the items of income, loss and deduction allocated to the nonresident *and* derived from New York sources will be considered New York source income. How does one determine the items of income, loss and deduction that are derived from New York sources?

New York source income is determined by applying an apportionment factor. Prior to the tax-reform legislation, business income was allocated using a business-allocation percentage and investment income was allocated using an investment allocation percentage.[2] Effective for the tax years beginning on or after January 1, 2015, income from a New York S Corporation is now allocated as New York source income using only the business-allocation percentage, which is now a fraction based on market-sourcing receipts.[3] As a result, all New York items of income, loss and deduction included in a nonresident shareholder's federal adjusted gross income must be allocated to New York using the business allocation percentage, regardless of whether some amounts might qualify as exempt investment income or other exempt income.

The application of the business-allocation percentage to all items of New York S Corporation income, with no statutory exemption or other provision for removal of income that would otherwise be exempt, presents a substantial change in tax liability for nonresident shareholders and part-year resident shareholders. If you have further questions, please contact the author. ●

Danielle Ridgely is an Associate in the Business & Finance Department. You can contact her via email at dridgely@woodsoviatt.com or (585) 445-2759.

1. Part-year resident shareholders are affected during the nonresident period of the tax year.
2. The business-allocation percentage was based on a single-sales factor for most taxpayers, but based on cost of performance for service providers. The investment-allocation percentage allocated investment income to New York based on the income generated in New York by each security.
3. The sourcing rules vary based on the category of income and pursuant to corporate tax reform now apply to all receipts included in the computation of a taxpayer's income, including services. Receipts not separately addressed in the statute are sourced by a catch-all category according to the location of the customer using a hierarchy method, with due diligence required at each level of the hierarchy before proceeding to the next method.

MERS Marches On

Despite a multitude of legal challenges to its model, MERS continues to prevail in the local, district and circuit courts.

Natalie A. Grigg, Esq.
Partner

Despite the fact that Mortgage Electronic Registration Systems Inc. (MERS) has seen an impressive winning streak in the local, district and circuit courts, the company remains a target for litigation. In fact, MERS has never lost a case regarding the issue of recording fees.

The onslaught of county clerks initiating lawsuits against MERS claiming, among other things, that the MERS model of privately tracking mortgage transfers between MERS members violates their respective state's recording statutes, creating a discrepancy in the land records and robbing the counties of their "would-be" share of recording fees remains a hot topic in the industry and one of public outcry by the clerks.

While last year, in *Montgomery County vs. MERSCORP*, 16 F.Supp. 3d 542, 2014 U.S. Dist. LEXIS 89222 (E.D.Pa., June 30, 2014) we witnessed the Recorder of Deeds successfully challenge MERS and its duty to record transfers and conveyances pursuant to the Pennsylvania Recording Statute, that success was short lived, as the decision of the District Court of the Eastern District of Pennsylvania was subsequently reversed by the Third Circuit Court of Appeals. In *Montgomery County v. MERSCORP*, 795 F.3d 372, 2015 U.S. App. LEXIS 13482 (August 3, 2015), the Third Circuit held that 21 P.S. § 351 did not imply a duty to record on MERS, but moreover, "does not issue a blanket command that all conveyances must be recorded; it states that a conveyance 'shall be recorded'...and does not in any way state or imply that failure to record constitutes a violation of the statute enforceable by a recorder of deeds." 2015 U.S. App. LEXIS 13482, *13. In so holding, the Court noted that the consequence of failure to record is set forth in the statute itself, noting that the failure to record makes it void as to any subsequent bona fide purchaser. "Significantly, § 351 does not specify who must record a conveyance, when it must be recorded, or how a duty to record would be enforced." 2015 U.S. App. LEXIS at *10-11.

