Wingate, Russotti, Shapiro & Halperin, LLP

Network Newsletter

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FEATURED ARTICLES:

WHAT YOU DON'T KNOW CAN HURT YOU

SUM-supplementary under-insured/uninsured motorist coverage

SCENARIO:

You are seriously injured in an automobile accident, which is the fault of the driver of the car that struck you. What happens next? Assume you bring a lawsuit which has a value of $300,000 but the other driver has a minimum $25,000 policy, or you were hit by a New York City taxicab which only has the required $100,000 policy, or worse is driving without insurance. How do you make up the difference between what your injury is worth and the amount of available insurance?

We have handled numerous cases like this and have been able to obtain a recovery above the policy limits. If your insurance broker was sharp, you would be able to recover more than the liability policy from your own automobile policy under supplementary under-insured/uninsured motorist benefits, commonly called SUM coverage. All you would have to do is have your attorney file a claim with your carrier to establish the value of your injury in excess of the coverage available from the other automobile, and either settle with them or go to arbitration with your insurance company.

But do you have sufficient SUM coverage? You can have as much SUM as you have liability coverage. For instance, if you have $500,000 liability limit, you could have $500,000 SUM to protect you and the occupants of your car, most likely family members. But most brokers don't advise you to purchase anything other than the minimum SUM coverage despite the fact that this coverage is inexpensive.

ADVICE:

Check the declaration sheet of your automobile insurance policy and see how much SUM coverage you have. Call your insurance broker and make sure you have as much SUM coverage as your liability coverage which you may also want to increase. This will protect you and the occupants of your car from being unable to recover the full value of their injuries. The amount of SUM you can obtain depends on your carrier but some insurance companies even write umbrella policies for SUM coverage up to $1 million.

In addition to checking your SUM coverage, also take a look at your medical coverage, called personal injury protection, or PIP. The law requires you to have medical insurance of $50,000 per person which pays the medical bills for your injuries or the injuries of the occupants of your car, regardless of who caused the accident. If anyone's medical bills are in excess of $50,000, their health insurance company would cover the excess but the company has the right to reimbursement of those expenses from any money the injured person recovers. Thus, the injured person would be paying for those excess medical bills. To avoid that, you can make sure that medical bills are paid no matter whose fault the accident was by obtaining supplementary medical coverage above the $50,000 which will pay the medical bills without coming out of your pocket. Under New York State law, the maximum supplementary PIP you can obtain is $100,000 for a total of $150,000 PIP coverage.

If you have any questions about these coverages, call our office and one of our attorneys experienced in the intricacies of the insurance will be happy to assist you.

"Every business that has non-owner employees is required to maintain unemployment insurance."

SUCCESSOR LIABILITY FOR A BUYER IN M&A TRANSACTIONS: ONE LITTLE-KNOWN EXCEPTION TO THE GENERAL RULE

by Peter Papagianakis

Most middle-market and smaller business acquisitions are structured as an asset purchase rather than a merger or a stock purchase. The primary reason for business acquisitions to be structured as asset purchase deals is to limit the post-acquisition (successor) liability of the Buyer.

Most NY attorneys representing a Buyer of a business know that an asset purchase deal triggers the Buyer's obligation to file a Form AU.196.10 captioned "Notification of Sale, Transfer or Assignment in Bulk" pursuant to NYS Sales and Use Tax Law, Article 28, Section 1141(c). One purpose of the AU-196.10 is to notify the Bulk Sales Tax Unit of the Department of Taxation and Finance (DTF) that the Seller is selling substantially all its assets and gives the DTF the opportunity to determine whether there is a deficiency in sales taxes due and previously remitted by the Seller. The AU-196.10 must be delivered to the DTF at least 10 days before the Buyer either takes possession of (or pays for) the assets. The AU-196.10 filing is critical because if the Buyer does not comply with that requirement, the principal of the Buyer may be held personally liable for the Seller's sales tax deficiency.

In contrast to successor liability arising from the Seller's sales tax deficiency, many attorneys are not aware that a Buyer of a business succeeds to the Seller's unemployment insurance experience ratings. Generally, every business that has non-owner employees is required to maintain unemployment insurance.

