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VIEW FROM THE BAR
FALL 2017

A Message from our CEOs

Every year we hold an annual retreat with all of the Firm's partners to talk about the current state of the Firm and our vision for its future. We discuss ways to best serve our client's needs and respond to the changing world around us. In other words, we contemplate how to ensure that our Firm's roots, which now date back an astonishing 87 years, remain firmly planted while continuing to branch out to reach our clients in the ways they need us most. Over the last few years some of our initiatives to come out of our annual retreats have included finding a new headquarters which we have not only settled in but expanded from within, enhancing our technological capabilities, strengthening our charitable ties within the communities we serve, broadening our women's initiative program, hiring both talented "newly minted" attorneys as well as recruiting well-known experienced attorneys, expanding our practice capabilities, forming a diversity committee and the creation of Team Mandelbaum, our committee devoted to charitable causes.

One thing our clients can be sure of is that we consider them a critical part of our growth and expansion. While our attorney count continues to grow and our practices expand, we are always reminded that the foundation of our firm is "built on relationships and focused on results." We hold steadfast to our commitment to providing our clients with effective and affordable legal services they can rely on today and in the future.

Very truly yours,

Barry R. Mandelbaum, Esq.
Co-CEO

William S. Barrett, Esq.
Co-CEO

Think You Have Insurance for Employee Claims? Think Again!

By: Dennis J. Alessi, Esq., LL.M.

Approximately 30 years ago insurance carriers began offering Employment Practices Liability Insurance ("EPLI"). This insurance purportedly provides employers with insurance coverage for claims by their employees of wrongful employment practices, such as discrimination, harassment, wrongful termination, and the like.

Insurance brokers packaged this insurance along with the other types of coverage that all employers purchase, such as commercial general liability and property loss and damage. This package of insurance was wrapped-up into a single premium quote; so that, if the cost for the EPLI was broken-out separately, its cost was quite reasonable, even for small, and the smallest, employers. It became standard in the industry for insurance brokers to offer EPLI in this package form. As a result, we find that many small employers, even those with only three or four employees, will have EPLI coverage.

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5 Essential Items to Include in a Buy-Sell Agreement

Casey Gocel, Esq., LL.M

Your business is likely one of your most valuable assets, so it is vital that you do everything you can to protect it.

A buy-sell agreement is a binding contract between owners of a business that provides instructions on what steps should be taken in the event of a change of ownership or management of the company.

There are five essential items that should be addressed in every buy-sell agreement.

1. Define the triggers. A buy-sell agreement is triggered by an event that causes a change in ownership and/or management. There are six primary triggers: death, disability, retirement or voluntary withdrawal, legal actions (such as bankruptcy or divorce), deadlock, and termination for cause. Whether some or all of these triggers results in a buy-out will depend on the nature of your business and your personal wishes.
    a. Death. In the event that your partner dies, do you want to remain in business with his/her spouse or children? If not, the buy-sell agreement must include a buyout provision. If there is a buyout provision, is it mandatory or optional? If optional, at whose discretion? Can you force the deceased partner's estate to sell? Or can they force you to buy?
    b. Disability. In some businesses, it is appropriate for an owner's disability to trigger a buyout. This is typical where the owner is providing services for the company. If the business is passive (such as a real estate holding company), disability will likely not trigger a buyout. It is also important to define disability. Is a buy-out triggered after a 6-month disability or a 12-month disability?
    c. Retirement. At what age is a partner allowed to retire from the business and force a buyout? Are the partners even allowed to retire? Again, this will likely vary depending on whether or not your company is an operating business or a passive investment business.
    d. Legal Proceedings. If your partner is involved in a legal battle that results in a third-party acquiring his interest in your business, it is vital that the buy-sell agreement address this scenario. A typical clause would allow the remaining partners to buyout the creditor at a discounted price. At a minimum, the buy-sell agreement should prohibit the creditor from having any voting or managerial rights.
    e. Deadlock. If a situation arises where the partners no longer agree and are deadlocked regarding a business matter, what happens then? In some cases, you may wish to appoint a third-party mediator to act as the tie-breaker. In other cases, it may be appropriate to give the consenting partners the right to buy out the dissenting partner.
    f. Termination for cause. You just found out that your partner has been taking money out of the company's bank account and using it for his personal benefit. Now what? Do you have the right to terminate your partner's ownership interest in the company? Without a buy-sell agreement that addresses this scenario, the answer is likely not without court intervention.
2. Establish the buyout price. This can be done in a few ways:
    a. Meet annually or semi-annually to adopt a "certificate of value", which attaches a fixed value to the company to be used in the event of a buyout. This does not have to relate to fair market value (FMV) or a third-party valuation, but should be updated regularly.
    b. Agree that, at the time of a buyout event, the company's accountant will attach a FMV that is binding on all parties.
    c. Hire a third-party valuation expert in your industry (this generally occurs with larger companies).
    d. At death, the buyout price is equal to the life insurance in place. (This is highly risky, because the life insurance may be grossly more or less than the actual value, or the policy may lapse resulting in no purchase price.)
3. Define how the buyout will be funded.
    a. Where will the money come from? Will it be insurance in event of death or disability? Or, via a promissory note over a period of time?
    b. How long will the buyer have to pay the purchase price? (Months, years or in one lump sum?)
    c. Will there be interest paid to the seller?
4. Create a succession plan. Buy-sell agreements should address not only the transition of ownership, but also the transition of management. A well-drafted succession plan will define the succession plan for the officers, managers and directors of the company, either by specifically naming successors or providing a mechanism for how they are elected. In a corporation, this is typically addressed in the bylaws. In the case of an LLC, this should be addressed in the operating agreement.
5. Define restrictive covenants (if any). Restrictive covenants typically address: (i) non-competition (restricts working for, or owning an interest in, a competing business); (ii) non-solicitation (restricts soliciting the company's employees and customers); and (iii) non-disclosure (restricts using or sharing the company's confidential information). Important things to address are: which of the restrictive covenants will be included, how long will they remain in effect, and what geographic territory will the restrictions apply to.