Ultimately, the holding in Montgomery County is in accord with the decisions of other courts. In *Union County v. MERSCORP, Inc.*, 735 F.3d 730, 2013 U.S. App. LEXIS 23038 (7th Cir. November 14, 2013), the Seventh Circuit was faced with reviewing whether MERSCORP violated an Illinois statute that Plaintiffs contended required every mortgage on real property in Illinois to be recorded. In holding that the statute created no mandatory duty to record, the Seventh Circuit noted that the Supreme Court of Illinois held more than a century ago that recording was not mandatory and that there was nothing in the record that would support the Court ruling otherwise. Likewise, in *County of Ramsey v. MERSCORP Holdings, Inc.*, 776 F.3d 947, 2014 U.S. App. LEXIS 23961 (8th Cir. December 19, 2014), the Eighth Circuit upheld the dismissal of the counties' claim against MERS finding that the Minnesota recording statute imposed no duty to record mortgage assignments.

Most recently, in *Harris County v. MERSCORP, Inc.*, 791 F.3d 545, 2015 U.S. App. LEXIS 10923 (5th Cir. June 26, 2015), the Fifth Circuit addressed class action allegations made by Dallas, Harris, and Brazoria Counties that the Defendants Bank of America and MERS fraudulently listed MERS as the beneficiary of deeds of trust that were recorded in the counties' land records and that the Defendants were required to record assignments of a deed of trust each time a MERS member transferred its interest in the promissory note to another MERS member. In interpreting Texas law as to the duty to record after each transfer between MERS members, the Court found that it imposed no duty to record in the text of the section but rather "is best read as a procedural directive to county clerks, not as a prerequisite to the validity of assignments." 2015 U.S. App. LEXIS 10923, *18.

Another recurring theme amongst plaintiffs despite having the vast majority of courts decide in favor of MERS is the validity of assignments of mortgage from MERS to the foreclosing entity and standing to foreclose. Generally, many courts have held that MERS' authority to assign is granted in the plain language of the mortgage agreement where MERS is acting solely as nominee for the original mortgage lender, its successors and assigns. (*Marjer, Inc. v. Ligus*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 280 (Common Pleas Ct. 2013)).

While it is noted that some jurisdictions require mortgagees, such as MERS, to prove both its nominee relationship with the note holder and the note holder's authorization of the mortgage assignment to show a valid assignment," (*In re Agard*, 444 B.R. 231 at 250-251 (Bky E.D.N.Y. 2011)) other jurisdictions take the position that it is not necessary to establish authority of the assignor to make the assignment so long as the assignment of mortgage complies with state law. (*Rosa v. Mtge. Elec. Registration Sys., Inc.*, 821 F.Supp.2d 423, 430 (D. Mass. 2011); *Lindsay v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 12964 (D. Mass. June 14, 2013)).

The more cases MERS win, the tougher it becomes for borrowers to raise arguments regarding whether MERS has a legal right related to properties assigned out of MERS or whether a defective MERS assignment voids a foreclosure. Such claims seek to invalidate foreclosures containing MERS assignments. One particular case some borrowers cite when attacking a MERS assignment is MERS status as a beneficiary. In the Washington Supreme Court case, *Bain v. Metropolitan Mortgage Group Inc.*, borrowers argued that MERS was an ineligible beneficiary within the terms of the Deed of Trust under Washington's law. (*Bain v. Metro. Mortg. Grp.*, 175 Wn.2d 83, 285 P.3d 34, 2012 Wash. LEXIS 578 (2012)). That court held that while MERS did not meet the definition of a trust deed's "beneficiary" under Washington's law, MERS can still act as an agent for the holder of the note.

The war on MERS is not over despite having won all of its battles. Unfortunately, we will continue to see the same type of attacks yielding the same results. Perhaps MERS having a case in front of the United States Supreme Court may end the war but in order for that to occur, at least one Circuit Court would have to rule against MERS.

The Bain court decided that MERS was not a lawful beneficiary pursuant to section 61.24.005(2) of the Washington Deed of Trust Act if it never held the promissory note secured by the deed of trust. (Wash. Rev. Code 61.24.031(1)(a)). However, the Act permits agents to take action on behalf of principals and the designation of an ineligible entity as beneficiary of a deed of trust, standing alone, does not render the deed of trust void. (*Bain v. Metropolitan Mortgage Group Inc.* 175 Wash. 2d at 106 ("nothing in this opinion should be construed to suggest an agent cannot represent the holder of the note."). In other words, the holder of the note can use MERS as its agent for the purposes of foreclosing a mortgage.