According to the NYS Department of Labor, even if a business acquisition is structured as a typical asset deal, the Buyer also acquires all or a portion of the Seller's unemployment insurance experience rating account balance and other aspects of the Seller's unemployment experience. Under NYS Department of Labor regulations, a business acquisition occurs when another employer (Seller) transfers or sells all or part of its business to the Buyer and any one of the following occurs:

- The Buyer acquires any of the Seller's goodwill;
- The Buyer continues or resumes the business of the Seller, either in the same location or elsewhere;
- The Buyer employs (post-acquisition) substantially the same employees who worked in the acquired (Seller's) business.

Attorneys should be aware of the Buyer's successor liability that arises from the Seller's unemployment insurance experience because each of the foregoing three scenarios is present in practically every business acquisition structured as an asset deal.

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TIDE MAY BE TURNING FOR STUDENT LOAN DISCHARGEABILITY IN BANKRUPTCY

by Richard E. Weltman

"Student loan debt exceeds what Americans owe on their credit cards."

Several recent decisions demonstrate that courts are reconsidering the treatment of student loan debt dischargeability in bankruptcy under the "undue hardship" exception of section 523(a)(8) of the Bankruptcy Code. If the trend continues, the long-standing *Brunner* test may become a mere "relic of times gone by." *Roth v. Educational Credit Management Corp.*, 490 B.R. 908 (9th Cir. BAP 2013).

This change results from recent efforts to make dischargeable a relatively small amount of hardship student loan debt at a time of exploding guaranteed loan debt. Educational debt has swelled to more than $1 trillion with little possibility of relief under the present law even to the most deserving. In context, student loan debt exceeds what Americans owe on their credit cards.

Section 523(a)(8) prohibits a bankruptcy court from discharging student loan indebtedness "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). In *Brunner v. New York Higher Education Services*, *Corp.*, the Second Circuit gutted the undue hardship exception by requiring a three-part showing that: (i) debtor cannot maintain, based upon current income and expenses, a minimal standard of living if forced to repay the loans; (ii) additional circumstances exist indicating debtor's affairs are likely to persist for a significant portion of the loan repayment term; and (iii) debtor has made good faith efforts to repay the loans. *Brunner*; 831 F.2d 395 (2d Cir. 1987).

After 25 years, several courts have recently questioned the viability of *Brunner*; and concluded that some student loan indebtedness may in fact be dischargeable. In *Kreiger v. Educational Credit Management Corp.*, the Seventh Circuit asserted that *Brunner* created a "judicial gloss" on the phrase undue hardship that could lead *Brunner* to "supersede the statute itself." *Kreiger*; 713 F.3d 882, 884 (7th Cir. 2013). Chief Judge Easterbrook, writing for the majority, reasoned that the Bankruptcy Code did not require a 53-year old unemployed debtor to forego a bankruptcy discharge by pledging to pay her student loan debt in perpetuity, assuming she might find employment eventually. *Id.* The court reasoned that if the Bankruptcy Code compelled such a result, "no educational loan ever could be discharged, because it is always possible to pay in the future should prospects improve." *Id. See also*, *Hedlund v. Educational Resources Institute*, 2013 WL 2232325 (9th Cir. May 22, 2013).

These decisions demonstrate that federal courts are reconsidering the tough hurdles announced in *Brunner*. Few disagree that students (and their parents) borrowing money for education have a social and legal contract to repay these loans. However, it may not be possible for certain people with limited prospects to repay tens of thousands of dollars of student loan debt in the midst of a stagnant employment market. Allowing relief to those few deserving individuals through bankruptcy, strictly but flexibly construing "undue hardship" seems both reasonable and necessary. More work needs to be done to ensure that student loan repayment continues to be the norm and wholesale defaults do not create a new credit bubble.

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"An incorrectly drafted lease can be an absolute nightmare if things go wrong and you wind up in court."

RESIDENTIAL LEASE PRIMER

by David A. Kaminsky

After 28 years of experience as a real estate attorney I have seen countless residential leases and the problems landlords and tenants encounter as a result of incorrectly drafted leases cannot be overstated. I will go through a few basic issues to be aware of from the perspective of each side of the transaction.

Tenant's Perspective:

Always know what kind of unit you are renting. Is it a coop, a condo, a rent stabilized or free market unit? If it is a coop or condo, it is essential that the lease be specific to such type of unit. In both coop and condo situations, you must get board approval prior to taking occupancy. Make sure that all promises are contained in the lease, and if something is not written in the lease, do not assume you are entitled to it. For example, new appliances, painting, refinishing of floors, or permission to have pets must all be in writing and contained in the lease if you are to be guaranteed that they will be provided to you.

