



LEGAL NOTES

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CREATIVE LITIGATION STRATEGY RESULTS IN BIG CLIENT VICTORY

By Gardiner S. Barone, J.D.

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The BSR&B litigation department recently secured a triumphant result in a difficult case.

Our firm was retained by a group of developers who were sued by their construction lender to recover a judgment against the developers for funds the lender had advanced on a \$7,000,000 construction and development loan

While we could not dispute that the funds were advanced to our clients, we asserted as an affirmative defense and counterclaim that the lender breached the loan agreement by not extending the maturity date / repayment period of the loan, and by failing to make required advances under the loan. We claimed that the lender's breaches caused our clients to sustain money damages because they were without funding to complete construction of the condominium project, and, in the present lending environment, they are unable to secure alternative financing to complete construction.

Immediately after we had filed an Answer to the Complaint, the lender moved for a verdict seeking to dismiss the claims we had pled, and to have the court enter a money judgment against our clients.

Based upon the arguments asserted by us in opposition to the lender's motion, the Court denied the application. In doing so, the Court made two key rulings in our favor: (1) that we had made a showing that the lender breached the agreement by imposing certain conditions on extending the maturity date / repayment period of the loan; and (2) that there were issues of fact with regard to whether the lender was able to fully perform its obligations under the loan, inasmuch as the FDIC found the lender had inadequate capital.

The lender was represented by one of the largest law firms in the world, having more than 1700 lawyers in 23 offices located around the globe, and nearly unlimited access to legal research networks and law libraries. While the BSR&B Litigation Department is not comparable in size, it proved to be more than a formidable opponent in this multi-million dollar commercial lending case.

THE TWO WAY STREET

By Richard J. Shapiro, J.D.

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When retaining an attorney to assist with their estate planning or elder law matters, people often expect that the attorney, as the person having the “expertise” in the subject matter at hand, is solely responsible for a successful outcome. Without meaningful and active client participation in the process, however, an estate plan that “works” is unlikely. We have a saying in our office: your estate planning won’t work if we care more about it than you do!

So, how can you best work with our estate planning team of attorneys and support staff to achieve the desired results? Here are a few recommendations:

- Be prepared to fully disclose *all* of your assets and liabilities, as well as *who* holds title to the assets (e.g., whether they’re individually owed, jointly owned, held in a business entity, an “in trust for” account, etc.). When planning for the protection and distribution of your financial assets, it is critical that we have a clear picture of what the client’s financial picture looks like. We will provide an intake form for you to list this information. You do neither yourself nor us any favors by coming to an initial meeting and saying, “I didn’t have time to complete the form.” You would be better off rescheduling the meeting until after you have completed the paperwork.
- Expect to have an open and honest conversation with the attorney regarding the family dynamics. Keep in mind that while we have the legal expertise, *you* are the “expert” about family matters. Remember that the conversations with

us are confidential; while no one likes to discuss potentially embarrassing information about themselves or their children, it is critical that we know about all the “skeletons in the closet.” Many parents, for example, are reluctant to inform an attorney that a child has a drug or alcohol problem, that a child has financial problems, or that a child’s marriage is shaky. But it is critical that we be made aware of this information so that we can work with the client to design an estate plan that provides the appropriate planning to protect that child’s inheritance.

- In advance of the initial attorney meeting, give careful thought about *what* you are hoping to accomplish. Is estate tax planning a major concern? How concerned are you about protecting assets if you someday require assistance with long-term care? Do you want to provide different amounts to different children, or even disinherit a child completely? Are you interested in making charitable gifts as part of your estate plan? Do you have pets that you want to be assured will be taken care of? When we schedule an initial meeting with our clients, we provide them with a “Goals” form” that serves as a starting point for that important conversation.
- Think carefully about whom would be the appropriate “helpers” in the event of your disability or death. These would include executors under your will, trustees for any trusts, guardians for minor children, agents under your power of attorney, and health care agents for your health care proxy. If no suitable family members exist, you are often better off choosing a professional fiduciary, such as a bank trust department, rather than a child or other family member who is ill-suited to the task.

“Successful” estate planning depends upon complete trust and interaction between the client and the attorney – it really is a “two way street.” Unless the client is fully engaged in, and committed to, the process, the client’s planning will likely fail to meet the client’s needs, regardless how knowledgeable or skilled is the attorney.