While the trending theme for challenging MERS assignments is to allege that the assignment is improper either because MERS lacks the authority to assign its interest, (because MERS had no interest to begin with) or that some defect in the assignment renders the assignment void, (i.e. attacks on the accuracy or sufficiency of an assignment) and thus making any foreclosure action void as well. A majority of courts have found that borrowers lacked standing to challenge assignment of their mortgage despite a proof of having a defective assignment. When presented with the issue of whether a borrower has standing to challenge the assignment of its own mortgage, the Supreme Court of Nebraska stated that "a borrower who is not a party to a mortgage assignment or a party intended to benefit from the assignment, lacks standing to challenge the assignment." *(Marcuzzo v. Bank of the West, 2015 Neb. LEXIS 84 (Neb. 2015).*

The war on MERS is not over despite having won all of its battles. Unfortunately, we will continue to see the same type of attacks yielding the same results. Perhaps MERS having a case in front of the United States Supreme Court may end the war but in order for that to occur, at least one Circuit Court would have to rule against MERS. ●

Natalie Grigg, a Partner in the Firm's Default Servicing Group, can be reached at Ngrigg@woodsoviatt.com or (585) 362-4521.

Natalie's Co-Author, Joanne LaFontant-Dooley, is a default services attorney at Klatt, Odekirk, Augustine, Sayer, Treinen & Rastede, PC.

Retaining and Incentivizing Key Employees

Thomas M. DiPiazza, Jr.
Partner

One of the challenges a successful business owner faces is how to incentivize and retain upper-level key employees. This article will briefly discuss some of the available options.

1. **Grant of Equity Interest** – The business could grant the key employee an equity interest consisting of stock if the business is operated as a corporation, or a membership interest if the business is operated as a limited-liability company. However, there are a number of downsides:

   - It may not be practical to provide an equity interest if there are numerous key employees;
   - The grant of a vested-equity interest in exchange for services is a taxable event resulting in ordinary income to the key employee (based upon the value of the equity interest received);
   - Equity holders have rights under state law. For example, in the corporate context, a shareholder has the ability to file for a judicial dissolution of the company under certain circumstances, and has the right to receive company financial information, including copies of tax returns which diminishes a business owner's privacy;
   - Amendments of business governance documents such as buy-sell agreements often need the signature of all the equity holders;
   - Depending upon the amount of equity held by the key employee, banks may require the key employee's personal guaranty;
   - If the key employee that has received a vested-equity interest leaves the business, his or her interest will need to be purchased which is a further complication;
   - Under state law, the key employee is liable for unpaid wages of the business if he or she is one of the top ten equity owners. This applies to equity interests in corporations as well as limited-liability companies.

2. **Alternatives to Granting Equity Interests** – Alternative arrangements involve deferred compensation that is linked to equity value without the transfer of an actual equity interest. One type of equity-based incentive plan that can be used to compensate upper level key employees is the "Phantom Stock Plan." Another is a "SAR Plan."

(a) **Phantom Stock Plan.** This type of plan typically provides the upper-level key employee with the financial benefits of stock ownership without the cost and/or risks of actual ownership. In a phantom stock plan, the employer contractually awards bonuses to an employee in the form of hypothetical shares of its stock based on the value or appreciation in the employer's stock. This "phantom stock" is credited to an account for the employee, and future dividends and/or stock splits are also reflected in the account as phantom shares. No tax is payable by the key employee at the time these amounts are credited to his or her account. Payments under the plan are made upon certain triggering events, and most pay out their benefits in cash. The payments are taxed to the key employee as ordinary income, with a corresponding income tax deduction for the employer.

(b) **SAR.** Another type of incentive program to compensate an upper-level key employee is the stock appreciation rights ("SAR") plan. This type of plan is not limited to corporations and represents the right to receive the appreciation in the equity value of the business. This appreciation generally is paid to the key employee upon certain triggering events in the form of cash. The grant of a SAR is not a taxable event. The key employee is taxed on the benefits when paid as ordinary income. At the time that the key employee is taxed, the employer may deduct the amount of income taxed to the key employee as deductible compensation.

