



# LEGAL NOTES

## Blustein, Shapiro, Rich & Barone, LLP

BURT J. BLUSTEIN  
MICHAEL S. BLUSTEIN  
RICHARD J. SHAPIRO  
GARDINER S. BARONE  
RITA G. RICH  
JAY R. MYROW

ARTHUR SHAPIRO,  
of Counsel

10 MATTHEWS STREET  
GOSHEN, NEW YORK 10924

PHONE: (845) 291-0011  
TOLL FREE (866) 692-0011  
WWW.MID-HUDSONLAW.COM

CAROL C. PIERCE  
JAMES G. YASTION  
MINDY MENKE

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**EDITOR'S NOTE:** The attorneys at Blustein, Shapiro, Rich & Barone, LLP are pleased to provide you with the first of our monthly *Legal Notes* newsletters. We hope that you find the articles of interest. If you have questions about an article or wish to learn more about a particular topic, please contact the author or any of our attorneys.

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### YOUR TERMS OR MINE?

#### THE DUTY TO READ

*THE FINE PRINT IN CONTRACTS*

By **Gardiner S. Barone, J.D.**

*[gbarone@mid-hudsonlaw.com](mailto:gbarone@mid-hudsonlaw.com)*

Commercial sales frequently involve an informal oral agreement followed by an exchange of forms. Often, these forms are "boilerplate" documents that each party uses in the day-to-day operations of its business, such as a purchase order or shipping invoice. The buyer, for example, will send to the seller a purchase order with a set of boilerplate terms on the reverse side. The seller usually responds with an acknowledgment and invoice with another set of boilerplate terms. The boilerplate's terms, however, are usually not mentioned in any preliminary negotiations

between the parties. Often the buyer and seller have no idea that the offer and acceptance are not in accord. This creates a "battle of the forms," and it often results in unnecessary litigation over which boilerplate terms are binding on the parties.

The "battle of the forms" and its legal treatment is attributed to two factors. The first factor is the failure of the participants to read thoroughly the terms of the other party's form and respond or object in a timely manner. The second factor is attributed to section 2-207 of the Uniform Commercial Code (UCC). Perhaps more criticism has been leveled against section 2-207 than any other provision of UCC. The section addresses contract scenarios in which commercial parties have failed to reach true "meeting of the minds" on all relevant terms to the contract.

Section 2-207 of the UCC attempts to answer three questions:

- a) Does the exchange of the conflicting forms constitute a binding contract?
- b) If a binding contract exists, what are the enforceable terms?
- c) If the exchange of forms does not establish a contract, but the parties nonetheless perform, what are the terms of

the contract established by the parties' conduct?

Unfortunately, judicial interpretation of section 2-207 varies widely, making the answers to these questions far from clear. Litigation relating to "the battle of the forms" derived from this section has produced hundreds of court decisions, nearly all of which could have been avoided had someone stopped to read the "fine print" of the other party's boilerplate form and made a timely objection to any offensive terms or conditions. In addition, there is certain language that can be incorporated into the "boilerplate" that strengthens your position in the "battle of the forms."

Regardless of the size of the transaction, we strongly encourage you to read the "fine print" on the other party's forms. You should also have your "boilerplate" forms updated and reviewed by your legal counsel, so you are not knocked-out of "the battle of the forms."

## **Federal Estate Tax Is Repealed in 2010– But For One Year Only!**

**By Richard J. Shapiro, J.D.**

*rshapiro@mid-hudsonlaw.com*

From the moment in June 2001 that President Bush signed into law the legislation that provided for the repeal of the federal estate tax in 2010, estate planners have been convinced that Congress would by now have acted to "fix" what is widely acknowledged to be preposterous tax policy. Not only does the repeal exist for this year only, but the federal estate will return with a vengeance in 2011, as the exemption returns to its 2000 level of \$1 million per person. Compared with the 2009 exemption of \$3.5 million, 2011 will see many

Likewise, it is very desirable that the "fine print" on your business forms be reexamined on an annual basis to ascertain its continued suitability in a changing commercial environment. For example, with the economic downturn, there has been a corresponding increase in the need to resort to legal proceedings to collect your accounts receivables. Unless your business forms provide for the collection of attorneys' fees, you are very unlikely to be awarded attorneys fees in an action to collect an account receivable. In addition, while you may think your "fine print" creates an enforceable personal guarantee, there very rigid rules applicable to the creation and enforcement of personal guarantees. You don't want the fine print on your forms to fail you when you need it the most, so we encourage you to have us review your business forms to verify the suitability of the language to create the rights and responsibilities you intend.

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more "middle class" estates subject to the imposition of federal estate tax.