BE WARY OF BROADLY WORDED ARBITRATION CLAUSES

By Gardiner S. Barone, J.D.
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According to the U.S. Supreme Court, “by agreeing to arbitrate, a party trades the procedures and opportunity for review of the court room for the simplicity, informality, and expedition of arbitration.” While this may seem like an advantageous trade-off to the inexperienced litigant, a poorly worded arbitration clause is likely to result in disappointment and discontent.

For example, by including an arbitration clause in your contracts with customers and/or suppliers, you may believe that you are avoiding “costly litigation” in the event of a dispute. However, a poorly worded arbitration clause will not likely reduce the costs of adjudicating a dispute, and may in fact increase the costs. In a broadly worded arbitration clause, the parties “split the cost” of the arbitration, and there is no limitation as to how much the arbitrator can charge per hour to hear and decide the dispute; in essence, the arbitration fees could be limitless.

Likewise, a broadly worded arbitration clause does not require the arbitrator to apply applicable and controlling law, and it does not oblige the arbitrator to support a decision with relevant findings of fact. Therefore, by signing an agreement containing a broadly worded

arbitration clause, you have given the arbitrator unbridled discretion to *apply or not to apply* applicable law, and you are not requiring the arbitrator to support the decision by any findings of fact. If the arbitrator makes a decision that you feel aggrieved by, you cannot urge a judge to vacate or reverse the decision on the grounds that the decision is contrary to controlling law and/or not supported by relevant facts. In short, a broadly worded arbitration clause may “simplify” and “expedite” the resolution of a controversy, but it does not ensure that the outcome will be fair.

Therefore, before signing an agreement that contains a broadly worded arbitration clause, you should give careful consideration to whether you will want to have a meaningful opportunity to appeal an unfair decision; a broadly worded arbitration clause does not permit a judge to reverse the arbitrator’s decision because it is unfair or not supported by any facts.

In addition to deciding whether to agree to arbitrate, you also will want to consider how detailed the arbitration clause should be worded, so that the jurisdiction of the arbitrator is appropriately limited. Here are some of the issues you should consider addressing in an arbitration clause:

- The scope of the arbitration agreement - all disputes between the parties, or just disputes arising out of the contract.
- Whether the arbitrator is bound to apply applicable law and make specific findings of fact to support the decision.
- Specifying where the hearing should be held, or whether a hearing can be dispensed with.
- Whether the parties will be entitled to depositions and discovery before the hearing.

- What credentials the arbitrator should possess.
- What rules of procedure should apply to the arbitration.

Another issue to consider is how the arbitrator will be chosen. You will want to choose an arbitrator that you feel will be able to understand your side of the issue. The other party will, of course, want the same. It may be desirable to require the arbitrator have certain minimum credentials. If you and the other party can't agree on who will serve as the arbitrator,

you need to specify some method for deciding on an arbitrator.

Arbitration can be a useful tool to resolve disputes by saving time and money on the judicial process. But because you are giving up valuable rights, an arbitration clause in your contract needs to be complete, well drafted and carefully vetted.

***JOIN RICH SHAPIRO FOR A BOOK
SIGNING PARTY!***

BSR&B partner Rich Shapiro is a contributing author for *The Complete Guide to Estate & Financial Planning in Turbulent Times*, recently published by the Collaborative Press. This 300-page hard cover book provides a wealth of information about estate and financial planning topics in an easy-to-use Q & A format.

On September 14, 2010 from 4 to 6 p.m., Rich will be hosting a book signing party in our Education Center. Each attendee will receive a *free* autographed copy of the book (retail price is \$29.95)!

To register, call Donna Wood at 291-0011 ext. 242, or send an e-mail to dwood@mid-hudsonlaw.com.

EDUCATIONAL WORKSHOPS

Blustein, Shapiro, Rich & Barone, LLP offers complimentary educational workshops to our clients and friends. Here's our upcoming workshop schedule:

Estate Plans That Work™

August 19, 2010 – 3:00 p.m. to 6:00 p.m.
September 16, 2010 – 3:00 p.m. to 6:00 p.m.

Protecting Your Assets from Nursing Home Costs

September 29, 2010 – 3:30 p.m. to 5:30 p.m.

To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Event Calendar" link.

All workshops will be held in the BSRB Education Center at our 10 Matthews Street location.

The information in this newsletter is for general information purposes only and is not, nor is it intended to be, legal advice, including legal advice for Internal Revenue Code purposes as described in IRS Circular 230.