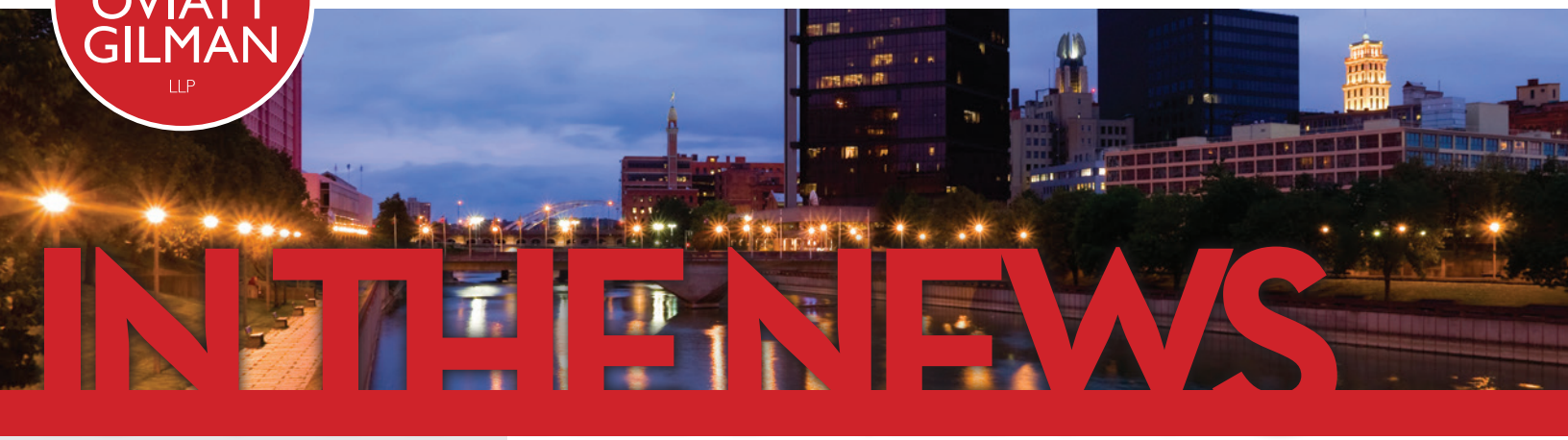
WOODS OVIATT GILMAN LLP

The art of representing people®

Spring 2018



IN THE NEWS

Feature Article

Practices

- Business & Finance
- Default Servicing
- Employment & Labor
- Family Wealth & Estate Planning
- Intellectual Property
- Litigation
- Real Estate Development & Finance
- Secured Lending & Financial Recovery

Offices

Rochester, New York
700 Crossroads Building
2 State Street
Rochester, New York 14614
p 585.987.2800 | f 585.454.3968

Buffalo, New York
1900 Main Place Tower
350 Main Street
Buffalo, New York 14202
p 716-248-3200 | f 716-854-5100

Phoenix, Arizona
275 N. GateWay Drive
Suite 118
Phoenix, Arizona 85034
p 602.633.1793 | f 585.362.4614

WoodsOviatt.com

Long-Term Care Planning and the Family Home

Philip L. Burke, Esq.
Partner

According to the 2010 US Census (www.census.gov), 13% of the populations of the United States (approx. 40.3 million people) were then age 65 or older, and this number is increasing. It is estimated that by 2050, a mere 30 years from now, the population over age 65 will more than double to about 88.5 million people.

Demographically, it is obvious that these numbers will translate to not only the need for more knee and hip replacements, but also a greater need for long-term care services. However, since basic health insurance and Medicare do not cover custodial care in a nursing home, planning to meet these expenses becomes more and more critical.

For many individuals, the personal residence is one of their most valuable assets and there are a few planning options available to protect this valuable asset from potential long-term care expenses. Each of these options has some "pros and cons" associated with it and this article will address some of those.

First, many people consider deeding the home to the next generation (normally parent to a child or children) outright. While this is the simplest and least expensive way to effectuate this, there are some consequences. First, if the parent qualifies for any property tax reductions because of age, income (e.g., STAR exemption), veteran status, etc., retitling the home in the name of a child may cause those exemptions to be lost, thereby increasing your property taxes. Second, if the child owns the home, a creditor of the child could attach the home in the event the child was sued, had financial difficulties, etc., which may result in the loss of your home. Third, unless the home qualified as the child's residence, the child would likely have to pay capital gains taxes on any subsequent sale of the property. (A discussion of all the capital gains tax issues involved with these transfers is beyond the scope of this article.)

