WINGATE, RUSSOTTI, SHAPIRO & HALPERIN, LLP

Network Newsletter

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FOUR SUPER LAWYERS SELECTED

Wingate, Russotti, Shapiro & Halperin, LLP is proud to announce the selection of four (4) of our attorneys as Super Lawyers. Kenneth Halperin, Robert Bellinson, Clifford Shapiro and William Hepner join Phil Russotti and Jason Rubin, who were previously named, making six (6) WRSH attorneys who have been recognized as Super Lawyers.

Kenneth Halperin

This honor is the product of the investigative procedures by the publisher of *Law and Politics*, which examines the attorney's standing within the community in which the attorney practices, professional achievements, verdicts and settlements, honors and awards, special licenses and certificates and scholarly lectures and writings, as well as any other outstanding achievements. Bar associations and courts throughout the country recognize the legitimacy of the Super Lawyer selection process.

Robert J. Bellinson

Recent findings of a Special Master upheld by the New Jersey Supreme Court examined the details of the Super Lawyer evaluation process. The Special Master reported that "the Super Lawyer selection process is a comprehensive, good-faith attempt to produce a list of lawyers that have attained high peer recognition, met ethical standards, and demonstrated some degree of achievement in their field. It is absolutely clear from this record that Super Lawyers does not permit a lawyer to buy one's way onto the list nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one's inclusion in the lists." To be named to this list represents true recognition of accomplishment in the field by one's peers.

Clifford Shapiro

Kenneth Halperin has been practicing law for eighteen (18) years and is a specialist in construction litigation dealing with the New York State Labor Law. Responsible not only for the litigation aspects of the case, but also the day to day management of the cases that he is involved with, he credits the effectiveness of his partnerships with his clients as key to his success. Kenneth also does significant pro bono work representing low-income tenants.

Rob Bellinson is an accomplished trial attorney with a reputation in our firm for always "bringing home the bacon." He is also a member of the New York State Trial Lawyers Association, the New York County Lawyers Association and the American Trial Lawyers Association.

William Hepner

As managing partner, Clifford Shapiro reviews and evaluates every negligence case. Specializing in negotiation, Clifford is actively involved in the settlement of almost every case, and believes in negotiating the best possible settlement as soon as possible during the litigation process, so as to best serve the client.

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"One of the principal advantages of ADR is the speed (and accompanying cost savings) of its streamlined processes."

ALTERNATIVE DISPUTE RESOLUTION (ADR) INSTEAD OF COURT FOR BUSINESS DISPUTES

by David J. Abeshouse

Early in the 20th century, new alternatives arose in reaction to many of the defects of our judiciary, and others globally. Now, 90 years later, Alternative Dispute Resolution (ADR – including arbitration and mediation) has a firm and deservedly growing foothold in our business dispute resolution landscape, domestically and globally.

The vast majority of recent United States Supreme Court decisions encourage greater use of ADR in business cases. However, myths and misconceptions about ADR persist, despite its advantages in many cases.

Arbitration generally is a more streamlined, faster form of adversarial dispute resolution with greater finality than court litigation. Like court, there is a trial, and arbitration is binding – the Arbitrator issues an award, similar to a court judgment, determining who wins and who loses, and in what manner. Arbitrators hear cases only within their subject area expertise, whereas most judges are generalists, hearing a wide variety of matters. Most arbitrations are private, unlike the public-record court system.

Mediation, in contrast, generally is a more consensual, voluntary, negotiation-based process, with no mandatory resolution forced upon the parties. Rather, in mediation, the parties present their thoughts to each other and the Mediator (either with or without counsel), and the participants work together to reach a settlement that benefits all to the greatest extent possible, including by preserving relationships; civility trumps combativeness. The presence of the impartial Mediator changes the settlement dynamic, as (s)he helps the parties explore the issues, their positions, their interests, and the creative options for resolution. The participants enjoy the most open opportunity to be heard (and even "vent"), unrestricted by the rules of evidence. In mediation, the parties themselves ultimately determine the resolution of the dispute, often in a customized, cost-effective, win-win fashion. Mediation can be used instead of, or even during, an arbitration or court litigation. Mediation is highly successful, with more than 85% of mediated business cases resulting in settlement agreements.