Landlord's Perspective:

As it is generally the landlord who prepares the lease, the landlord is responsible for putting all details and facts into the lease completely and correctly. An incorrectly drafted lease can be an absolute nightmare if things go wrong and you wind up in court. Don't download just any lease from the internet. Use Blumberg or Real Estate Board of New York forms. Make sure the tenant's name is complete and correct and that the dates, rent amount and security deposit amount are all correct. If the landlord is a business entity, be sure to clarify what the entity is, such as a corporation or an LLC. Renting apartments is a business and businesses must be conducted correctly.

To All Parties:

In the age of electronic communications, there may be many emails going back and forth which may contain other promises and agreements outside of the signed lease. Be careful of what you say in emails as parties retain these and can use them in court to try and demonstrate additional promises and obligations between the parties.

Attorneys and Residential Leases:

Residential leases are often prepared by the landlord or sometimes by real estate brokers. With all due respect to all of the above, it is often very useful to have an attorney review the lease before it is signed.

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OPPOSING SUMMARY JUDGMENT IN A MEDICAL MALPRACTICE CASE – THE SECOND DEPARTMENT FINALLY GETS IT RIGHT

by Jason Rubin

The elements of a claim for medical malpractice against a physician are that there was a departure from accepted medical practice and that such departure was a proximate cause of the plaintiff's injury. Quite often, a physician will move for summary judgment at the completion of discovery, contending that he did not commit malpractice. The law is clear that a physician seeking summary judgment has the initial burden of making a prima facie showing that there was no departure from accepted medical practice or that the alleged departure was not a proximate cause of the alleged injuries. This prima facie showing must usually be made with the submission of an expert's affidavit. Assuming a defendant makes such a prima facie showing, a plaintiff, in opposition, must submit evidentiary facts or materials to rebut the defendant's prima facie showing, so as to demonstrate the existence of issues of fact which must be resolved by the trier of fact. Usually, this requires an affidavit from an expert to rebut the defendant's expert's affidavit.

But what about a scenario where a defendant moves for summary judgment solely on the basis that the physician did not depart from accepted medical practice, and he does not address the element of proximate cause? What is the plaintiff's burden in opposition to the motion? Does the plaintiff have to demonstrate solely that the physician departed from accepted medical practice? Or does the plaintiff also have to demonstrate that the departure from accepted medical practice was a proximate cause of the plaintiff's injuries?

For more than thirty years, the Appellate Division, Second Department has held that, in such a situation, a plaintiff must raise a triable issue of fact with respect to both the departure element and the causation element. Many cases were dismissed for the plaintiff's failure to address both elements in opposition to such a summary judgment motion. In my opinion, this line of decisions made little sense and was unfair to malpractice plaintiffs. It often required a plaintiff to submit affirmations from multiple experts – one on the departure element and one on the causation element – despite the fact that a defendant did not raise any issue with respect to the element of causation in their motion. This increased the cost of litigation and required a plaintiff to prematurely "show their hand" and prove his entire case prior to trial – even when causation issues were not then being contested.

Thankfully, in the 2011 case Stukas v. Streiter, 83 A.D.3d 18, the Second Department finally saw the error of its ways and held that where a physician defendant "makes a prima facie showing of entitlement to judgment as a matter of law on a single element or theory, there is no good reason to require the opposing party to rebut or address any element or theory other than that raised by the moving party." The Court stated, "[i]t is neither logical nor fair to require the nonmoving plaintiff, who has previously alleged in the pleadings that the defendant's departure was a proximate cause of the claimed injuries, to come forward with evidence addressing an element that was never raised by the moving defendant."

"Many cases were dismissed for the plaintiff's failure to address both elements in opposition to such a summary judgment motion."

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"While some more prove effective than others, I guarantee at least one of the electeds will deliver."

GOVERNMENT CAN WORK FOR US

by Corey Bearak

Occasionally, one of your clients may be faced with a difficult problem and reach out to you for help. A client homeowner or property owner may face a large bill from their local water utility, Con Edison or National Grid (soon to be replaced by Public Service Gas and Electric). Perhaps that large utility ignores its customers, or an error was made and they prefer to cover up rather than own up, regardless of the implications for the homeowner. Though your instinct may be to take up the cause, the dollars may not justify it, even if the goodwill does. The matter might require more time and cost in the form of billable hours than you want to impose on your client.