Regardless of the terms set forth, be sure to review your buy-sell agreement regularly to make sure it still makes sense for your business and that it is still fair under prevailing economic conditions and your personal circumstances. Having a well-drafted buy-sell agreement prevents future disputes between partners and ensures a successful transition of ownership and management following any of the triggering buyout events.

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Think You Have Insurance for Employee Claims? Think Again!

A claim by a former employee of an alleged wrongful termination, or other wrongful employment practice, is often initiated by an attorney demand letter sent directly to the employer. Many times, when I speak with an employer about such a letter, the first response is that: "I'm not worried I have insurance for this." Unfortunately, when we consider what coverage an EPLI policy provides and, more importantly, does not provide, it gives a false sense of security.

In general, an EPLI policy does not provide coverage for those elements of a wrongful employment practices claim which are most often the costliest for an employer. Specifically, the policy generally does not cover any contractual, breach of contract claims for compensatory damages such as lost salary and benefits under an Employment Agreement. Sometimes, the policy does not even cover compensatory damage claims for lost wages and benefits based on statutes prohibiting discrimination, harassment and other statutorily prohibited employment activities. Statutory benefit claims such as wage and hour and overtime violations; failure to pay the employer's portion of Social Security, Medicare and other payroll taxes and, most importantly, punitive damages are also not covered by the policy. In many cases punitive damages are by far the biggest portion of any jury verdict against an employer. (Punitive damages are, as the name reflects, to punish the employer for the wrongful act.)

With many policies only three types of damages are actually covered. These are: (1) the employer's defense costs for attorneys' fees, experts and other litigation costs; (2) any damages based on physical, mental or other injury to the employee (essentially personal injury damages); and (3) the employee's attorneys' fees and other costs of litigation if the employee prevails. (In most wrongful employment claims the employer is also obligated to pay the employee's attorney's fees and other costs of litigation if the employee wins the case.)

There is another gap in EPLI insurance which is even more troubling for employers. In my experience, EPLI policies universally exclude from coverage any "intentional" acts. Although I always do so, it is difficult for any employment defense attorney to argue that sexual or other forms of harassment, discrimination, or other wrongful employment acts were not intentional. Consequently, if the claim is tried to a verdict, and the employer is found to have intentionally engaged in whatever wrongful employment activity was alleged, the employer faces the specter of having no insurance coverage whatsoever!

The point of this article is not to counsel against employers purchasing EPLI insurance. Quite to the contrary. I always urge employers to purchase such insurance. There are two take aways from this article. First, it is important to negotiate through your company's insurance broker to obtain the broadest possible coverage under the EPLI policy. Coverage for some of the above-described excluded items is negotiable; for an additional premium, of course! The second take away is that, in addition to purchasing insurance, employers must have a robust HR management plan in place, and they must seek the advice of experienced employment law counsel before taking any adverse action against any employee.

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New Jersey Estate Planning Moves into the Digital Age

By Marc J. Comer, Esq.

On September 13, 2017, New Jersey signed a new law governing a fiduciary's access to digital assets. The Uniform Fiduciary Access to Digital Assets Act allows fiduciaries to access and manage digital assets just as they would any tangible property. The UFADAA applies to four groups of fiduciaries: executors/administrators of a decedent's estate, agents under a power of attorney, trustees of a trust, and court-appointed guardians of incapacitated persons. This legislation became necessary because more and more important information is being transmitted and stored digitally. Online bank accounts, financial statements, photos, tax returns, social media accounts, computer files, virtual currency, music, as well as important correspondence and documents are just a few examples.

It is important to note that the UFADAA draws a distinction between digital property and electronic communications. Fiduciaries are permitted to manage digital property but will not have access to electronic communications such as email, text messages and social media accounts unless the original user expressly consented to such access in a will, trust, power of attorney or similar document. So, for example, if you want to stop Facebook from freezing your account upon your death or disability and subsequently refusing your family access to any photos or other posts stored there, you may need to update your estate planning documents to expressly grant such access. And, forget about your fiduciary accessing emails or anything personal stored on your office computer – the new law does not cover an employee's use of digital assets belonging to an employer.

In addition to updating your estate documents, as necessary, to cover access to digital assets, it is a good idea to gather passwords, usernames, and security questions/answers in a safe but accessible place for your fiduciary. This information can be kept with information about bank accounts, investment accounts, insurance policies, real property, business interests, and any other important non-digital information and documentation that your fiduciary will need to take care of your affairs when you are no longer able.

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Employers Beware: Common Misconceptions of Arbitration Clauses

By Lauren X. Topelsohn, Esq.
and Steven I. Adler, Esq.

Arbitration is generally touted as a more cost effective alternative to litigation (but that isn't always the case). It is certainly a more private process intended to avoid the risk of a runaway jury. As a result, arbitration clauses have become de rigueur in employment agreements. But not all arbitration clauses are created equal. Employers need to choose their terms thoughtfully, with an eye to case law, changes to the Commercial Rules of the American Arbitration Association (the "Rules"), and potential, unintended consequences.

1. Emergency Relief:

Since the appointment of an arbitrator may take weeks, prior to October 2013 parties to an arbitration agreement in need of immediate, emergent relief had to look to the Courts to fill the gap. This is no longer the case.

Effective October 1, 2013, the AAA adopted Rule 38, "Emergency Measures of Protection." (JAMS soon adopted a similar rule). Rule 38 enables parties to request emergency relief from an "emergency arbitrator" ("EA"). The EA is appointed "within one business day" of the request and within two business days will schedule a hearing. Once the full-time arbitrator or Panel is appointed, the EA has "no power ... unless the parties" agree otherwise.