One of the principal advantages of ADR is the speed (and accompanying cost savings) of its streamlined processes. A recent statistical review of 100 business cases filed with the American Arbitration Association with claims seeking more than $500,000 shows the median completion time as just 13 months. AAA Commercial Bulletin, Issue 6, Dec. 2010. Those same cases if filed in court likely would have averaged between 3 and 4 years to complete. Longer duration almost always equals more attorney hours expended, which translates to significantly greater expense, even after adding arbitrator compensation.

So if business owners and their contract-drafting lawyers want to benefit from ADR, they can include a dispute resolution clause in their business agreements. Unfortunately, all too often, negotiating arbitration clauses is an afterthought, if it's considered at all, although an arbitration clause becomes a key provision when a dispute later arises.

Many different forms of dispute resolution clauses exist, as ADR is a creature of contract and is flexible almost without limit. So it is a shame that most lawyers use an old "standard" (actually sub-standard) form dispute resolution clause, thereby squandering the opportunity to create a truly customized and helpful provision. Many resources exist for obtaining assistance in drafting, including sample clauses on the websites of various ADR providers such as the American Arbitration Association (http://www.adr.org), JAMS, NAM, and others. Perhaps the best course of all is consulting a knowledgeable ADR expert, to learn about what specific components of a clause might be used to the advantage of a client in a particular situation. Some experts even offer free consultations for drafting dispute resolution clauses, because this enhances appropriate use of ADR to resolve business disputes, and that rising tide floats all boats.

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FATCA
(Foreign Account Tax Compliance Act)
by Paul Gengo

"While the new law is directed towards Foreign Financial Institutions, there are provisions that directly affect US citizens and resident aliens filing their 1040 personal income tax returns."

While FATCA came into law on March 18th 2010, its compliance date of January 1, 2013 has been delayed until 2014; I don't expect there will be another extension of time for compliance. While the new law is directed towards Foreign Financial Institutions, there are provisions that directly affect US citizens and resident aliens filing their 1040 personal income tax returns.

The ACT requires Foreign Financial Institutions to supply information and withholding on US source payments such as dividends and interest. If the past is an indication of the future, the database information collected by the United States Government will be used to correlate "voluntary" compliance by US citizens and resident aliens.

The individual 1040 filing form has for years required Form TD F90-22.1 (Report of Foreign Financial Accounts "FBAR"). FATCA now imposes additional filing requirements, it requires US Taxpayers with foreign accounts and assets with the aggregate value exceeding $50,000.00 to report the assets on an informational return. Of course the complexities of determining the $50,000.00 threshold remain for further clarification.

Specific foreign account assets include not only financial accounts maintained by foreign financial institutions but any stock or security issued by a non US person and any financial interest, contract held or investment that has a non US issuer or counterparty. It includes any interest in a foreign entity which means that taxpayers who purchase foreign real estate through an entity will have a filing obligation.

The minimum penalty for failing to submit the required disclosure is $10,000.00 and it increases by $10,000.00 for each 30 day period following notification from treasury department. The maximum penalty is $50,000.00.

Section 66.62 permits the IRS to impose a 20% penalty on a substantial understatement of income tax or for negligence or disregard of rules or regulations that is not attributable to fraud "for which a 75% penalty applies"

Section 512 of FATCA amended Section 662 to add a penalty of 40% on any portion of the underpayment attributable to a transaction involving an undisclosed financial asset that should have been reported under Sections 6038, 6038B, 6046A, 6048 or new Section 6038D.

The increased penalty structure is affected for the tax years beginning after March 18, 2010. This Act also includes an expanded statute of limitation, as well as special provisions for the grantor trust or taxable distributions.

BACKGROUND

This act is among the many changes that have occurred because of the terrorist attack September 11, 2001. While there are changes that occur very quickly, these changes in our financial world took years to implement, to construct and design. Initially, the governments intention was to find sources of financial support for terrorist organizations and supporters within the United States, this program has grown far beyond that. While the security of United States was the initial primary objective, the revenue potential has not been overlooked.

In many cases a small inheritance of property and or money in a foreign country or the transfer of funds for the purpose of supporting or subsidizing a US relative in a foreign country will now bring these activities into a disclosure analysis.