However, another option is available. Engage the public servants elected to represent us. Most local elected officials, also referred to as "electeds", have liaison relationships to the utilities and can assist you and your clients. They apply no billable hours and have the ability to devote ample staff time to assist your clients' needs.

Perhaps your client owns a business that performs work for New York City or State. Suppose payment is withheld or and invoice takes too long to process. If you sue, one third goes to an attorney – if successful. However, that outstanding sum might represent a gross profit and taking out that one-third also impacts the company's bottom line. Counsel the client to turn to one of their electeds instead.

In the wake of Superstorm Sandy, suppose an insurance company refuses to pay out or honor a valid claim. Ask NYS' Department of Financial Services, the insurance regulator, to intervene. Rather than reach out directly, use the resources available to you and your client. Your local state assembly member and state senator have direct liaisons to the agency.

Plenty of other matters exist where you can help your client by directing them to their local electeds. While some more prove effective than others, I guarantee at least one of the electeds will deliver. State electeds can help with issues having to do with medicaid, Department of Motor Vehicles and many state tax matters, while members of Congress can assist with medicare, immigration and passport issues. Give it a try.

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OPPORTUNITIES IN PRIVATE CAPITAL MARKETS

by Mark Schwarz

A long anticipated watershed in the market for raising capital for nonpublic companies was reached recently when the Securities and Exchange Commission published adoptive regulations under the JOBS Act passed in April 2012. Congress mandated the SEC to promulgate conforming regulations to permit issuers and broker-dealers to use means of general solicitation such as print ads, seminars, mailings, websites and even cold calls to solicit investment capital, techniques which had been banned for decades. These are subject to a 60-day comment period prior to taking effect.

Though the public imagination is routinely beamed to the IPO market and all the hoopla surrounding public offerings, "hot issues" and the like, probably greater amounts of capital raised in the US for corporate growth are raised privately. However, until now, investor solicitation had to be made discreetly to persons or entities having a preexisting relationship with the issuing company or with the intermediary placement agent or investment bank. The good news for attorneys representing capital hungry companies, investment banks, ad agencies and corporate public relations firms is that substantial work should flow due to these liberalized sales approaches.

"Investor solicitation had to be made discreetly to persons or entities having a preexisting relationship with the issuing company or with the intermediary placement agent or investment bank."

Caveats:

A. Only high net worth investors will be eligible to participate in offerings utilizing general solicitation and heightened scrutiny will be required on the part of the sponsor in verifying compliance.

B. Promoters with prior regulatory or legal problems will generally be prohibited from engaging in the offerings.

C. The anti-fraud rules under the '34 Act remain in force and apply to the content of advertisements, mailers, oral statements and web content, which in most instances will need to be filed with regulators.

D. Certain state securities law restrictions (including New York!) must be observed.

In summary, attorneys involved with their clients' financial needs should be aware of the day which has dawned, including their own stake in making the legislative changes work for them to the fullest.

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"Settling involves addressing claims by the decedent's creditors prior to making final distributions to the heirs."

PROBATE AND ADMINISTRATION OF ESTATES

by Vlad Portnoy

When someone passes away, the long and arduous road of settling their estate begins. An estate is everything a decedent owned during their lifetime. Settling involves addressing claims by the decedent's creditors prior to making final distributions to the heirs. This is done through Court either by Probate (decedent dying with a properly executed Last Will and Testament), or by Administration (where there is no Will, and the decedent passed away intestate).

Everyone has an estate plan. Where a Client did not take minimal steps to execute a Will, or a Trust, an estate plan is provided by the State's rules of intestacy. The difference is that if a Client had taken affirmative steps towards creating their own estate plan, they would be able to make their wishes known about their intended beneficiary designations. These beneficiaries could be friends, relatives, charities, and any other appropriate entity. Even pets get their own trusts! But the distribution of inheritance by rules of intestacy is usually done by marriage and blood relations. Thus, if one passes without an estate plan, some of their assets may go directly to those who might not have been the intended beneficiaries.