One obvious benefit of Rule 38 is it eliminates the need to proceed in two forums when emergent relief is required. In addition, the standard to obtain emergency relief is markedly lower before an EA than in Court. Courts typically require a party to demonstrate a likelihood of ultimate success on its claims. In contrast, an EA may issue emergency relief when "immediate and irreparable loss or damage" will result without it.

Employers should seriously consider incorporating Rule 38 in their employment contracts. The Rule, however, applies only to arbitration agreements entered into on or after October 1, 2013. As such, if your agreement predates October 1, 2013, it may be worthwhile to restate (reaffirm) the arbitration clause alone, or as part of an amendment to the over-all agreement.

2. Arbitration: Unexpected Costs

A key issue to consider when adopting an arbitration clause is whether the potential dispute is the type you are prepared to entrust to a single arbitrator or, alternatively, prefer a Panel, typically comprised of three members. In the context of employer/employee disputes, there is a concern that a single arbitrator may be sympathetic to the "David" in the equation, whereas a Panel may be more balanced. Nevertheless, three heads are not always better than one. While a Court's time is paid for with tax dollars, parties pay the arbitrator (and forum fees). For a 3 member Panel, the equation looks something like: (3 x Average Hourly Rate of Qualified Professional x unknown hours = $$$ ÷ (# parties). Costs mount quickly at a multiple of three. Certainly, not every dispute requires a Panel. Moreover, with suitable due diligence during the arbitrator selection process, a single arbitrator may be just right.

As a "Goliath," you may believe that you will be able to overwhelm "David" with costs until he relents. Not so fast. If a party does not pay the arbitrator's fees, the AAA "informs" all parties so that the paying party (you) may advance the required payment on the non-paying party's behalf. If you decline? The arbitrator may "suspend" or "terminate the proceedings." Victory? No. The non-paying party will undoubtedly march into Court – exactly where he/she wanted to be (and you did not) in the first place – and assert that he/she did not have the financial wherewithal to arbitrate, despite being bound by an arbitration agreement. The only way to avoid this outcome is to pay "David's" fees. On the "upside", if you do carry "David's" fees, you may request that the arbitrator take "specific measures," including dismissing his claim and awarding you the fees paid on his behalf. That said, an arbitrator cannot bar a non-paying party from defending against your claim or counterclaim. The lesson here: a "poorer" party may be able to avoid arbitration based on an inability to pay, while a wealthier one cannot.

3. The Award: Written in Stone?

Judicial review of an arbitration award is extraordinarily narrow; "[a] party seeking relief" from an award "bears a heavy burden." Oxford Health Plans, LLC v. Sutter ("Oxford"). Under the Federal Arbitration Act ("FAA"), the model for most State Acts, an award may be overturned only if it is the product of "corruption, fraud, or undue means," "evident partiality" or "misconduct" on the part of the arbitrator, or where the arbitrator "exceeded his powers" or failed to render a "definite award." FAA §10(a).

The FAA favors "finality" and courts rarely disturb an arbitrator's decision. According to the U.S. Supreme Court, "it is not enough to show that the [arbitrator] committed an error—or even a serious error." Oxford. "Because the parties 'bargained for the arbitrator's construction of their agreement,' an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits." Id. So, before opting for arbitration, take note that you will likely have to live with the award, be it good, bad or ugly.

4. The Future of Class Actions

In AT&T Mobility v. Concepcion, the U.S. Supreme Court upheld an agreement that required consumers to submit to arbitration, and prohibited arbitrations in the form of a class action. In the wake of that decision, employers were quick to adopt similar clauses in an effort to prevent employees from joining together. Such provisions

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Employers Beware, *continued*

have been highly criticized by the National Labor Relations Board, and their enforceability has led to a split among the federal appeals Courts that is particularly problematic for employers with workplaces across the country.

On January 13, 2017, the U.S. Supreme Court accepted three cases to resolve whether employers may require employees to submit to individual arbitration and waive class actions and collective proceedings, Epic Systems Corp. v. Lewis, (7th Circuit); Ernst & Young v. Morris, (9th Circuit) and National Labor Relations Board v. Murphy Oil USA, (5th Circuit). Reply Briefs were filed last month. Stay tuned...

In short, arbitration clauses are not a one-size-fit-all proposition, and sometimes should not be included at all. The next time you enter into an agreement, make certain that the arbitration clause is not simply cut and pasted from another document, and that you fully understand all of its ramifications.

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Negotiating the Loan Commitment: Borrower Beware

By Craig W. Alexander, Esq.

There was a time when negotiating a loan commitment only required a discussion of the amount, rate and term. The other details would be resolved when reviewing the loan documents, with the loan officer available to address any comments. It was a time when borrowers could depend on their "relationship" lenders to accommodate reasonable requests in order to close the loan.

Times have changed. In the post-recession, HVCRE and Basel III financial world, borrowers can no longer afford to negotiate a bare bones loan commitment. Despite the best intentions of loan officers, lenders no longer can be trusted to resolve significant loan and property issues after a commitment has been accepted.

The significant issues include more than the loan amount, rate and term. Issues such as recourse limitations, permitted transfers, leasing and financial covenants should all be addressed in the commitment. For example, if the mortgaged property is leased, what are the leasing restrictions? What are the lender's "standard carve out" provisions? Will terrorism insurance or a zoning endorsement be required? Is the loan assumable? Will transfers of interests in the borrower be permitted? How much insurance will be required? Will the lender escrow for real estate taxes and insurance? Will estoppel certificates be required from all of the tenants, even the "mom and pop" tenants? Will an updated survey be required, and if so must it be an ALTA survey?

Each property has particular issues relating to its ownership and operation, and those details should be considered and addressed in the loan commitment.

In the present financing environment, borrowers will discover that their loan officers now lack the authority to agree to an issue not addressed in the commitment. It will have to go back to committee, which will delay the closing. And this process will occur after loan documents have been drafted – long after the commitment has been accepted, a substantial deposit has been paid, and third-party reports have been completed. It will be too late to terminate the matter if the loan committee will not agree to amend the loan documents, which have now been standardized precisely to avoid any revisions. The lender will blame the "regulators" and promise to work with the borrower post-closing, but the end result will be a loan containing objectionable terms and conditions.