The penalties for failure to comply are substantial to say the least. Are they serious? You bet they are. And the table stakes are very high.

FALL 2012

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"...a small amount of modern jurisprudence and legislation superimposed upon crusty old rules of law and procedure."

FALL 2012

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SOME UNIQUE ASPECTS OF MARITIME LAW

by Jim Hazen

Dating back to the Rules of Oleron, maritime law and admiralty procedure have had many unique aspects.[1] This article will discuss the areas of varied personal injury limitations periods and quirks in the law pertaining to the carriage of cargo. Founded on tradition, maritime law is resistant to change. Often amended by treaty or statute, amendment can be a laborious and contentious process. The end result is a small amount of modern jurisprudence and legislation superimposed upon crusty old rules of law and procedure.[2]

Initially, a patchwork of personal injury limitations periods is found in the maritime law. In 1980, a statute was passed to establish a uniform three-year limitations period in maritime personal injury cases.[3] However, in passenger cases, the shipowner may insert prominently in the passage contract ticket a one-year limitation,[4] Then, in the hoary field of "maintenance and cure, cure", actions are barred by "laches"—unreasonable delay coupled with prejudice, with a statute of limitations used only as a "guide." However, since the passage of the Uniform Statute, courts have disagreed on whether to apply it directly or an analogous state statute as the guide in a particular case.[5]

Turning then to the field of cargo claims, we turn to the "package limitation", which limits recovery to $500 per package or customary freight unit, unless a higher value is declared.[6] Surprisingly, error in management or navigation of the vessel is a defense.[7] However, incompetent officers or crew make the ship unseaworthy, losing the defense.[8] It has been argued that gross negligence ousts the package limitation, but that is a minority view.[9] To add insult to injury, freight is payable to the shipowner even if the goods are lost or misdelivered, where the bill of lading has a freight-earned on loading clause.[10]

To conclude, above are but two areas containing some unique aspects of maritime law.

1) Due to space limitations, only two areas are dealt with here. There are, of course, many more. The reader is referred to the several treatises on the subject for a broad survey. Also, references herein are starting points for the researcher and are not meant to be definitive.

2) A maritime doctrine which requires the employer to provide seamen injured "in the service of the ship" medical and minimal living expenses while receiving "curative" treatment.

3) 46 U.S.C. §30106(a).

4) 46 U.S.C. Appx. §183b (a).

5) Compare Exxon Corp v. Apex R.E. & T, 1987 A.M.C. 1759 (Tx. App. 1987) with Etheridge v. Crew, 1982 A.M.C. 616 (D. Al. 1982).

6) Carriage of Goods by Sea Act, 46 U.S.C. Appx. §§1301, et seq.

7) See, e.g., Folger Coffee Co. v. Olivebank, 201 F.3d 632 (5th Cir. 2000).

8) In re Potomac Transport, Inc., 909 F.2d 42 (2d Cir. 1990).

9) Compare In the Matter of Tecomar S.A., 765 F.Supp. 1150 (S.D.N.Y. 1991) with La Patagonia Compania de Segura v. Empresa Lineas Maritimas Argentina's, S.A., 1992 A.M.C.1755 (N.D. Cal. 1992).

10) Amoco Transport v. S.S. Mason Lykes, 768 F.2d 659 (5th Cir. 1985).

FINANCIAL STATEMENTS AND THE REASONS ATTORNEYS IN GENERAL SHOULD UNDERSTAND THEIR BASICS

by Alan E. Kahn

Many attorneys at law do not have the slightest idea about the fundamentals of financial statements, their preparation and interpretation. Imagine a personal injury attorney saying that he or she doesn't have to understand the functions of organs, limbs and so forth. How can you examine or cross-examine an expert witness in a case involving Financial Statements without understanding their fundamentals? Or advise clients? Or prepare legal documents?

These are the usual Financial Statements:

1. **Balance Sheet** – this is essentially a snapshot of the Assets, Liabilities and Capital of the entity as of a fixed date—usually the end of the fiscal period.
2. **Statement of Income and Expenses** – a detailed summary of Revenues and Business Disbursements over a period of time—usually covering the fiscal period of the entity.
3. **Statement of Cash Flows** – this ties in the amount of cash and cash equivalents at the beginning of the fiscal period with those of the end of the fiscal period. It acts as a bridge between the Balance Sheet at the beginning with that of the end, taking into account the results of Statement of Income and Expenses over the same fiscal period.