A second popular transfer option is a "life estate – remainder" deed where the

Continued on page 2

Long-Term Care *From page 1*

parent transfers the "remainder" interest in the property to the child/children while retaining, in the parent's name, "life use," meaning that the parent continues to reside in the house, continues paying the taxes, insurance and utilities, etc., until death, at which point the property passes to the child/children. This type of transaction should not involve any change in eligibility for property tax benefits (although it is often helpful to check with the local tax assessor to be sure), and will not allow a child's creditor to get access to the home during the lifetime of the parent/life tenant. Also, on the death of the parent, the date of death value of the home will become the new "basis" for capital gains tax purposes and any subsequent sale would use this value to determine any subsequent capital gain or loss. However, the major drawback with the life estate deed comes into play if the property is sold during the parent's lifetime. If this were to happen, the proceeds would be divided between the parent and child with this division based on the parent's age at the time of the sale; the older the parent is at the time of sale, the less value the parent has in the property. Consequently, the allocation of the proceeds between the parent and child will be a function of the parent's age. For example, based on current interest rates, if the parent is 85 years of age when the property is sold, the parent would be entitled to only approximately 16% of the sale proceeds and the child would receive the remaining 84%, meaning that the parent would not have 100% of the sale proceeds to use to buy a new residence, to invest, etc. Also, unless the property was also the child's residence, the child would likely have to pay capital gains tax on their share of the proceeds.

The third option is the creation of an Irrevocable Trust into which the house would be deeded. The parent would maintain, through the trust, the use of the property for his or her lifetime and, on the parent's death, the trust property would pass to the trust beneficiaries, most likely the children. As with the life estate – remainder deed, this transaction should not affect eligibility for property tax benefits, and avoids and/or reduces capital gains tax consequences on the sale during lifetime or after the death of the parent. In addition, if the property is sold during the parent's lifetime, 100% of the proceeds remain in the trust and can be used through the trust to either purchase a new residence for the parent (if, for example, downsizing becomes an option) or the proceeds can be invested for the parent's benefit. However, in order to protect the trust assets from potential long-term care expenses, the parent is only entitled to receive the income generated by the investments and would have no right to access the underlying principal.

As you can see, the first two options are fairly straightforward and involve the preparation and recording of a deed to the property. On the other hand, the creation of an Irrevocable Trust, and preparation of a deed transferring the residence to the trust, is more complicated and, as a result, more expensive.

Please note that this is a broad overview of these planning options and is by no means intended to be a comprehensive discussion. For example, the transfer of any asset needs to be addressed in the context of potential Medicaid eligibility for assistance with covering nursing home costs. The Medicaid transfer rules are quite complicated and for anyone concerned with nursing home or other long-term care needs, these rules should be reviewed with a knowledgeable Elder Law attorney. If you have any interest in discussing these options further, please contact your Woods Oviatt attorney who, if not already part of our Elder Law Department, can refer you to one who is. ●

Philip L. Burke, Esq. is a Partner and Chair of the firm's Family Wealth & Estate Planning Department. He can be reached at: PBurke@woodsoviatt.com or 585-987-2850.

In The Community

Anthony L. Eugeni, Esq. has been elected to the Board of Directors of United Way of Greater Niagara.

Gregory W. Gribben, Esq. has been named Chair of iCircle Services of the Finger Lakes, Inc. and Vice Chair of CDS Life Transitions, Inc.

Benjamin M. Keller, Esq. has joined the Board of Directors for the Rochester Downtown Development Corporation.

Timothy P. Lyster has been named a Board Member, Turnaround Management Association, Upstate New York Chapter.

Token Offerings

Christopher R. Rodi, Esq.
Partner

With bitcoin hitting all-time highs, blockchain technology and token offerings are the newest buzzwords in the world of raising capital. These can be initial coin offerings (or ICOs) where virtual tokens are sold in a public offering, or smaller private sales of tokens to a more limited group of investors. These private offerings can seem similar to traditional sales of equity, but investors need to understand the differences between equity and tokens and the risks unique to these types of investments.

Although the details of blockchain technology are complex and its possible uses almost limitless, each use is essentially an electronic ledger that is visible to all users of the system. A token is a digital key allowing a user to use this ledger. For example, Kodak's recently proposed blockchain system would allow photographers to add their digital images to a ledger. Users could access the ledger using Kodakcoin tokens, which would be paid to photographers if their images are used.

In recent years, instead of traditional sales of equity or ownership, companies building a product based on blockchain technology have offered these tokens for sale as a means of raising the capital needed to build their technology. Imagine that you want to build a video arcade. To raise the money for the arcade, you sell arcade tokens for 20 cents now, which you promise to give to buyers when the arcade opens. After you open, the tokens will be sold for 25 cents each. The buyers agree, either because they are getting a discount on the token they plan to purchase later or because they are hoping a secondary market for the token develops allowing them to sell at a profit.