To avoid this situation, the loan commitment should be scrutinized and revised to include all pertinent details, including any unique issues relating to the ownership and operation of the property. The attorney who will be closing the loan should review the commitment as well as the borrower's insurance broker and accountant. Issues should be flagged and discussed before the commitment is presented to the loan committee.

To avoid an unpleasant surprise at closing, borrowers should also insist upon a fee estimate from lender's counsel and negotiate that amount from the inception. Borrowers should also request a list of law firms from their lenders for review with counsel. Borrowers should be involved in that selection to avoid the difficult attorneys and paralegals who can make the closing a torturous process.

Loan officers may resist this process, arguing it will only complicate matters, but borrowers should be mindful of this admonition -- if it is not expressly addressed in the commitment, the lender has not agreed to it. Besides minimizing risk, a comprehensive loan commitment will also avoid costly delays and increased legal fees attendant to lengthy loan document negotiations.

Borrowers beware. Just as financial institutions now operate under a "new normal" so too must borrowers adapt to this environment and take appropriate steps to protect themselves.

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Why Lenders in the Commercial Real Estate Market Should Conduct Adequate Environmental Due Diligence

By Douglas I. Eilender, Esq.

All too often we see banks, especially community and smaller banks, failing to perform adequate environmental due diligence. Unfortunately, this opens the door for unanticipated environmental risks that could be readily avoided.

Today, with few exceptions, environmental laws are clear: those who own real property are liable for environmental contamination on their property regardless of fault and when the problem occurred. However, most state and federal laws have safe harbor provisions that protect lenders from incurring environmental liability where they merely held indicia of ownership in real property to protect a security interest. A lender will be eligible to assert this secured creditor exemption from environmental liability so long as it does not "participate in the management" of the facility.

In general, a lender holding a security interest in a property "participates in the management" of the facility while the borrower is in possession of the encumbered property, and risks environmental liability, if they do any of the following: (1) exercise decision-making control over the borrower's environmental compliance activities such that the lender has undertaken responsibility for the borrower's waste disposal or hazardous substance handling practices; or (2) lender exercises a level of control that equates to day-to-day decision-making activities relating to environmental compliance, or overall operational functions. Thus, if a secured lender engages in acts of management that constitute actual participation in the management or operational affairs of the facility that influence facility operations, they will be deemed to have "participated in the management" of the facility by applicable law and may no longer to be eligible to assert the secured creditor exemption from environmental liability.

Under New Jersey law, the lender retains liability protection when it becomes an owner by way of foreclosure (including deed in lieu of foreclosure), if it seeks to sell, re-lease, or otherwise divest itself of the property in a "reasonably expeditious manner" after foreclosure. "Reasonably expeditious manner" is defined as whatever commercially reasonable means are appropriate with respect to the property. Therefore, as long as the lender does not participate in the management of the site and sells/divests itself of the property in a commercially reasonable matter, it should be eligible to assert the secured lender protections and avoid environmental liabilities. Please note that lenders may even "undertake environmental response actions pursuant to state and federal law," and take measures to preserve, protect or prepare the property for sale without fear of losing its exemption. However, holders of a secured interest are not required to conduct environmental inspections and failing to do so does not affect their exemptions.

Despite a lender's ability to assert the secured creditor exemption, it does not eliminate the fact that the asset is contaminated, which may undermine the lender's financial position. Thus, the ultimate purchase price received by the lender from the disposition of the asset to recoup its investment could be significantly diminished by the adverse environmental impact. But this situation can be avoided. The key is to retain competent environmental consultants to perform adequate environmental due diligence. Further, retain counsel who can translate this information in an easily understandable format and cost effectively provide options that avoid or allocate the known and unknown environmental risks, such as adequate reserves, indemnities, and environmental insurance. In any financial transaction, the best advice is to be pro-active in assessing the environmental risks to avoid a situation where the lender is accepting pennies on the dollar for a contaminated asset.

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Team Mandelbaum was a proud supporter of the Mayors 5K Walk to break the silence on Ovarian Cancer in West Orange, NJ on Sept. 24, 2017.

Bringing Value-Based Compensation to Your Medical Practice

By: Dennis J. Alessi, Esq., LL.M.

Over the last several decades, and up to today, I have reviewed literally thousands of Employment Agreements for physicians with private medical practices, all of which base the physician's compensation on the fee for service productivity model. These Employment Agreements almost uniformly provide a base salary and then a productivity bonus calculated on the total dollars collected by the practice for the medical services personally performed by the physician. The bonus is generally a percentage of the Physician's total productivity dollars which are in excess of a threshold dollar amount. Often times, the bonus provision has a two or three tier schedule of an increased percentage payment to the physician as the total dollars collected on his/her personal productivity increases above the threshold amount.

The problem with this compensation model is that it is somewhat (but, as I will explain shortly, only somewhat) antiquated, given the dynamic changes occurring in how physicians in private practice are being reimbursed for their services with the move, both by Medicare and private insurance carriers, to value-based healthcare ("VBH") compensation arrangements. VBH compensation, as compared to PFS, Physician Fee Schedule, is calculated on the quality of the health care services and the costs for them, as measured against a matrix of predetermined quality and efficiency (cost) standards, such as the quality of patient outcomes, the amount of services provided by the practice to achieve these outcomes, and cost savings for these services and outcomes, through coordinated care with other practitioners and otherwise.

Many physicians in New Jersey may not realize the extent to which both Medicare and private insurers have already implement VBH compensation models, while still maintaining a significant portion of physician compensation using the traditional PFS model. For physicians whose practice is not participating in an Accountable Care Organization ("ACO"), the most relevant Medicare VBH program is the value based modifier. In a nutshell, the value modifier provides for an enhanced payment to a medical practice, above the standard PFS amount for a particular service. This value modifier is calculated on an evaluation – again employing a predetermined matrix of performance/cost standards – of the quality of care (i.e., good clinical outcomes) provided, as compared to the cost.