Here are a number of situations where knowledge of financial statements is really necessary:

1. **Security and Exchange and Attorneys General Compliance** – since these authorities require compliant Statements to be filed by the entities involved, the Attorney must understand whether or not the client has indeed met its responsibilities.
2. **Contracts Generally** – many contracts involving business activities refer to the financial status of the entity; some examples are profit sharing agreements, commission agreements and the like.
3. **Buy-Sell Agreements** – a great number of these make reference to the "book value" of the entity or interests therein. Book Value is defined with reference to the Financial Statements of the entity.
4. **Purchase of an Interest in a Condo or Co-op** – New York requires the Condo or Co-op to regularly issue audited Financial Statements and such are important to both the purchaser as well as the seller.
5. **Income Tax Matters** – while just about income tax authority has its own rules as to valuation of various relevant tax bases, the books of the entity, as exemplified by the Financial Statements, are the usual starting point.
6. **Litigation Damages** – in many cases, such as personal injury or property damage, it becomes necessary to show how the claimant or plaintiff was injured financially, by comparing the book value of the business before the wrongful incident with after.
7. **Punitive Damage Claims** – an important component of assessing punitive damages is the financial condition of the miscreant—again, financial condition is shown starting with any of his or her business interests as shown on recent Financial Statements.
8. **Domestic Relations Matters** – where either or both of the marital parties has a business interest valuations beginning with Financial Statements are extremely relevant.
9. **Immigration Matters** – on a personal note, I was called in by an immigration attorney to testify as to the Statements of a sponsor where it was claimed by the Immigration people that said sponsor could not afford to hire and pay the applicant. Fortunately, we won.

While the forgoing merely scratches the surface, I hope the reader will be interested enough to dig deeper and acquaint himself or herself with all of the ramifications of this important subject.

"I was called in by an immigration attorney to testify as to the Statements of a sponsor where it was claimed by the Immigration people that said sponsor could not afford to hire and pay the applicant. Fortunately, we won."

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MEDICAID EXPANDED ESTATE RECOVERY

by Anthony J. Lamberti

"The concern is the issuance of New York State and New York City regulations that will set forth Medicaid's position on retroactivity, valuations and the actual meaning and assets included in the statutory language '...any other property...'."

In the Summer, 2011, *RCBA Journal*, I reported an amendment to the Social Services Law Section 369 effective April 1, 2011 which redefined "estate".

The significant adverse change to the medicaid law has become how a person's "estate" is defined for recoupment purposes. Subdivision 6 of section 369 of the Social Services Law is amended to redefine "estate" as follows: "an individual's estate includes all of the individual's real and personal property and other assets passing under he terms of a valid will or intestacy. Pursuant to regulations adopted by the commissioner, which may be promulgated on an emergency basis, an individual's estate also includes any other property in which the individual has any legal title or interest at the time of death, including jointly held property, retained life estates, and interests in trusts, to the extent of such interests; provided, however, that a claim against a recipient of such property by distribution or survival shall be limited to the value of the property received or the amount of medical assistance benefits otherwise recoverable pursuant to this section, whichever is less. Nothing is this subdivision shall be construed as authorizing the department or a social services district to impose liens or make recoveries that are prohibited by federal laws governing the medical assistance program."

At that time it was hoped that I would be able to report to you now that the Commissioner of Health N.Y.S. promulgated regulations to implement this legislation. It is over five months since the effective date and **No Regulations** have been published.

The concern is the issuance of New York State and New York City regulations that will set forth Medicaid's position on retroactivity, valuations and the actual meaning and assets included in the statutory language "...any other property...".

No regulations have been issued and our clients, after five (5) months (effective April 1, 2011), are being left without an answer to the estate planning strategies that are in place or pending strategies. It is noted that a ninety (90) year old with a life estate has .28221% interest that passes and is subject to recovery under the amendment. So a $400,000 home would subject the remainderman th a claim for long term care services to the extent of $112,840. This is a substantial claim and loss.

Certainly, the use of life estates after April 1, 2011 is inadvisable at the very least because of the exposure of the remainderman to recovery for the cost of the long term care of the life tenant based on the value of the life estate.

