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Firm Mourns Passing of HOWARD ROTH

Howard Roth, who had served Of Counsel to the Firm for the past eight years, passed away on September 20, 2010. Mr. Roth, an Albany native and a graduate of Cornell University and Albany Law School, was a long-time practitioner in the Capital District, specializing in taxation and real estate law.

Mr. Roth was a partner in a large Albany firm when he originally met Rob Ganz and, years later, reunited when Howard was looking for a place in which he could begin to wind down his practice and focus his energies on his pursuit of antiques and the history of early American iron making. He was in the midst of writing a book on the subject at the time of his passing.

Howard served as a mentor to the younger members of our Firm and, in turn, the Firm was able to provide support services for Howard and assistance to him for the many real estate and estate planning clients that he had served faithfully for the past 40 years.

Howard is survived by his wife, Judy, three children and five grandchildren.

His humor and companionship will be sorely missed at the Firm.

What's Your Status? Social Media Postings May Affect Your Case In Court.

Facebook and MySpace, as well as other social networking sites, are often used by individuals to post status updates, including everything from the most mundane comments or details about their locations to specific play-by-plays about what they are doing at any given moment.

People also frequently post photographs on their Facebook or MySpace pages and comment on other peoples' postings and photographs. In New York, even what appear to be mundane postings may be discoverable in civil litigation.

New York has fairly liberal civil discovery laws, allowing a party to discover a wide range of information from other parties in a case. In September of this year,

a New York State Supreme Court Judge held that a defendant could access a plaintiff's private postings on her Facebook and MySpace pages. That case, *Romano v. Steelcase, Inc.*, is a personal injury case wherein the plaintiff claimed that she had suffered injuries such that she was largely confined to her house and bed. However, photographs on her public Facebook profile appeared to contradict these claims, and the Judge allowed defendants to discover her private Facebook postings and photographs. Her choice of privacy settings on her Facebook page was deemed to be irrelevant. The Court held that it was "reasonable to infer from the limited postings on Plaintiff's public Facebook and MySpace profile pages that her private pages may contain materials and information that are relevant to her claims or that may lead to the disclosure of admissible evidence." The Judge ordered the plaintiff to authorize the defendant to access Facebook and MySpace records, including deleted or archived records.



Similarly, the New York State Bar Association Committee on Professional Ethics also recently released an opinion concerning whether, under New York's Rules of Professional Conduct, it is ethical for an attorney to view a party's social network pages. The committee determined that so long as the attorney did not engage in any deception, the attorney could access and view the (continued on page 2)

NEWS OF THE FIRM

Cindy Mosley has become a grandmother! Cindy's daughter, Karen Mosley, presented Cindy with a granddaughter, Blayke Cynthia Ann Mawery, on July 14th. ■

Conor Brownell is the new President-Elect of the Colonie-Guilderland Chapter of Rotary International. ■

The Firm was featured in the summer edition of the on-line publication, Alliance Notes, published by Harter Secrest & Emery which serves as the leader of 30 upstate New York law firms allied to increase professional networking and continuing education opportunities. ■

David Siegfeld made a presentation to the Guilderland Chamber of Commerce on new business formation. ■

Jed Wolkenbreit was appointed to the Audit Advisory Committee of the New York State Office of the Medicaid Inspection General. ■



What's Your Status? *(continued)*

public social network pages of a party to search for impeachment material.

Although Romano was a personal injury case, it has implications for discovery in other types of civil litigation. In fact, an Indiana Federal Court, in a case from May 2010 involving sexual harassment resulting in severe emotional distress, found that content from social networking sites like Facebook must be produced when relevant to the claim or defense. (EEOC v. Simply Storage Management, LLC).

Despite a number of cases ruling that Facebook postings and comments may be discoverable, on May 26, 2010, a California Federal Court ruled that the Stored Communications Act portions of the Electronic Communications Privacy Act (enacted in 1986 prior to the advent of most social networking sites and generally not appropriately worded to apply to such sites) would provide some protection to content on social networking sites and, if an individual chooses the appropriate privacy settings, some material may remain undiscoverable. The California case, Crispin v. Christian Audigier, Inc., quashed subpoenas for material on MySpace and Facebook sites related to the plaintiff's postings on those sites. As of the date of publication of this article, the need for amendment of the Electronic Communications Privacy Act was being addressed by the Senate Judiciary Committee in order to bring it in line with modern technologies.