Private insurance carriers in New Jersey, where the price of healthcare is among the highest in the nation, are also rapidly moving toward VBH reimbursement models which all employ the same concepts discussed above. In 2016, it was reported that Horizon Blue Cross/Blue Shield, the state's largest health insurance provider with 3.8 million participants, directed sixty (60%) percent of its medical spending to providers that have value-based arrangements with it. United Healthcare has reported that more than fifty (50%) percent of claims by its participants were paid to providers in value-based arrangements. Aetna states that nearly sixty-six (66%) percent of the claims its pays are to physicians participating in such programs.

These statistics are not signing the dirge for the near-term death of PFS, productivity based, compensation. At a very recent Brookings Institute event, entitled "Medicare Physician Fee Schedule and Alternative Payment Models", the presenters, who addressed the specific issue of alternative models, agreed that the PFS model will be a compensation component for a long time to come; and they implied that they expect this to be true for private insurers as well. The thought is that physician productivity still needs to be encouraged through compensation; while also compensating for quality care, lower costs and efficiency. So there needs to be a balance between these two compensation models with both existing side-by-side, as with the Medicare value modifier actually being a component of the PFS. My thought is that what portion of the physician's compensation will be based on which model may vary over time based on market and other forces. (For example, productivity may receive greater emphasis when there is a shortage of physicians, such as the enhanced payments provided by the ACA under Medicaid for primary care physicians due to their shortage).

The problem for medical practices is that all these VBH compenation payments are calculated on an evaluation of the practice as a whole, and not the individual physicians and other licensed providers in the practice. Consequently, the weakest physician in the practice, in terms of the quality/efficiency standards of whatever VBH program(s) the practice is participating in, may prevent the entire practice from reaping the financial rewards of the program.

ACOs in the Medicare Shared Savings Program ("MSSP"), which is a VBH compensation program, have developed their own internal quality/efficiency matrixes for determining how the ACO will allocate the MSSP payments it has received among the physician practices participating in the ACO, depending on each practice's comparative rating in this internal VBH program. In my opinion, forward looking medical practices will need to develop similar matrixes, and new compensation models, for their physicians and other licensed providers which balance a provider's productivity, quality of care and cost effectiveness, in determining overall compensation for that provider. The real trick will be how to do so while maintaining relative peace within the practice.

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Intellectual Property and Divorce

By: Lynne Strober, Esq.
and Jennifer Presti, Esq.

The first question that must be asked at the time of a divorce where there are intellectual property assests is whether the intellectual property asset was created during the marriage. Perhaps it is a hybrid asset established partially during the marriage. The marital portion is subject to equitable distribution. For example, assume a book is written partially before the marriage and partially during the marriage and after a complaint for divorce is filed the book is made into a movie. It is difficult to factually quantify what the marital component is and to determine how to value the marital portion of this growing asset. If the asset is a song, the royalty stream is a clear valuation tool. However, for example, with the song, even though it may have been created during the marriage five years after the complaint is filed it is the current marketing of the song that puts it on the air long after the marriage has nothing to do with the asset. It is a creative area of practice as unique facts help to establish the application of the laws of equitable distribution - the division of the assets upon divorce.

These types of issues require the team work of the family law attorney, the intellectual property attorney and the forensic accountant to come up with a reasonable approach to dealing with these complex issues and to assign and justify value. There is only limited case law to guide the practitioner. Therefore, these issues present an interesting and challenging frontier.

The four most common approaches to estimate the fair value of these types of assets are the Cost Approach, Market Approach, Income Approach, and Royalty Relief Approach. Once the marital portion has been determined the asset must be valued. It is relatively easy to value such an entity if it has just been sold or there is a clear basis for value. That is not frequently the case. If it is not a mature asset, such as an App for the cell phone that has not yet been sold, the value can be difficult to quantify.

Once a value or approach to value is carefully analyzed, assuming the divorce case settles, the issues must be clearly addressed in an agreement. The family law practitioner must spell out how the value of the asset may be tracked and paid out going forward. The agreement must address all possible contingencies such as, how future expenses will be treated, the length of the payout, the potential future success or failure of the asset are among the issues.

If the divorce case is litigated special expert opinion as to the asset and as to its value will need to be presented. All aspects of the issue will need to be submitted to the Court. Prenuptial Agreements may need to protect these assets as well.

These issues are new and unique to this area of the divorce practice. The authors are helping to create and present the analysis necessary to properly address this area of the law and have previously teamed up with with Eisner Amper's Joan M. D'Uva, CPA, to co-author articles on Intellectual Property for Valuation Strategies and the Matrimonial Strategist.

For those interested in more information, the articles' authors, along with Joan M. D'Uva of Eisner Amper will be hosting a live webinar on the subject of valuing intellectual property assets at the time of divorce on February 13, 2018, titled "Divorce and Intellectual Property: Valuation and Distribution of Intangible IP Assets" Sponsored by the Legal Webinar Group of Strafford Publications.

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The Holland, The Hudson and Holographic Wills

by Richard I. Miller, Esq.

The distance between Moonachie and Manhattan is thirteen miles. These locations, however, are a world apart if you pass away with a holographic will.

Generally, for a will to be valid it must be signed by the testator in the presence of two witnesses. A holographic will is handwritten and signed by the testator without witnesses. New Jersey law recognizes holographic wills provided the signature and material portions of the document are in the testator's handwriting. If these elements are satisfied the will can be written on a napkin, candy wrapper, toilet paper, cereal box (...you get the idea).

New Jersey goes even further – allowing wills that are not even signed by the testator. If a document or writing is not executed, it can still be probated in New Jersey if the proponent of the will establishes by clear and convincing evidence that the decedent intended the document or writing to constitute his or her will. This opens the door to any number of instruments being construed as a will, such as a text message, e-mail, Word document or fill-in-the-blank form.