If properly structured, the use of phantom stock and appreciation-rights plans can provide the following benefits:

- No immediate taxation to the key employee;
- The key employee is taxed upon receiving payments from the business under the plan, at which time the business is entitled to a corresponding income tax deduction;
- The business's financial information does not have to be provided to the key employee;
- If the key employee terminates employment, the plan can be structured so that any rights or payments under the plan are forfeited.

The use of deferred compensation incentive plans can provide a tax efficient means of retaining and incentivizing upper-level key employees. However, there are many issues to consider when deciding whether to implement such a plan. If you have any questions, please do not hesitate to contact the author or your Woods Oviatt attorney. ●

Thomas DiPiazza, Esq. is a Partner in the firm's Business & Tax Department. He can be reached at Tdipiazza@woodsoviatt.com or (585) 987-2861.

Woods Oviatt Gilman's Areas of Practice

At Woods Oviatt, our practice areas encompass the many areas of law which are fundamental to providing the interdisciplinary services needed by our clients. Take a moment and get familiar with all that we can do for you!

BUSINESS & FINANCE

We understand the rapidly evolving challenges faced by businesses today and approach them with creative and proactive solutions. At the same time, we will study your operations to fully understand your unique needs and become valuable legal advisors to your management team. Our breadth of experience combined with singular focus on your business, enables us to craft the best possible solutions to your legal issues as they arise.

AREAS OF PRACTICE

- Business Counseling
- Business Succession Planning
- Corporate Governance
- Cross Border Transactions
- Cybersecurity and Data Privacy
- Delaware Corporate Governance
- Emerging Companies
- Employee Benefits / Executive Compensation
- Franchising, Distributions & Dealerships
- Health Care
- Intellectual Property, Licensing & Technology
- Investment Management
- Mergers, Acquisitions, Divestitures
- Not-For-Profit & Tax-Exempt Organizations
- Private Equity & Venture Capital
- Public Companies / Securities
- Special Investigations
- Tax Controversies
- Transactional Tax Planning

EMPLOYMENT & LABOR

Building and maintaining an effective, productive workforce is essential to the success of every business. We work with our clients in developing and implementing personnel policies that accomplish these objectives. We assist our clients in understanding and complying with the myriad of Federal and State laws and regulations governing the employment relationship. We protect our clients by seeking to successfully resolve employment-related disputes through the process of negotiation, arbitration and litigation.

AREAS OF PRACTICE

- Education & School Law
- Employment & Labor Litigation
- Employment & Non-Competition Agreements
- Employee Benefits / Executive Compensation
- Employment Counseling and Compliance
- Immigration Law
- Union / Collective Bargaining
- Wage and Hour Litigation
- Workplace Safety / OSHA

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FAMILY WEALTH & ESTATE PLANNING DEPARTMENT

The attorneys in our group offer counsel and representation on all matters involving estate planning, administration, charitable giving, planning for the elderly and infirm, and other issues that often involve family members. They handle these areas with great care and sensitivity, while providing counsel that best protects an estate's assets.

AREAS OF PRACTICE

- Adoptions
- Asset Protection Planning
- Business Succession Planning
- Charitable and Foundation Planning
- Elder Law/Long-Term Health Care and Medicaid Planning
- Estate and Trust Administration
- Estate and Trust Litigation
- Estate and Trust Taxation
- Florida Estate & Trust Practice
- Family Wealth Planning
- Guardianships
- Pre/Post - Nuptial Agreements
- Retirement Benefit Planning
- Intellectual Property

INTELLECTUAL PROPERTY

The attorneys in our Intellectual Property group help clients defend their valuable investments by securing and enforcing patent, trademark and copyright protection, and advising clients in the protection of trade secrets. Our attorneys are highly qualified to navigate your applications through the complex channels of the United States Patent and Trademark Office. When administrative disputes or contests develop, our trial attorneys have experience in successfully vindicating client rights.