Applying this example to a blockchain technology company, because the platform and the underlying tokens do not yet exist, a Simple Agreement for Future Tokens (SAFT) has become the vehicle for completing this transaction. This is similar to the Simple Agreement for Future Equity (SAFE) used by some start-up companies to sell equity in their new venture. Under a SAFT, the investor provides the company funds to build their platform and the company agrees to provide tokens to the investor at a discounted price once the platform is up and running. The investor agrees to this arrangement with the expectation that, if the platform is successful, the tokens will have a higher value to users of the platform that the investor can take advantage of later.

Generally, the Securities Exchange Act of 1933 requires that the offering for sale of any security either be registered with the United States Securities and Exchange Commission (the SEC), or qualify for an exemption from registration. Although in the initial days of this technology tokens were sold in an unregulated, wild-west kind of a market, in recent years the SEC has made very clear their view that both a token and a SAFT would be considered a security. As such, the typical Rule 506 private placement procedures that many are familiar with from equity sales are followed with respect to a SAFT offering as well. This includes offering tokens only to accredited investors, and using a private placement memorandum describing the platform, the company's business plan, and the risks related to the offering.

Although in the initial days of this technology tokens were sold in an unregulated, wild-west of a market, in recent years the SEC has made very clear their view that both a token and a SAFT would be considered a security.

However, the risks relating to a SAFT or token offering as an investment can differ greatly from a traditional equity offering. The success of the business depends almost exclusively on the ability to build the platform, and the token may still never be adopted as a valuable currency or commodity. If you are considering in-vesting in this type of offering, you should ask detailed questions about the business model, the founders experience, and the terms of the offering, and consult with your legal advisor. ●

Christopher R. Rodi, Esq. is a Partner in the Business and Finance Department of Woods Oviatt Gilman LLP. He can be reached at 585-987-2820 or Crodi@woodsoviatt.com

Former New York State Surrogate Judge Barbara Howe Joins Woods Oviatt Gilman LLP

The Honorable Barbara Howe, former New York State Surrogate Judge for Erie County, became Senior Counsel to the firm on February 5, 2018.

Judge Howe served as New York State Surrogate Judge for Erie County from 2004 through 2017. She began her judicial career on the Buffalo City Court bench in 1988, and served as a New York State Supreme Court Justice from 1992 through 2003.

Judge Howe has held numerous leadership roles on statewide committees of the New York Courts. As a member of the New York State Office of Court Administration's Legislative Advisory Group, she was instrumental in initiating and implementing legislation that made the Erie County Surrogate's Court the first Surrogate's Court in New York State with an e-filing option. She also played an active role in shaping legislative proposals relating to estate and Surrogate's court practice while serving on the Office of Court Administration's Surrogate's Court Advisory Committee, of which she remains a member.

James McElheny, Woods Oviatt's Managing Partner, said: "It is a great honor to have a jurist of her experience and prominence join our firm. I cannot think of anyone who is better qualified and more uniquely experienced to work with our Trusts and Estates and Mediation practice groups."

From 1974 through 1987, Judge Howe was a member of the faculty of the Sociology Department at the University at Buffalo. In 1988, she gave up her academic tenure there to become a member of the judiciary. While on the bench, she served as an adjunct clinical professor of law at UB, and as an adjunct associate professor of sociology.

Judge Howe received her J.D. from the University at Buffalo School of Law, her Bachelor's degree from the University of Connecticut at Storrs, and she has a Masters and Ph.D degree in sociology from Cornell University.

Honors and Awards

Woods Oviatt named a Wealth of Health Finalist, Best Overall Company to Work For and Best IP Firm Finalists.

The Rochester Business Journal named Woods Oviatt as one of the 2018 Wealth of Health Award finalists in the Top Employer category for 150-399 employees. Finalists were selected by a panel of judges based on their commitment to encourage and foster healthy behaviors in the workplace. The twenty companies and organizations that were among the finalists were recognized at a breakfast on June 21.

Woods Oviatt has also been named one of the Top 3 companies for "Best Overall Company to Work For / 251-500 Employees" and "Best IP Firm" in the Rochester Business Journal's Reader Ranking Polls. They will announce the winning company for each category at a reception celebration on August 1st at the Joseph A. Floreano Rochester Riverside Convention Center. ●

Greta K. Kolcon Installed as President of the Women's Bar Association of the State of New York.