But just because there is no federal estate tax in 2010 doesn't mean that Congress has necessarily done taxpayers a huge favor. That's because 2010 also brings the elimination of the unlimited "step-up" in basis for inherited assets. In 2010, only the first \$1.3 million in assets (\$4.3 million if there is a surviving spouse) will be valued at their "date of death" value for capital gains tax purposes. All other assets will be passed to the heirs at a "carryover" tax basis, and will result in the imposition of a capital gains tax if appreciated assets are later sold by the heirs. Trying to determine the original tax basis of many assets – especially stocks that may have been owned by a decedent for many years – will be a record-keeping nightmare.

We're already seeing the impact of this irrational tax policy. A recent article in the *New*

*York Post* described how 87 year-old Fritz Lohman died at 11:00 a.m. on New Years' Eve. Since Lohman died in 2009, his \$10 million estate will be subject to a total federal and New York State estate tax in excess of \$3.5 million. Had Lohman survived thirteen hours, his estate would have been subject to a New York estate tax of about \$1 million.

Why this tax roller coaster? When the current estate tax legislation was passed in 2001, the Senate's budget rules required that the legislation "sunset" in 2011. The Republicans were then able to claim that they had lived up to their 2000 election promise to repeal the estate tax, leaving it to future Congresses and Presidential administrations to come up with a more permanent resolution. The Republicans came close to passing a permanent repeal of the estate tax during the latter years of the Bush administration, but fell a few votes short. Today, with the nation fighting wars on multiple fronts, facing the need to fund an ambitious health care plan, and trying to keep Social Security afloat -- all during a period of economic stagnation -- it seems unlikely that Congress will be willing to forego the revenue that would be generated by the estate tax beginning in 2011. At best, we may see legislation enacted that will return the tax to the 2009 per person exemption of \$3.5 million.

What's the average person to do? Married couples with total assets (including the value of the death benefit of their life insurance) in excess of \$2 million need to review their wills or living trusts to ensure that the estate tax planning language takes into account the possibility of a death in a year without a federal estate tax. The absence of such a "savings clause" might lead to the unintended result where all of the deceased spouse's assets pass into a "credit shelter trust" for the benefit of the deceased spouse's children -- with nothing passing to the surviving spouse!

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## **Tax sales: Be Careful What You Buy!**

**By Jay R. Myrow, J.D.**

*jmyrow@mid-hudsonlaw.com*

What happens when you buy land at tax sale and, after the closing, the local building inspector tells you that it can't be developed? Land purchased at tax sale is subject to the same title and zoning restrictions as any other purchase. Recently, I agreed to represent a client who had purchased vacant lots at tax sale that had been created by a subdivision in 1984. The lots were identified on the filed subdivision map as "Open Area" A and B. A note on the map stated that Open Areas A and B were "not approved for building lots." When our client applied to the building inspector for building permits, he denied the applications claiming that he interpreted the map note as meaning that the lots were to be "forever green." We made an application to the planning board to interpret or change the map note but were denied for essentially the same reasons as stated by the building inspector.

We then commenced a lawsuit to challenge the decision by the planning board, claiming that (i) the map note did not prohibit future development of the lots, and (ii) a reasonable review of the municipal proceedings in 1984 did not adequately establish an intent that the lots be "forever green." In November, 2009, Orange County Supreme Court Justice Elaine Slobod agreed with our client by ruling that the records available to our client could not be adequately interpreted as restricting the future development of his property. Absent such clear evidence, Judge Slobod concluded, "that to deprive petitioner of any use of his property could result in an unconstitutional takings claim or a requirement that the respondent (municipality) acquire the property by eminent domain."

Tax sales of land are generally enticing because the prices are almost always a “bargain.” All too often, the “bargain” label disappears when the buyer is confronted with restrictions applicable to the purchased property. In a majority of cases, the owner of the land has “let the property go to taxes” for a reason: i.e. it has no road frontage; it is encumbered by wetlands; zoning or title restrictions render the property undevelopable; etc. In such cases, what was once a “bargain” now turns into money down the drain!

Tax sales are the ultimate “buyer beware” transaction. They can be a great investment, so long as you know what to look for in determining the true value of the property. I research and advise many of my clients as to potential pitfalls in advance of any purchase they make in real estate. Make sure that you are properly advised before the purchase so that you will not be unpleasantly surprised afterwards.

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## **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™**

February 18, 2010 – 3:00 p.m. to 6:00 p.m.

March 16, 2010 – 3:00 p.m. to 6:00 p.m.

### **Protecting Your Assets from Nursing Home Costs**

March 4, 2010 – 3:30 p.m. to 5:30 p.m.

April 7, 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](http://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.**