The New York State Bar is following this matter closely and we are all concerned on the impact New York State regulations may have on Third Party Trusts, retirement funds, insurance and, of course, real property.

Concern is also directed to the State's method of valuation, conflict of laws and treatment of exempt transfers. It is hoped that the regulations are published soon and that they clarify the State's position so we may have some security in the planning process.

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THE CASE FOR A FLEXIBLE LEASE

by Diane Schottenstein

"New York law provides that the landlord can arbitrarily refuse consent for any arbitrary reason and can even extract a fee from the tenant for agreeing to give its consent."

A failure to have flexible transfer provisions in a lease can end up a very costly mistake for a business as it can saddle a business with an expensive and non-useable leased space or derail a corporate merger. The article presents an overview of the landlord's right to deny consent and the timing of the landlord's decision.

If a lease is silent about subletting or assigning, it is allowed, since the courts generally disfavor limits on alienation. However, often the landlord's form lease provides that assignment and subletting are subject to the consent of the landlord. In New York there is no requirement of good faith by a commercial landlord. In fact, New York law provides that the landlord can arbitrarily refuse consent for any arbitrary reason and can even extract a fee from the tenant for agreeing to give its consent.

Generally, one will try to negotiate a lease that provides that the landlord will not unreasonably deny a request to sublet or assign. However, what a court will ultimately consider reasonable is fact sensitive. If the landlord agrees to be reasonable, the landlord would be limited to rejecting a proposed tenant based on objective factors such as financial responsibility, legality of the proposed tenant's business, or suitability of the proposed use in context of the particular building. For example, a landlord was found to be unreasonable in rejecting a tenant because of philosophical objections to the proposed tenant's business.

One should also be aware that depending on the language of the provision, transfers by operation of law which include bankruptcy, death or merger can be treated as prohibited transfers. Some leases even have separate broad change of control clauses. This is one reason why corporate mergers or any change in the ownership of a business require a careful lease review.

It is possible to negotiate a safe harbor of transfers that will not require any landlord consent. For example, a landlord may agree that one national retailer can assign to another within certain parameters.

Since a delay of consent can possibly sour a deal, at a minimum one should negotiate that a landlord not unreasonably delay consent. However, a best case result is to get the landlord to agree that its failure to respond within a specified time period is deemed consent.

Although commercial leases may bind for a set period of time, these clauses provide flexibility. Spending some time on thinking through and negotiating these provisions can result in a thankful client.

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"Predicate to the application of the holding in Burns is whether the amount of workers' compensation benefits are even ascertainable, that is, definitively calculable."

DON'T GET BURNED BY HOLDING IN BURNS

by Joseph F. Sensale

While in general New York Workers' Compensation Law may be an enigma wrapped in riddle to those practitioners who do not ferry across its roiling waters routinely, the occasional excursion required when same must be considered in the settlement of a third-party action at law arising out of a work-related injury is no less fraught with potential attorney liability.

Of paramount importance is the holding in Burns v. Varriale, 34 A.D.3d 59, 820 N.Y.S.2d 655 (3rd Dep't 2006), wherein the New York State Supreme Court, Appellate Division, Third Department held, inter alia, the instant workers' compensation insurance carrier will be liable for payment of its "equitable share of the cost of obtaining [workers' compensation] benefits" on behalf of the plaintiff-claimant which "are no longer…hypothetical or speculative[.]"

Predicate to the application of the holding in Burns is whether the amount of workers' compensation benefits are even ascertainable, that is, definitively calculable. This analysis will result in the affirmative if (a) the benefit paid is a death benefit; (b) the plaintiff-claimant is found to be permanently totally disabled, or, most contentious, (c) the plaintiff-claimant is found permanently partially disabled but nonetheless can prove he/she is entitled to continued benefits. The latter will either require the claimant to remain attached to the labor market, or, not be in receipt of fluctuating reduced earnings payments.