From planning to prosecuting, we deliver winning IP strategies.

Business borders change every day, so our attorneys stand ready to assist in worldwide patent procurement and global trademark protection. This can include strategic intellectual property portfolio planning and analysis as well as patentability, infringement and trademark availability searches and opinions. In the boardroom we can enable technology transfer and commercialization and intellectual property licensing and agreements; in the courtroom we're ready for intellectual property litigation.

AREAS OF PRACTICE

- Cybersecurity & Data Privacy
- Intellectual Property Litigation
- Intellectual Property, Licensing & Technology

LITIGATION

Our attorneys regularly serve as litigation counsel for national, regional and local companies, fiduciaries and individuals. We have significant trial and appellate practice experience in both federal and state courts.

Whether we're representing businesses engaged in shareholder disputes, unfair competition, intellectual property matters or counseling individuals navigating through workplace issues, personal or professional negligence or real-property dispute matters, our attorneys have the experience and skills necessary to deliver positive results for their clients. Whether we appear before administrative or governmental agencies, go to court, or negotiate a solution in a conference room, we see that our clients' best interests are well served.

AREAS OF PRACTICE

- Appellate Litigation
- Business Litigation
- Construction & Surety Law Litigation
- Estate & Trust Litigation
- Employment & Labor Litigation
- Education & School Law
- Environmental Law & Litigation
- Government & Municipal Law
- Insurance Coverage & Risk Management
- Insurance Defense
- Intellectual Property Litigation
- Medical Malpractice
- Products Liability / Mass & Complex Torts
- Personal Injury Litigation
- Professional Malpractice Defense
- Securities & Shareholder Litigation
- Securities Arbitration
- Tax Assessment & Condemnation

REAL ESTATE DEVELOPMENT & FINANCE

Our group is comprised of real estate, construction and litigation attorneys who are experienced in all phases of commercial and residential real estate, real estate development and the construction process from site selection through preparation of tenant leases.

Our attorneys represent developers, owners, contractors, design professionals and suppliers in real estate development and construction.

AREAS OF PRACTICE

- Commercial Leasing
- Commercial Real Estate Development
- Commercial Real Estate Finance
- Commercial Real Estate Transactions
- Condominiums and Associations
- Construction Law
- Environmental Law & Litigation
- Land Use & Zoning
- Residential Transactions
- Section 1031 Tax Free Exchanges

SECURE LENDING & FINANCIAL RECOVERY

When facing difficult transactional or litigation-oriented matters, our clients know they can rely on our broad and diverse secured lending, bankruptcy and restructuring practice. Our resources and experience have made our attorneys a leading presence in the bankruptcy and restructuring world and bring added value to our clients.

Borrower or lender, each client knows their personal interests are the priority.

Our attorneys handle asset-based transactions, equity and debt restructurings, loan workouts, and bankruptcy-related and strategic litigation as well as tax-exempt and taxable public finance transactions. We represent commercial lenders, corporate borrowers, secured and unsecured creditors, private lenders, creditor's committees, bankruptcy trustees, court appointed receivers, commercial landlords, and purchasers of assets from distressed companies and bankruptcy sales.

AREAS OF PRACTICE

- Debt Collection & Asset Recovery
- Commercial & Asset Based Lending
- Creditors' Rights
- Financial Institution Regulatory Matters
- Financial Restructuring and Bankruptcy
- Foreclosures / REO
- Landlord - Tenant
- Public Finance
- Real Estate Litigation

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Duwaine Bascoe, Esq. has been named Co-Chair of Monroe County Bar Association's Diversity Clerkship Program. He has also been named President Elect for the Rochester Black Bar Association.

Philip Burke, Esq. has been appointed to the Meritas US Leadership Team. Meritas is an established global alliance of 175 independent law firms from 80 countries, that offer a full range of high-quality, specialized legal services.