By contrast, New York recognizes holographic wills only if made by a member of the armed forces while in service during war or armed conflict or by a person who serves with or accompanies the armed forces during actual conflict. (Imagine, Tom Hanks in Saving Private Ryan scribbling a list of his worldly possessions on the back of matchbook cover as grenades explode around him.)

The distinction between New York and New Jersey's recognition of holographic wills had a significant impact on a recent case in which our firm was involved. An individual died in New York leaving a handwritten signed document bequeathing his 2 million dollar estate to an in-law with whom he maintained a close and loving relationship. The in-law provided assistance to the decedent and saw him regularly. The decedent had no other known relatives or heirs with whom he had contact. If the decedent resided in New Jersey at the time of his death, the holographic will could have been probated and the estate inherited by his in-law as intended. However, since the individual resided in New York when he died, the will is invalid and the estate passed by intestacy to distant relatives with whom the decedent had no relationship.

As illustrated by this case, the importance of properly drafting and executing a will cannot be understated. As I learned in grammar school – handwriting counts. As I learned in law school – it counts even more depending on which side of the Hudson you write a holographic will.

Richard I. Miller, Esq., a Member of the Firm, is Chair of its Elder Law Practice Group and Co-Chair of the Special Needs Practice Group. He can be reached at rmiller@lawfirm.ms.

Catastrophic Injuries Cause Catastrophic Losses. The Necessity to Have an Umbrella Policy *WITH* UM/UIM Coverage

By: Nicholas J. Waltman, Esq.

Auto insurance is required in the State of New Jersey. While most automobile accidents are relatively minor, automobile accidents resulting in serious injury or death can place substantial physical, psychological, and financial burdens upon those injured and/or their family members. Having adequate UM/UIM coverage is just one part of making sure you're protected on the road. UM stands for 'uninsured motorist' coverage. UIM stands for 'underinsured motorist' coverage. These are types of coverages that are on ***your*** own automobile insurance policy. If you are injured by a negligent driver who does not have liability insurance or inadequate liability insurance, you may make a claim with your own insurance carrier if you have UM/UIM coverage. The maximum UM/UIM coverage in New Jersey is $500,000.

Most people have an umbrella policy to protect their assets from an unforeseen event, such as a tragic accident in which you are held responsible for damages or bodily injuries. In a case where an uninsured or underinsured motorists causes an accident and does not have the coverage required to pay for your injuries, you would typically need to have uninsured/underinsured motorists coverage in place to receive that benefit. Excess UM/UIM from a personal umbrella policy pays after the auto policy's UM/UIM limits have been exhausted. ***It is very important to understand that most umbrella policies DO NOT cover uninsured/underinsured motorists.*** Most available umbrella insurance policies apply only to situations in which YOU are held liable to another party, and do NOT apply if you are the victim of another's negligence. Therefore, you must insist upon and obtain umbrella coverage that contains UM and UIM coverage, which will apply regardless of who is negligent. If you have already purchased an umbrella insurance policy, you must read your policy and determine if it contains UM and UIM coverage.

Consider this example: as a result of an automobile collision caused by a drunk driver, you sustain significant injuries which threaten to render you seriously impaired for life. Your pain and suffering, past and future lost wages are estimated at over two million dollars ($2,000,000). If the drunk driver failed to carry automobile liability insurance and had no viable personal assets, you will recover ***NOTHING*** from the negligent uninsured drunk driver. If you had the maximum UM/UIM coverage you would only receive $500,000. That's only a quarter of what is necessary to compensate you and your family for your injuries. If you had an umbrella insurance policy with UM and UIM coverage, once you obtained the maximum limit from the drunk driver's insurance carrier (if any) and your primary UIM/UM insurance policy, you would be able to recover under your umbrella policy. Supposing you maintained a $2 million dollar umbrella, you would be fully compensated.

To summarize, I strongly recommend you check your insurance to ensure you have the maximum amount of UIM/UM coverage that you can afford and if you have already obtained an umbrella policy, ensure that your umbrella policy provides UIM/UM coverage irrespective of who is negligent and/or request an additional umbrella policy that provides UIM/UM coverage. Following these steps will best protect you and your family for that day that hopefully never comes.

Nicholas J. Waltman, Esq. is an Associate in the Firm's Personal Injury Practice Group. He can be reached at nwaltman@lawfirm.ms.

Immigration Law Updates

by Laurie Woog, Esq.

There have been numerous changes to immigration law practice and procedure in recent months. Employers, foreign employees, family petitioners and travelers all need to be aware of such shifts to ensure applications and travel go as smoothly as possible. The Immigration Law Department at Mandelbaum Salsburg is dedicated to staying abreast of the latest news. Here is a brief summary of some important developments in the field:

- DACA Rescission: As of this writing, the DACA program has been rescinded and any DACA (Deferred Action for Childhood Arrival) recipient whose DACA approval and work authorization will expire before March 5, 2018, MUST have sent in a request to extend his or her status by October 5, 2018. Employers of DACA recipients who want to see this program extended should contact their Congressional representatives.
- Travel Ban: President Trump instituted new restrictions on travel from several majority-Muslim countries but also added Chad and Venezuela. If you are from one of the affected countries, make sure you understand whether you can travel to the United States. The Supreme Court may decide that some of the issues surrounding the original travel ban have become "moot" when it is scheduled to take up the case this month.
- H-1b Requests for Evidence: USCIS has thrown up several roadblocks in employment-based immigration, including issuing thousands of RFEs questioning Level 1 wages for many occupations. While many of these cases are ultimately receiving approvals, this is becoming an area of concern for many employers whose workers have traditionally been accorded specialty occupation status as H-1b beneficiaries and will now find it harder to gain approval; this development is in addition to the difficulties already presented by the uncertainty of the H-1b lottery.
- H-1b Premium Processing: In a bright spot, USCIS has resumed expedited, or "premium," processing for H-1b petitions.
- Temporary visitors and "90 day rule on misrepresentation:" The Department of States now will consider "inconsistent conduct" within 90 days of entry to the U.S. as possible misrepresentation. This has potential consequences for visitors who apply for adjustment of status (green card) based on marriage or change of status soon after entering the U.S. on a temporary basis.