Application of Burns requires responses to yet additional queries: (i) as the facts in Burns involve a court-ordered compromise of the workers' compensation insurance carrier's lien/credit rights, unless such court-ordered compromise exists in the case at bar, is the holding of Burns even applicable? (ii) did plaintiff-claimant reserve rights provided same pursuant to Burns at the time of settlement of related third-party action? (i.e., did workers' compensation insurance carrier agree to continue workers' compensation payments to plaintiff-claimant upon settlement of third-party action?) (iii) is a finding the claimant has not voluntarily withdrawn from the labor market indispensable when a plaintiff-claimant is permanently partially disabled? and, (iv) even if a plaintiff-claimant returns to employment producing earnings affecting the permanent partial disability rate, upon production of proof of such earnings, is such rate subject to recalculation in accordance with the percentage of the workers' compensation insurance carrier's equitable share of the cost incurred in obtaining such benefits previously established?

Securing answers to the foregoing, while not dispositive, will at least point the ship in the right direction amidst those roiling waters.

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KEY MORTGAGE/REAL ESTATE RELATED PROVISIONS OF THE DODD-FRANK

Wall Street Reform and Consumer Protection Act (the "Act")

by Daniel M. Shlufman

The Act has had a tremendous impact on residential real estate transactions. In this article I will summarize the significant provisions of the Act which affect these types of transactions.

The Consumer Financial Protection Board ("CFPB") was established by the Act to have broad oversight over financial products. It is under the control of the Federal Reserve and has far-reaching powers to ban abusive products and practices. The CFPB will oversee banks, mortgage lenders and credit card companies. They will regulate real estate related laws such as RESPA, TILA and HOEPA and assume authority from the Federal Reserve, HUD, the FDIC and the OTS with respect to these matters.

The Act also eliminated stated income loans by requiring that lenders obtain proof from borrowers of their ability to pay for their mortgages. Borrowers must provide evidence of income such as tax returns, paystubs and bank documents in order to qualify for a loan. Prepayment penalties are also eliminated on adjustable rate loans and interest only loans. On conforming loans (i.e. those made by Fannie Mae or Freddie Mac), they are limited to 3 years and 3%.

Mortgage brokers are prohibited from placing borrowers into higher interest loans and products to earn a larger fee. As a result, these "anti-steering" provisions prohibit a mortgage broker from being compensated on either the interest rate itself or the loan terms. In addition, mortgage brokers are now only allowed to be paid by either (i) the lender or (ii) the borrower, but not by both. If paid by the borrower, there is a 3% limit on the broker points and fees that a borrower may pay.

All mortgage loan originators ("MLO") are required to be licensed by the Nationwide Mortgage Licensing System and Registry ("NMLS"). Each MLO is given an individual NMLS number which now must be included on all loan documentation. Treble damages will be assessed for violations of the licensing and anti-steering provisions of the Act.

"Treble damages will be assessed for violations of the licensing and anti-steering provisions of the Act."

Banks and mortgage banks are required to maintain a 5% economic interest in the mortgages that they originate. But, there is an exemption from this 5% required for "qualified residential mortgages". This term has not yet been defined. Though the definition will likely include all FHA, Fannie Mae and Freddie Mac loans.

The above represent the material provisions of the Act. However, there are many others that affect residential real estate such as (i) expansion of HOEPA to purchase loans, (ii) prohibition on mandatory arbitration on mortgage disputes, (iii) additional disclosure requirements for ARMs and (iv) stricter requirements for loan servicers with respect to escrows, timing of payoff letters, and payment crediting. A foreclosure defense has been established for situations when a broker or lender has violated either the anti-steering or ability to repay provisions of the Act.

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"Develop a Code of Conduct/Ethics that defines and expands the company's mission statement and explicitly states what types of behaviors are unacceptable, as well as the consequences of violating the Code."

ANTI-FRAUD CONTROLS: TEN THINGS EVERY BUSINESS OWNER SHOULD KNOW

by David Zweighaft

Regardless of industry, location, size or phase of the economic cycle, every business is susceptible to fraud in one form or another. Briefly, there are three principal types of fraud that occur: i) misappropriation of assets, ii) financial statement misrepresentation, and iii) corruption. Owing to the diversity of clients and the unique facts and circumstances that each business faces, there is no "one-size-fits-all" set of rules that would apply to all businesses equally in addressing these types of fraud. There are however, leading practices based on sound principles that every business owner can apply in order to mitigate the risks:

- Ensure there is sufficient segregation of duties so that no one individual has more than one of the following: access to assets, the ability to record transactions and record keeping responsibilities. An example of this would be a bookkeeper who has control of the checkbook, maintains the cash receipts and disbursements journal and receives and reconciles the banks statements.
- For all disbursements above a specified amount, require two signatures for approval of checks.
- Require multiple bids on all purchases above a specified amount.
- Conduct surprise cash counts or inventory counts at least twice a year.
- All employees should take their full vacation allotment, with at least one full week taken consecutively.
- Incorporate a Vendor Audit Clause into all purchase agreements that allows the customer to review or audit the vendor's records for that customer.
- Develop a Code of Conduct/Ethics that defines and expands the company's mission statement and explicitly states what types of behaviors are unacceptable, as well as the consequences of violating the Code. Have all employees, officers and owners read the Code and sign a document stating that they have read the Code, understand it and agree to abide by it. Require that all personnel sign a re-affirmation of the Code annually.
- Perform thorough background checks of all employees prior to hiring.
- Communicate a zero-tolerance policy for any fraud, dishonesty, conflicts of interest, or other prohibited practices.
- Maintain a hotline or other anonymous reporting mechanism for employees to report unethical behavior without fear of retribution. Provide a feedback mechanism so that employees reporting suspicious activity can learn the outcome of their calls.

While implementing these "top ten" business controls does not necessarily guarantee the total elimination of opportunities for fraud to occur, they will provide a system of oversight that will result in prevention, deterrence and timely detection of attempts to commit material frauds against a business.

One parting thought: the most robust and thorough system of anti-fraud controls are of negligible value if i) management personnel are not they are not tasked with responsibility for them, ii) exceptions are not reported or investigated, and iii) they are not periodically tested for operating effectiveness.

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WRSH NEWS

$7,250,000 RECOVERY FOR WORKER INJURED AS A RESULT OF DEFECTIVE SCAFFOLDING

Phil Russotti and Ken Halperin recently settled the case of Fernando Araujo, a union-affiliated painter in his 40s, who was injured while working at a chemical storage facility in the city of Niagra Falls. While painting a large chemical tank, Araujo fell as he ascended the attached ladder that provided access to the scaffold's platform. Because Araujo had not been provided a harness or any other safety device that could have prevented his fall, he plummeted 12 feet and sustained brain damage including memory loss, concentration impairment, speech impairment, anxiety and depression, as well as a torn hip labrum, and a torn rotator cuff.

Phil and Ken would have introduced evidence of $2,400,000 for loss of earnings. Their meticulous preparation and relentless efforts resulted in the case being settled during the pendency of the defendant's motion for summary judgment, for $7,250,000.

This dedication to advocating on behalf of our clients resulted in an impressive settlement and is what sets WRSH apart from other firms.

FOUR SUPER LAWYERS *continued from page 1*

William Hepner, who has been practicing law for 20 years, joined WRSH as a trial lawyer in 1998 and has tried and litigated numerous significant automobile, premises and construction accident cases throughout his career. His experience in over 70 trials, as well as his calm and unflappable demeanor in court, gives him credibility with jurors and allows him to withstand the rigors of trial without losing focus. Bill is an arbitrator and member of the American Judges Association.

Jason Rubin is an extremely experienced medical malpractice attorney and was recognized as a Super Lawyer in 2010. During one recent case, a cause of action was dismissed on Statute of Limitations grounds in the Supreme Court and Jason appealed to the Appellate Division, 2nd Department. Though the dismissal was affirmed, Jason moved to reargue because he believed the decision was erroneous. The motion was denied a second time and yet Jason moved to reargue again, finally convincing the court that they had made a mistake. They set aside their prior rulings, reinstated the cause of action and remanded the case for trial. Jason then settled the case for 2.5 million dollars, a result which can only be accomplished by a truly outstanding attorney.

Phil Russotti is a leading trial lawyer in the City of New York and has tried every type of civil case including medical malpractice, products liability, construction accidents, premises liability, police brutality and automobile cases. He has been honored as a Super Lawyer by his peers every year since its inception in 2007.

Wingate, Russotti, Shapiro & Halperin is proud to have six attorneys recognized by their peers for their skill in the field and commitment to their clients.

UPCOMING NETWORKING

EVENTS

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