Julia Henrichs, Esq. has joined the Board of Directors of the Penfield Presbyterian Early Learning Center. ●

Calendar of Events

April 13
Cyber Security Seminar
Monroe Golf Club, Pittsford

May 4
Labor and Employment Seminar
Park Country Club, Buffalo

May 5
Labor and Employment Seminar
Doubletree Hotel, Rochester

Contact Kelly Beauchamp at (585) 987-2822 if you would like to receive invitations to any of these seminars.

Duwaine Bascoe, Esq. receives 2015 Emerging Bar Leader and Up & Coming Attorney Awards

Duwaine Bascoe, Esq., an Associate in the firm's Litigation Department, was the recipient of the Monroe County Bar Association's 2015 Emerging Bar Leader Award. This award recognizes a member of the Monroe County Bar association that has been admitted 10 years or fewer and who has made a significant contribution to the Bar Association through participation on committees or other Bar Association sponsored activities and who has demonstrated the potential to be a leader in the profession.

Mr. Bascoe was also a recipient of *The Daily Record's* "Up & Coming Attorney Award." The Up & Coming Attorneys demonstrate professional accomplishment, community service and a strong commitment to the legal profession early in their careers. To be considered, nominees must be admitted to the bar for 10 years or less.

Philip Burke, Esq. named as a "Leader in Law" by The Daily Record

Philip Burke, Esq., a Partner in the firm's Family Wealth & Estate Planning Department, has been selected as a "Leader in Law" by *The Daily Record*. This award is given to attorneys in the Rochester area who have shown tremendous dedication to the legal profession and selfless, tireless commitment to the community. Phil and the other honorees were honored at a dinner in November.

R. Thompson Gilman, Esq. has received the Accredited Estate Planner (AEP) designation

by the National Association of Estate Planning Councils. The AEP® designation is awarded by the NAEPC to estate planning professionals who meet special requirements of education, experience, knowledge, professional reputation, and character.

Natalie Grigg, Esq. named recipient of "Top Women in Law Award"

Natalie Grigg, Esq., a Partner in the firm's Default Servicing Department, was named one of the recipients of *The Daily Record's* "Top Women in Law Award." The Top Women in Law awards recognize the outstanding accomplishments of female attorneys who are making notable contributions to the legal profession while inspiring a positive change in the community. ●

2015 Holiday Donations

In December of 2015 Woods Oviatt Gilman LLP made its annual donations to selected charities in honor of our clients. These contributions reflect the firm's appreciation of its clients and its commitment to the community. The charities that were the recipients of this year's contributions are:

1. **Action for a Better Community** – Steve Tierney presents the check to James Norman and Tim Flaherty of Action for a Better Community.
2. **Artists Unlimited, Inc.** –Phil Burke and Jim McElheny present the check to Steve Pasquarella, Carol Cassara and Tom Ricci of Artists Unlimited, Inc.
3. **Finger Lakes Regional Burn Association** – Jim McElheny and John Liebschutz present the check to Paul Schwartzman, Scott Valpey and Anne Marie Gefell of Finger Lakes Regional Burn Association.
4. **Hillel School** – Jerry Goldman and Jim McElheny present the check to Tracie Glazer and Matt Rosenbaum of the Hillel School.
5. **Women and Children's Hospital of Buffalo Foundation** – Chris Henrich presents the check to Acea Mosey of Women and Children's Hospital of Buffalo Foundation. ●

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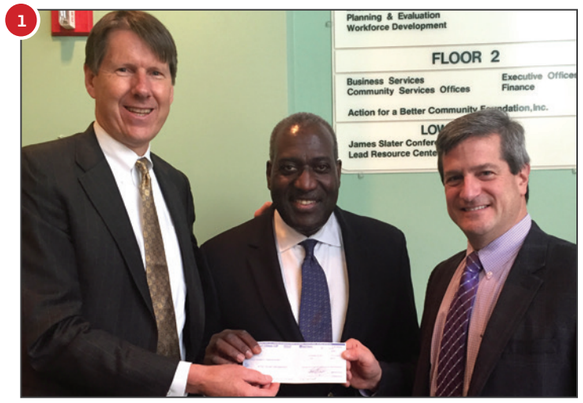

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