Laurie Woog, Esq. is Counsel and Chair of the Firm's Immigration Law Practice Group. She can be reached at lwoog@lawfirm.ms.

Mandelbaum Salsburg in the Community

Lectures and Publications

Dennis J. Alessi, Co-Chair of the Firm's Healthcare Practice Group and Co-Chair of its Labor and Employment Law Practice Group published an article in *Medical* Economics on "Expressing Sympathy Without a Malpractice Lawsuit."

Steven I. Adler, Co-Chair of the Firm's Labor and Employment Law Practice published an article on "The Use of Confidentiality and Non-Disclosure Provisions in Employment Agreements" in the October 25, 2017 issue of *NJBiz*.

Mandelbaum Salsburg teamed up with Fortune Management to host "Dental Practice Mergers, Acquisitions, Partnerships and Transitions with a Win-Win Strategy" on October 24, 2017 at the Harvard Club in New York City. The Firm's Co-CEO **William Barrett**, Bernie Stoltz, CEO of Fortune Management and Mark Murphy, CEO of Northeast Private Client Group spoke to dentists on how to effectively create associateships, partnerships and transitions that work.

Privacy and Cyber Security Chair **Khizar Sheikh** spoke at a CLE Seminar presented by First American Title Insurance Company & Two Rivers Title Company, LLC on Tuesday, October 17, 2017 on "Protecting Your Business and the Information it Collects."

Dennis J. Alessi, spoke at the Institute for Continuing Education and Dental Studies Institute's "Ethics & Recordkeeping" course on October 16, 2017.

Mandelbaum Salsburg hosted the NJCFA's "Yo-Pro Financial Planning Seminar: A Real Life Road Map for Your Future" on October 12, 2017 where Member and ERISA Practice Group Chair **Martin D. Hauptman** spoke.

Intellectual Property Chair **Peter Levy** was interviewed on October 6, 2017 on WBBR 1130 AM for Bloomberg Radio's "Bloomberg Markets PM" segment where he discussed tips for helping startups succeed. He was also featured on Patch.com with his Ten Tips for Launching a Successful Business.

On Thursday October 5th **Richard Miller**, Chair of the Firm's Elder Law Practice Group and Co-Chair of its Special Needs Practice Group presented as part of a panel on "Handling Contested Guardianships" at the New Jersey Law Center for NJICLE.

Michael Saffer, Co-Chair of the Firm's Commercial and Corporate Litigation Practice Group, was recently featured in NJ Biz with a Triple Play on "3 Things to Consider When Deciding Whether to Litigate."

Members, **Robin Lewis** and **Peter Tanella,** attended the annual International Society of Primerus Law Firms' Global Conference in Vancouver, British Columbia the week of October 4th. In addition to hearing from leading experts in the legal industry, the conference was attended by member law firms throughout the US and nearly 40 countries worldwide.

Laurie Woog, Chair of the Firm's Immigration Law Practice, spoke with Chris DeBello on his "Issues and Ideas" radio show in September about the current state of DACA and how it is impacting of the 22,000 people in New Jersey who are in it.

Mandelbaum Salsburg Co-CEO and Chair of the Firm's Professional Practice Transitions and Business Law Practice Groups, **William Barrett**, spoke at Fortune Management's Fortune 50 Advanced Training for the Dental CEO event in San Jose, California September 28-29, 2017 on "Mergers & Acquisitions and DSO Formations."

Dennis J. Alessi, was interviewed by *New Jersey Monthly* Magazine for their September 2017 issue on "Handling Business Closings and Layoffs."

Khizar Sheikh joined with Rob Kleeger, Founder & Managing Director of Digital4nx Group, Ltd. for a (ISC)2 NY Metro Presentation on "Incident Response Challenges and Practical Approaches, Regulatory Expectations and Legal Considerations" on September 13, 2017.

Gordon Duus, Chair of the Firm's Environmental Law Practice Group authored a 2 part piece for GlobeSt.com on "Using Environmental Insurance to Close Real Estate Transactions."

Laurie Woog authored an article in the September 2017 *Matrimonial Strategist* on "Divorce and the Undocumented Spouse."

Peter Tanella, a Member in the Firm's Professional Practice Transitions and Corporate Law Practice Groups, spoke at Columbia University's College of Dental Medicine on September 27, 2017 where he presented a "Dental 101" lecture to the students.

Mandelbaum Salsburg Member and Co-Chair of the Firm's Personal Injury Practice Group **Joseph Peters** recently gave a talk on Personal Injury Law and his role as a Personal Injury attorney to local business owners and community members.

Steven Holt, Chair of the Firm's Tax and Trusts & Estates Practice Groups was featured on NJ.Com's Biz Brain where he answered readers' questions on property tax and mortgage deductions and how the federal estate tax is calculated

Khizar Sheikh spoke as part of an Atlantic Business Technologies' webinar on August 17, 2017 on "Do You Have a Roadmap for EU GDPR Compliance?"

Mandelbaum Salsburg in the Community, *continued*

Khizar Sheikh spoke at TECHDAY at Microsoft's New York City offices on Wednesday, July 21, 2017 on "Patent Troll Kill Switch + Blockchain."

Mohamed Nabulsi, Co-Chair of the Firm's Health Law Practice Group published a Health Law Alert concerning suspect in-office laboratory arrangements.

Laurie Woog, was quoted in a northjersey.com article on the Revised Travel Ban.

Richard Miller was featured in NJ.com "Biz Brain" section answering a readers question on lowering an estate's value before death.

David Carton a Member in the Family Law Practice Group, was featured in an NJ.com Biz Brain where he answered a readers question on the impact ones spouses bad credit has on the other spouse during a divorce.