For both Probate and Administration proceedings, there are two types of assets: probate and non-probate. A probate asset is everything that the decedent owned during their lifetime (including fractional interests), but that cannot be described as a non-probate asset. A non-probate asset is something the decedent owned or had interest in that would pass automatically upon one's death, without necessity for Probate, (such as retirement accounts, life insurance policies and property held jointly by decedent with someone else during their lifetime). A house, as an asset owned by a husband and wife as tenants by the entirety, or by two or more persons as joint tenants with right of survivorship, would pass to the surviving tenant(s) by operation of law. Proceeds from retirement accounts and life insurance policies are paid out directly to the beneficiaries designated on the policy by the owner.

However, the same type of asset may be considered a probate or a non-probate asset. This depends on who owns the asset. A checking account held jointly by a husband and wife would be a non-probate asset. But the same account passing from the second-to-die, or surviving, parent to the children would be included into the surviving parent's estate for probate purposes. Even though the death benefit would be paid out directly to the beneficiaries, a built-up cash value of the whole life insurance policy owned by the decedent at the time of their death may also be included into a decedent's overall estate. Estates over certain amounts are taxable by the New York State, and larger estates are taxable on both Federal and New York levels.

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ALTERNATIVE DISPUTE RESOLUTION: A WIN FOR ALL

by Irwin Kahn

As practicing attorneys we know that a large percentage of civil cases are ultimately settled prior to trial. Alternative Dispute Resolution enhances this result.

With regard to Mediation, there is no downside to sitting down and discussing your case before a trained neutral. From a business standpoint, in most situations it makes sense to dispose of a matter without having to invest additional time, energy and money. Receiving prompt payment is a plus for the claimant. Defendants can benefit by capping the potential exposure. These are reasons why mediation is a win-win proposition.

Arbitration can result in ending a matter that could linger in the court system for a long time. This saves not only time, but energy and money for fees as well.

For any aspect of ADR to be successful both sides should evaluate the liability, damages, and potential verdict in the venue in which the action is pending. For a successful Mediation, both sides must agree to enter into good-faith negotiations before a skilled neutral acting as an agent of reality. One should approach ADR in the same way one prepares for trial. A Memorandum should be prepared for both Mediation and Arbitration.

There are many tools under the umbrella of Alternative Dispute Resolution. They are mediation, arbitration, mini-trials, fact or coverage determination, and many variations of same that are subject to the imagination and creativity of the participants,

In the Securities industry FINRA has instituted both Mediation and Arbitration programs. The American Arbitration Association has programs in commercial, insurance, and labor areas. In the Federal Courts, ADR is in effect in both the Southern and Eastern Districts. Participants in these programs have benefited from expedited discovery and the narrowing of issues.

There are a number of programs available in New York State including Family Court, Community Dispute Resolution Centers, the New York County Commercial Division, and other County Commercial Division programs. Matrimonial Mediation and Tort mediation are also available in New York County.

Commercial providers supply skilled neutrals at a reasonable cost and aid parties to agree to participate and decide which modality would be most beneficial.

Statistics show that utilizing ADR as a case management tool will result in speeding up the turnover of cases and enhance client satisfaction. Therefore, ADR is a winning proposition for all concerned.

"Defendants can benefit by capping the potential exposure. These are reasons why mediation is a win-win proposition."

Irwin Kahn, Mediator & Arbitrator

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UPCOMING NETWORKING

EVENTS

NETWORK FALL EVENT

THURSDAY, OCT. 17TH

5:30 - 7:30 PM

CIBO RESTAURANT

767 2ND AVE., NYC, NY 10017

NETWORK HOLIDAY PARTY

THURSDAY, DEC. 12TH

5:00 - 10:00 PM

CIBO RESTAURANT

767 2ND AVE., NYC, NY 10017

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Be sure to visit the WRSH Cross Referral Network website. As a part of our continuous efforts to encourage cross referrals, a full directory of all participating network attorneys can be found in electronic form on the WRSH Network Portal website for your convenience. To access the website, visit our website at **www.wrslaw.com** and click "**WRSH Network Login**" at the bottom of the blue toolbar on the left hand side of the page. Enter the password "**wrsnet**", and click "**Directory of Lawyers**" to view the directory either by name or by practice area. You can view upcoming events and past newsletters, as well as post any questions or comments you may have.

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Super Lawyers

Wingate, Russotti, Shapiro & Halperin is proud to have six of its Attorneys listed in "Super Lawyers" Publications.

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NEWSLETTER

PRACTICE AREAS

- Construction Accidents
- Medical Malpractice
- Premises Liability
- Products Liability
- Motor Vehicle Accidents
- Wrongful Death
- Birth Injuries
- Brain Injuries