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Legal Notes

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BSR&B Joins Forces with Richard A. Stoloff, PLLC to Expand Legal Services

Blustein, Shapiro, Rich & Barone, LLP and Sullivan County Catskills law firm Richard A. Stoloff, PLLC recently announced an Of Counsel relationship in which they will provide services to each other, bringing together two of the area's most reputable law firms.

The new affiliation will allow both firms to better serve the needs of their clients. Blustein, Shapiro, Rich & Barone, LLP clients will benefit from a convenient location in Monticello, N.Y. to meet with the firm's attorneys. The long-time clients of Richard A. Stoloff, PLLC will now have access to an expanded range of legal services through BSR&B and its attorneys.

Richard A. Stoloff, PLLC is owned by well-known and respected Sullivan County attorney Richard A. Stoloff, who has served the community for over 40 years. His practice focuses on litigation, appeals, corporate and business law, real estate law, land development, municipal law, and condemnation and tax certiorari proceedings.

"Both of our firms have a long history in their respective communities, and we share a deep commitment to providing outstanding legal services to our clients," said BSR&B Managing Partner Michael Blustein. "We are very pleased to have this opportunity to serve Mr. Stoloff's clients."

"With the changing climate in Sullivan County, it's important that my clients have access to additional legal services that will be delivered by reputable, experienced, and knowledgeable attorneys," said Stoloff. "That's exactly what Michael and his team provide; I'm confident that our community will benefit from this relationship."

Is Your Insurance Agent Liable if You Have Improper or Insufficient Insurance Coverage?

By Gardiner S. Barone, J.D.
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You buy insurance coverage with the hope that you never need to use it. When you do need to use it, you don't want to hear that the insurance coverage doesn't cover the claim, or that you have insufficient coverage to fully cover the loss. In short, you don't want to pay for insurance coverage that doesn't fully compensate you when you suffer a loss. Unfortunately, many of us often do not find out we are underinsured until it is too late.

Upsetting? Indeed! More upsetting is when, after you've sustained a loss, you realize that your insurance agent should have advised you to obtain additional coverage, but never did. Worse yet is when you find out the insurance coverage you bought doesn't actually contain the full scope or amount of coverage for which you asked your agent. So you wonder, "Can I sue my agent and win?"

The answer is - like so much in the field of law - it depends.

The most commonly litigated claim against insurance agents occurs when the agent's client claims he or she told the agent to provide a specific type or amount of coverage, but the agent did not do so. Then a loss occurs, and the insurance company does not pay the compensation the client expected to receive, as the coverage the client believed to be in place was, in fact, not in place. Since the insurance company will not acquiesce, the client is constrained to sue the insurance agent to be fully compensated. However, such a lawsuit must overcome many hurdles to succeed. The client would need cogent proof to establish that:

1. The client actually communicated to the agent his or her request for the particular coverage;
2. The agent acknowledged the requested coverage was going to be provided; **and**
3. The agent failed to produce the agreed upon coverage.

If the client can establish these elements, then he or she has a basis to sustain a claim that the agent breached a contract to produce the coverage.

However, in response to such a claim, the agent may try to establish that the requested coverage would not have covered the loss anyway, so his or her failure to provide the particular coverage requested didn't actually damage the client. Nevertheless, if the client has proof to establish he or she requested the particular coverage from the agent, and the agent agreed the coverage would be provided, the claim that is worth further examination by an attorney.

The second most common type of claim against an insurance agent is when the client believes the agent should have advised about, or recommended the purchase of additional coverages. To prevail on such a claim – where a client is claiming the agent is an advisor who is obligated to make recommendations about coverage – would require overcoming the widely-accepted rule of law that the insurance agent has no duty to advise a client about the best type of insurance coverage for that individual.

Indeed, the applicable rule in New York is that an insurance agent generally does not have a continuing duty to advise, guide, or direct a client, absent a special relationship of trust and confidence.

In other words, if you tell your agent that your daughter just got her license and is driving your car, the agent has no obligation to inform you of the desirability of purchasing additional insurance coverage to protect you in the event your inexperienced driver has an accident. Your insurance agent also doesn't have an obligation to recommend you purchase umbrella coverage if you decide to put a deck on the back of your house.

While an agent generally does not have a duty to give sound advice relative to risk exposure and insurance needs, there are three situations where a court may find the agent did have a special duty to advise:

1. If the agent is paid specifically for consultation *apart* from the payment of the premiums.
2. If there was some specific interaction between the client and the agent regarding a question of coverage, and the client can demonstrate the agent gave advice with the understanding that he or she was relying on the agent's advice.
3. If there is a course of dealings over an extended period of time that puts the agent on notice that his or her advice was being sought and specially relied on by the client.

While these types of claims are generally difficult to prove, if you feel you have such a claim, have the matter reviewed by an attorney. In the meantime, you should also shop around for a reputable agent, and have your existing insurance coverages reviewed by several independent agents. Dealing with a knowledgeable agent will serve you well in the long run.