Despite the California case which found that some protection exists for postings on social networking sites, parties to litigation would be wise to limit their postings and to be aware that anything they post may be discoverable in litigation. Furthermore, because such postings may have an impact on employment law cases, such as the sexual harassment case in Indiana, New York employers may want to establish policies preventing or limiting employees from posting content related to the employer, to the office environment and, particularly, related to any other employees. Although it is unclear how any individual court may rule in this new arena, it is important to be aware that your postings may not be private, regardless of your privacy settings. ■

Employers' Obligations when an Employee Returns from FMLA leave

A secretary for the Company for five years is a real asset to the Company. She announces to you that she is pregnant and will be taking her guaranteed Family Medical Leave Act

("FMLA") leave after the birth of her child. During her leave, the company suffers financial reverses, re-structures the office staff, and it is now possible to perform all of the necessary functions with a lesser number of staff. What are the Employee's rights when returning from FMLA leave and what are the Employer's obligations in this situation?

Employers with fifty (50) or more Employees must



provide 12 weeks of unpaid leave to any "eligible Employee" who desires to take leave after pregnancy/adoption or for a serious medical condition under the Federal FMLA statute. In general, Employees have the right to be reinstated to the job they had at the Company before he or she went on leave OR to be reinstated to a different job at the Company with the same pay and same fringe benefits.

However, the Employee's right to reinstatement is not guaranteed. If, for example, an Employee chooses not to return to the Company after the 12 weeks of leave, but after being gone 20 weeks demands her job back but seeks to work a reduced earning or hours per week, the Employer is not required to continue to hold open the job for the Employee; nor is the Employer required to reduce work hours from full time to part time after the leave. The situations in the above examples no longer protect the Employee under FMLA leave because the Employee either did not return to work after 12 weeks or decided to work part time and the Employer did not agree. However, in real life, not all situations are this cut and dry.

Assuming there is not an equivalent position available at the Company, Employers are not required to reinstate an Employee to his/her position if there are legitimate business reasons for denying the reinstatement. If, for example, due to economic conditions, the Company decides to make layoffs, and the Employee on leave had the least amount of seniority, letting her go while she is on leave is not an FMLA violation. Reduction and/or reorganization of staff are legitimate business reasons for not reinstating an Employee on FMLA leave. This does not mean that an Employer has carte blanche to deny reinstatement in every situation. Employers need to be very cautious when determining whether to deny reinstatement to an Employee.

An Employer who does not reinstate an Employee after FMLA leave will most likely be opening the door for a lawsuit even if at the conclusion of litigation the Employer could show it had legitimate business reasons for not reinstating the Employee. Employers will need to look at all the circumstances leading up to and surrounding the FMLA leave, consult with counsel, document their reasoning and deliberation, before deciding whether to deny reinstatement and take the risk of a lawsuit. If the situation is properly analyzed and well documented at the time, it is possible that the affected employee and his/her counsel may be deterred from filing suit. ■

The Small Business Jobs Act

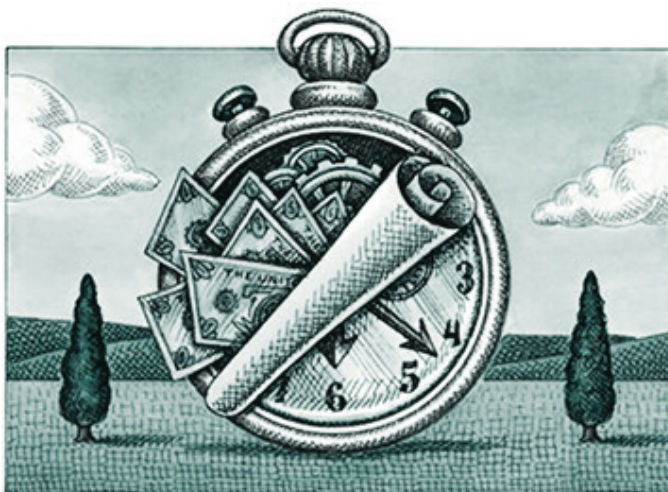
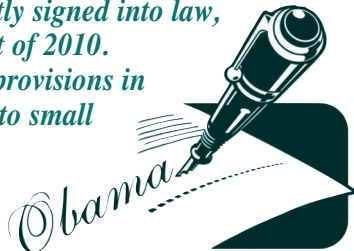
President Obama recently signed into law, the Small Business Jobs Act of 2010. There are a number of tax provisions in this law which are relevant to small business owners.

The limit for the amount that can be written off pursuant to §179 of the Code with regard to expenditures for capital outlays has been increased for the years 2010 and 2011 from the previous limit of \$250,000.00 to \$500,000.00. The investment limit was also increased from \$800,000.00 to 2 Million Dollars. In addition, for these two years the \$500,000.00 amount can include up to \$250,000.00 of qualified leasehold improvement.