Martin D. Hauptman spoke at the July 21, 2017 NJ ICLE "Estate Planning Summer Institute."

Khizar Sheikh and **Richard Simon** presented together at the Association of Commercial Finance Attorney's Continuing Legal Education Weekend, June 2-4, 2017 on the hot topic of "Online Lending: The Risks and Rewards."

Khizar Sheikh presented a Members Only webinar to Primerus members on June 21, 2017 on the general landscape of cyber security and how it affects law firms and clients regardless of size

Richard Miller presented at the National Association of Insurance and Financial Advisors' Annual Career Conference on June 14, 2017 about planning for families with special needs children.

Steven Holt was featured in New Jersey Business Magazine's May 2017 issue with an article on Irrevocable Trusts.

Martin D. Hauptman, Chair of Mandelbaum Salsburg's ERISA and Employee Benefits practice group has issued a client alert on "Employer Health Plan Benefits Includable in Income."

Khizar Sheikh was recently interviewed on WNBC Radio about the worldwide ransomware attack known as "WannaCry."

Casey Gocel, a Member of the Firm, recently authored an article on LinkedIn entitled "5 Essential Items to Include in the Buy-Sell Agreement."

Co-Chair of the Firm's Banking and Finance Practice **Richard Simon** spoke at the 2017 Factoring Conference in Fort Worth, Texas as part of a diverse panel of legal experts that addressed the key legal issues pertaining to the commercial finance sector.

The Family Law Practice Group recently issued an *Alert* on the changing Standard of Analysis in relocation cases written by chair **Lynne Strober**, and another *Alert* on Domestic Violence and Covert Surveillance by Associate **Jennifer Presti**.

Lynne Strober, Chair of the Firm's Family Law Practice Group, published an article in the March 2017 issue of "New Jersey Business on Divorce and Intellectual Property."

Charitable Endeavors

Co-CEO **Barry Mandelbaum** served as Dinner Chair for the 2017 Steps to Independence Celebration for CPNJ, a dinner that raised a record breaking $940,000 for the charitable organization.

Team Mandelbaum was a proud supporter of the Valerie Fund Walk on Saturday, June 10th. The Firm has supported the Valerie Fund for the last 5 years.

Team Mandelbaum sponsored a blood drive at the Firm's Roseland, NJ headquarters on June 21, 2017

Members of Team Mandelbaum and their families walked on Sunday, September 24th in the Mayor's 5K to end the silence on ovarian cancer in West Orange, NJ. Team Mandelbaum raised $3,000 for this worthy cause.

Team Mandelbaum, sponsored a Hurricane Relief Gift Card Drive during the month of September to benefit those affected by Hurricane Harvey, Hurricane Irma and Hurricane Maria through One America Appeal. The Firm donated over $1,700 in gift cards and raised $650 in check donations to total $3,000.

Co-CEO **Barry Mandelbaum** serves as a Trustee for the Steven and Beverley Rubenstein Foundation which in 2017 donated $1,900,000 to charitable organizations.

Firm Accomplishments

Member **Casey Gocel**, was named by NJ Biz as a Winner of their prestigious Forty Under Forty Award. We could not be more proud of Casey's accomplishments both professionally and within the community. According to NJ Biz, "These up-and-coming stars of the New Jersey business community have achieved professional excellence at a young age, representing the future of their industries and the state as a whole."

In October 2017, **Steven I. Adler**, and Member **Lauren Topelsohn**, obtained a $750,000 attorney fee award added to the $3.5 million judgement they obtained in the U.S. District Court in N.J. on behalf of Asta Funding, Inc.

Mandelbaum Salsburg in the Community, *continued*

Seven of our attorneys were selected to The Best Lawyers in America© 2018 edition*. Congratulations to our Co-CEO and Co-Founder **Barry Mandelbaum** (listed in Real Estate Law) and Members **Michael Saffer** (listed in Commercial Litigation, Litigation - Banking and Finance and Litigation - Real Estate), **Arthur Grossman** (listed in Real Estate Law), **Gordon Duus** Environmental Law), **Jeffrey M. Rosenthal** (listed in Banking and Finance Law, Corporate Law, Equipment Finance Law and Securitization and Structured Finance Law), **Owen Hughes** (listed in Real Estate Law), and **Robin F. Lewis** (listed in Real Estate Law). We are proud of the accomplishments of these attorneys who were selected by their peers for inclusion in next year's edition. *No aspect of this recognition has been approved by the Supreme Court of New Jersey or the American Bar Association.

Peter Tanella was reappointed as Mayor of Cedar Grove, New Jersey. This is the 4th term for Peter and the first time in the town's history a mayor has served back-to-back terms.

We are pleased to have recently welcomed **Damian Conforti,** Of Counsel and Co-Chair of the Government Enforcement & White Collar Crimes Practice Group; **Kenneth Del Vecchio**, Of Counsel and Chair of the Firm's new Entertainment Law Practice Group as well as a part of the Firm's Municipal & Criminal Defense and Government Enforcement & White Collar Crime Practice Groups; **Shawna A. Brown**, Associate who joined the Firm's growing Elder Law, Trusts & Estates and Special Needs Practice Groups; **Ryan Buehler** who has joined our Firm as Counsel where he will concentrate his practice on commercial litigation; **Edward Dabek, Jr.**, Associate in the Firm's Banking and Financial Services and Bankruptcy and Creditor's Rights Practice Groups.

Peter Tanella was appointed to the Metro YMCA Board of Directors in October. The Metro YMCA is the largest association of YMCAs in New Jersey, serving more than 30,000 individuals.

Khizar Sheikh was elected to the Board of the Morris County Economic Development Corporation, and as Chairman of the Board for Family Intervention Services, Inc., a charitable organization whose mission to keep families strong and together.

Mohamed Nabulsi was named by the *New Jersey Law Journal* as one of its "Diverse Attorneys of the Year" for 2017.

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