BSR&B PARTNER FRANK HONORED BY TOWN OF WALLKILL

BSR&B partner William A. Frank was honored recently with an appreciation award from the Town of Wallkill. Will, who serves as the town attorney, was acknowledged for his years of service and dedication. Congratulations, Will!

Who Pays the Estate Tax?

Lessons From Tom Clancy's Estate

By Richard J. Shapiro, J.D.
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When novelist Tom Clancy died in 2013, he left an estate valued at approximately $86 million. While he had significant wealth at the time of his death, like many other people, Clancy also left behind a "blended" family. Clancy had four children (hereafter the "older children") with his first wife, Wanda, and was survived by his second wife, Alexandra, and their young daughter, Alexis.

Clancy's will left a portion of his estate to separate trusts for each of his older children, with another portion being left to two trusts for Alexandra, a "marital trust" and a "family trust". Given the size of his estate, it was inevitable that a substantial estate tax would be owed on account of Clancy's assets. **A significant estate planning issue was who would be responsible for the estate tax liability, and when would it be payable?**

Had Clancy wished to defer as much of the estate tax as possible, he would have left his older children a total amount up to the federal estate tax exemption at the time of his death – which in 2013 would have been equal to over $5.2 million – with the balance being left to Alexandra. **Under federal estate tax law, assets in any amount left to a surviving spouse – either outright or in what is known as a Qualified Terminable Interest Property (QTIP) trust – will pass to or for the benefit of the surviving spouse free of**

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estate tax under a concept known as the "marital deduction". The catch is that upon the surviving spouse's death, all the assets inherited by the spouse, including any future growth on those assets, will be added to the spouse's own assets for calculating the estate tax due.

In Clancy's case, however, his original will specified that his older children were to receive one third of his total estate in trusts, with the other two thirds divided between the marital trust and the family trust for Alexandra. Under that scenario, the value of the older children's trusts and the family trust would have been combined to determine the total estate tax liability, which would have resulted in an estimated total estate tax of $15.7 million.

Shortly before Clancy's death, however, he executed a "codicil" (i.e., an amendment) to his will, in which he modified the family trust so that it would qualify for the unlimited marital deduction. The benefit of doing so was that, as reported in the Wall Street Journal, the total estate tax bill was reduced from the estimated $15.7 million noted above to $11.8 million. So, what could be bad about that? Well, from the older children's perspective, the codicil effectively shifted the entire $11.8 million estate tax burden to their share of the inheritance. Had the original will not been amended, the resulting $15.7 million estate tax obligation would have been divided evenly between the older children's share and the family trust for Alexandra, effectively saving the older children approximately $4 million in estate tax liability.

Ultimately, the Maryland Court of Appeals sided with Alexandra, and ruled that her husband's clear intent was to maximize the amount left to her, thereby saddling the older children with the entire estate tax obligation.

The Clancy case points out the challenge in allocating both assets and the tax burden between different "factions" of a blended family. Further, this episode demonstrates how essential it is to provide clear and direct instructions as to what party (or parties) is to be burdened with the obligation to pay taxes from their inheritance. Lastly, this case shows the potential folly in relying upon codicils to wills when making changes to an estate plan. Such modifications often leave a trail of ambiguous and conflicting provisions between the original will and any subsequent codicils. **A far better practice is for the attorney to simply prepare an entirely new will (or restate an existing trust, if that vehicle is used), so that all modifications are contained within a single instrument.**

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BSR&B PARTNER SHAPIRO PUBLISHED IN WEALTHCOUNSEL QUARTERLY MAGAZINE

BSR&B Partner Richard J. Shapiro co-authored an article titled *Domestic Asset Protection Trusts v. Prenuptial Agreements,* which appeared in the October 2016 issue of the WealthCounsel Quarterly.

The article outlines why a **domestic asset protection trust** (DAPT) may be a better option than the more common **prenuptial agreement** for those who want to hide money from a future spouse and avoid the uncomfortable conversation a prenuptial agreement requires.

"It is essential that professionals discuss the many benefits of DAPTs with clients who are contemplating premarital planning," said Shapiro. "A DAPT can be a safe and less offensive way to protect one's assets while simultaneously maintaining the love and trust everyone desires when considering marriage."

Read the full article on our website at https://www.mid-hudsonlaw.com/blog/domestic-asset-protection-trusts-v-prenuptial-agreements/.

FREE EDUCATIONAL WORKSHOPS

Estate Plans That Work™

THURS., JAN. 19TH
THURS., FEB. 23RD
TUES., MARCH 21ST

3 P.M.-6 P.M.

Except as otherwise noted, the above workshops will be held at the BSR&B Education Center, 10 Matthews St., Goshen, NY, 1st Floor

To register for a workshop, call **845.291.0011** or email **receptionist@mid-hudsonlaw.com**

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