Greta K. Kolcon, Esq., a Partner in the firm's Litigation Department, was installed as the President of the Women's Bar Association of the State of New York at their annual convention on June 2 in Cooperstown. As President of the Women's Bar Association of the State of New York, Greta will lead the WBASNY's efforts to promote the advancement of the status of women in society and in the legal profession. With chapters in 20 different local communities throughout New York State, WBASNY acts as a unified voice for its members in its advocacy to promote equal justice and gender equality. WBASNY is a member of the National Conference of Women's Bar Associations and holds ECOSOC status at the United Nations, and works to support women' rights and access to fair administration of justice on issues even beyond the state's borders. ●

The Best Evidence: New York Blockchain Legislation and its Prospective Effect on Verifying Documents in a Mortgage Transaction

Megan Kale, Esq.
Associate

Legislation to define and regulate blockchain technology is in its infancy. New York Assemblyman Clyde Vanel (of Queens) is a leading voice on advancing the understanding and implementation of blockchain technology regulations in New York State.

On November 27, 2017, Vanel introduced Bill 8780, regarding how blockchain technology can be utilized in government record keeping, elections, and business.[1] The bill defines blockchain technology as "distributed ledger technology that uses a distributed, decentralized, shared and replicated ledger, which may be public or private, permissioned or permissionless, or driven by tokenized crypto economics or tokenless. The data on the ledger is protected with cryptography, is immutable and auditable and provides an uncensored truth."[2]

The benefits that blockchain technology could bestow on the mortgage industry and, in turn, the residential foreclosure process, are numerous. Currently, the New York foreclosure process is estimated to be one of the longest civil court processes when compared to other states, averaging approximately 900+ days from commencement to sale. A common defense raised in a New York residential foreclosure action is whether the plaintiff can prove standing.[3] This is complicated by the mortgage industry where industry practice often amounts to loans being sold and assigned to successor lenders and/or trustees. As the plaintiff must have ownership of the mortgage and hold the note prior to commencing the action, verifying this information is paramount and has been complicated by many issues, including, but not limited to, pooling and servicing agreements, securitization of mortgages, and human error.

Blockchain can be utilized to verify transactions.[4] The implementation of Bill 8780 could mitigate the risk of filing and proving a foreclosure action by allowing the electronic ledger provided by blockchain technology to verify the mortgage and note prior to commencing the suit. By placing land records on blockchain, the act of the conveyance (transferring ownership from one party to another) and providing notice of the conveyance, would eliminate potential gaps in time as well as lost documents in the recording process.

However, one major obstacle for this potential usage is that blockchain obtained signatures are not currently recognized under the New York Electronic Signatures and Records Act (ESRA) as a valid means of obtaining a legally enforceable signature. However, proposed section 310 of Bill 8780 could provide the gateway for allowing blockchain technology to be recognized as a lawful form of electronic signature.[5] The proposed bill states: "A signature that is secured through blockchain technology is considered to be in an electronic form and to be an electronic signature." Other states, such as California and Florida have also introduced bills that would recognize blockchain obtained electronic signatures. In California, Assembly Bill 2685, proposes an expansion of the definition of an electronic signature under the current Uniform Electronic Transactions Act.[6] The definition would be inclusive of electronic signatures obtained through blockchain.[7] Legislation like this and the bills introduced by Clyde Vanel could pave the way for utilizing blockchain in real estate and other transactions.

The utilization of electronic signatures obtained by blockchain would change the way real estate transactions are verified in New York State. Given the definition of blockchain under the proposed legislation, determining the initial ownership and validity of signatures on the note and mortgage, could be substantiated by blockchain data which is inherently "immutable" and averse to the inherent fraud risks that have plagued the industry, such as straw buyers and robo-signatures. Each mortgage transaction could be on its own ledger, having proprietary security measures driven by the originator of the loan. New York's impending legislation may soon enable lenders and consumers to tap into the blockchain breakthrough and change the way they do business. ●

Megan Kale, Esq. is an Associate in the firm's Default Servicing Department. She can be reached at: MKale@woodsoviatt.com or 585-445-2724.

[1]Elizabeth Zima, Four Blockchain Bills Introduced in New York State Assembly, http://www.govtech.com/Four-Blockchain-Bills-Introduced-in-New-York-State-Assembly.html (December 15, 2017). [2]Assem. Bill Reg. Sess. 8780 (NY 2018). [3]Aurora Loan Servs., LLC v Taylor 2015 NY Slip Op 04872 Decided on June 11, 2015 Court of Appeals. [4]James Condos, Blockchain Technology: Opportunities and Risks, https://perma.cc/9TKH-V4KN (last visited March 10, 2018) Summarizing, "A valid blockchain is a reliable way of confirming the party submitting a record to the blockchain, the time and date of its submission, and the contents of the record at the time of submission.' [5]Assem. Bill Reg. Sess. 8780, Sec. 310 (NY 2018). [6]Riley T. Svikhart ,Blockchain's Big Hurdle, https://www.stanfordlawreview.org/online/blockchains-big-hurdle/ (November 2017) See for potential federal preemption issues related to The Uniform Electronic Transactions Act (UETA) and ESIGN. [7]Annaliese Milano, California Bill Would Legally Recognize Blockchain Data https://www.coindesk.com/california-lawmaker-files-bill-legally-recognize-blockchain-data/ (February 20, 2018).

New Faces at the Firm

Elizabeth A. Clarke 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. Clarke received her J.D. from Western Michigan University's Thomas M. Cooley Law School and her B.A. from the University of Rochester.

Brandon R. Cottrell is an Associate in the Firm's Real Estate Development and Finance Department. He concentrates his practice on real estate development, commercial leasing, commercial real estate transactions, banking, and finance. He also has experience serving as bond counsel, issuer's counsel, and underwriter's counsel in connection with private activity and general obligation bond financing. Mr. Cottrell received his J.D. degree, *summa cum laude*, from Syracuse University College of Law where he graduated first in his class. He received his B.S. degree, *cum laude*, from the State University of New York at Geneseo.

Anthony J. De Marco is an associate in the firm's Default Servicing Group. He represents creditors and servicers throughout New York State in all aspects of residential foreclosure proceedings. Mr. De Marco received his J.D. from Albany Law School. He received his B.A. from the State University of New York at Albany.

Megan S. Kale is an associate in the firm's Default Servicing Group. Prior to joining Woods Oviatt Gilman, LLP, she worked as a compliance officer and senior analyst in the legal and financial services sectors. Ms. Kale received her J.D. degree from Stetson University College of Law and her B.A., *Summa Cum Laude*, from Syracuse University.

Stephanie J. Lapple is an Associate in the firm and a member of the Family Wealth and Estate Planning Department. She concentrates her practice in the areas of Estate Planning, Estate and Trust Administration, Long-Term Care Planning, and Medicaid Planning. Ms. Lapple received her J.D. from The Pennsylvania State University, Dickinson School of Law, where she served as Editor-in-Chief for the Arbitration Law Review. She received both her B.S. degree in Crime, Law & Justice and her B.A. degree in Sociology, *magna cum laude*, from the Schreyer Honors College at The Pennsylvania State University.

Todd Z. Marks is an associate in the firm's Default Servicing Group. He represents creditors and servicers throughout New York State in all aspects of residential foreclosure proceedings. Prior to coming to Woods Oviatt Gilman, LLP, he represented creditors and servicers throughout New Jersey in all aspects of residential foreclosure proceedings. Mr. Marks received his J.D. from the University of New Hampshire School of Law. He received his B.A. from Binghamton University.

Cynthia M. Olin 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. Olin received her J.D. from the University at Buffalo Law School. She received her B.A. from the State University of New York at Geneseo.

2017 Holiday Donations

In December of 2017, Woods Oviatt Gilman LLP made its annual donations to selected charities in honor of their clients. The organizations that we select are recommended by our attorneys and staff, and 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. Brian Gwitt and Jeff Gleason present the check to **Aspire of Western New York**. For more information go to www.AspireWNY.org

2. Chris Monachino and Jim McElheny present the check to **NAMI of Rochester**. For more information go to www.NamiRoc.org

3. Sue Sorci and Jim McElheny present the check to the **Easter Seal's Kessler Center for Special Education**. For more information go to www.EasterSeals.com/newyork

4. Jerry Goldman, Beryl Nusbaum, and Jim McElheny present the check to the **Jewish Home of Rochester**. For more information go to www.JewishSeniorLife.org

5. John McAndrew and Jim McElheny present the check to **House of Mercy**. For more information go to www.HouseofMercyRochester.org

1

2

3

4

5

WOODS OVIATT GILMAN LLP

700 Crossroads Building | 2 State Street | Rochester, New York 14614

The art of representing people®

WoodsOviatt.com

Areas of Practice

BUSINESS & FINANCE

- Business Counseling
- Business Succession Planning
- Corporate Governance
- 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

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

FAMILY WEALTH & ESTATE PLANNING

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

REAL ESTATE DEVELOPMENT & FINANCE

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

LITIGATION

- 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
- Toxic Torts / Lead Paint Litigation

SECURED LENDING & FINANCIAL RECOVERY

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

Best Lawyers BEST LAW FIRMS U.S.News 2016

LAW FIRMS WORLDWIDE MERITAS®