The new law allows tax payers to deduct up to \$10,000 in trade or business start up expenses in the year 2010. This is an increase from the previous limit of \$5,000.00. The new law also allows small business owners to deduct the cost of health insurance incurred in 2010 for themselves and their family members in calculating their 2010 self employment tax.

Finally, a major change is that the holding period for sales of the assets of S-Corporations which had been converted from a C- Corporation has been reduced from the previous 10 year period to a 5 year period, so long as the 5th year of the holding precedes the year 2011.

These are only a few highlighted provisions of the law which we think might be of interest. If you would like further information on any of the provisions of the law and how they may affect your business, please contact us. ■



NYS Bulk Sale Protections

As we have previously reported, the filing of a Bulk Sales Report when purchasing a business is not only a way of reporting the amount of sales tax due on the transaction but more importantly, it is a way of protecting the purchaser from having to pay the sales tax which the seller had neglected to pay on sales occurring long before the transfer of the business.

A recent case of the New York State Tax Appeals Tribunal demonstrates the importance. In this case the taxpayer purchased a restaurant business and continued the business under the same name as its predecessor. The sale of the business included the use of all of the property, including the tables, chairs, barstools, tableware etc. Unfortunately for the taxpayer the transfer of the business also included the assumption of the previous owner's sales tax liability. New York State Tax law requires that when you purchase a business you must file a Bulk Sale Report with the Sales Tax Department at least 10 days prior to the sale. If you do not, you retain the liability for the payment of the sales tax of the previous owner. That is what happened to this taxpayer, and the tribunal determined that he was liable for the sales tax due from the predecessor restaurant. (Matter of Llargo of Lockport, Inc 8/23/ 2010)

In another case dealing with Bulk Sales, the taxpayer purchased real estate and improvements consisting of a closed gas station and convenience store. Again, the taxpayer did not file the required Bulk Sale Report 10 days before taking possession of the business assets. In this case, payment of the purchase price was not in cash but was made by assuming the Seller's back real estate taxes and a personal purchase money mortgage. In that case, the Division of Tax Appeals held that this was sufficient to establish a Bulk Sale under the sales tax law, and since no report was filed the tax payer was held liable for the seller's unpaid sales and use taxes. (Matter of Corner Quick Stop, Inc. 9/2/ 2010) ■

What We're Up To



Conor Brownell and Robert Ganz will be presenting, on behalf of the New York State Bar Association, a program entitled "Collection and the Enforcement of Money Judgments". ■

David Siegfeld has recently been appointed by the Albany County Surrogate as a guardian ad litem in several matters, including a recent appointment involving the review of a corporate trustee's accounting. He is also presently involved in helping two not-for-profit organizations merge operations and legal structures. ■

Robert Ganz has recently received court victories in real estate related litigations. In one case, the court upheld, on behalf of the Plaintiff he represented, the validity of claims that he was defrauded by partners in connection with real estate transactions. In the other, a Defendant's claim that its dissipation of assets from a single-asset real estate LLC should be permitted, at the time the LLC was subject to a lawsuit, was rejected ■

Beth Carey has recently been involved in the sale of a out-of-state division of a Albany business and in the acquisition of commercial property for a multiple location retailer. ■

Lianne Pinchuk is involved in a multiparty mechanics lien foreclosure litigation arising out of a failed residential real estate development and also received a substantial settlement in a case against a home inspector. ■

Jed Wolkenbreit is involved in a variety of contracts involving the sale and management of different types of professional practices. ■

The Law on Competency to Contract: The Importance of a “Meeting of the Minds”

Imagine that you have just finished negotiating a business deal with a competing business to purchase their assets. The seller was an older gentlemen looking to get out of the business.

He seemed “ok” to you for the most part, but there were times when he would appear distracted and overwhelmed, and he generally consented to almost all of your bargaining points. You walk out of the conference room feeling good about the deal, but with a weird sense that the seller was just not completely “with it.” While hopefully not a common occurrence, the issue of competency to contract is well established in the law and is worth reviewing so that deals and negotiations are not thwarted when one party later seeks to void the contract.

It is well settled that a fundamental principal of all contracts is that the parties to the contract had a “meeting of the minds” as to the material terms of that contract. For instance, without a “meeting of the minds” no enforceable contract exists. It follows, therefore, that if one party to a contract is suffering from disease or other ailment that would prevent him or her from thinking and functioning as a rational human being would, there can be no “meeting of the minds” with respect to that contract. Otherwise, unfair and unjust results may occur.

Weighing against that need to protect the incompetent is the need for stability in contractual relations and protection of the expectations of parties who bargain in good faith. Fortunately, the law recognizes and understands the need for a set of rules to govern when one party may elect to void a contract because he or she was not competent at the time the contract was made. What follows below is a brief overview of those rules.

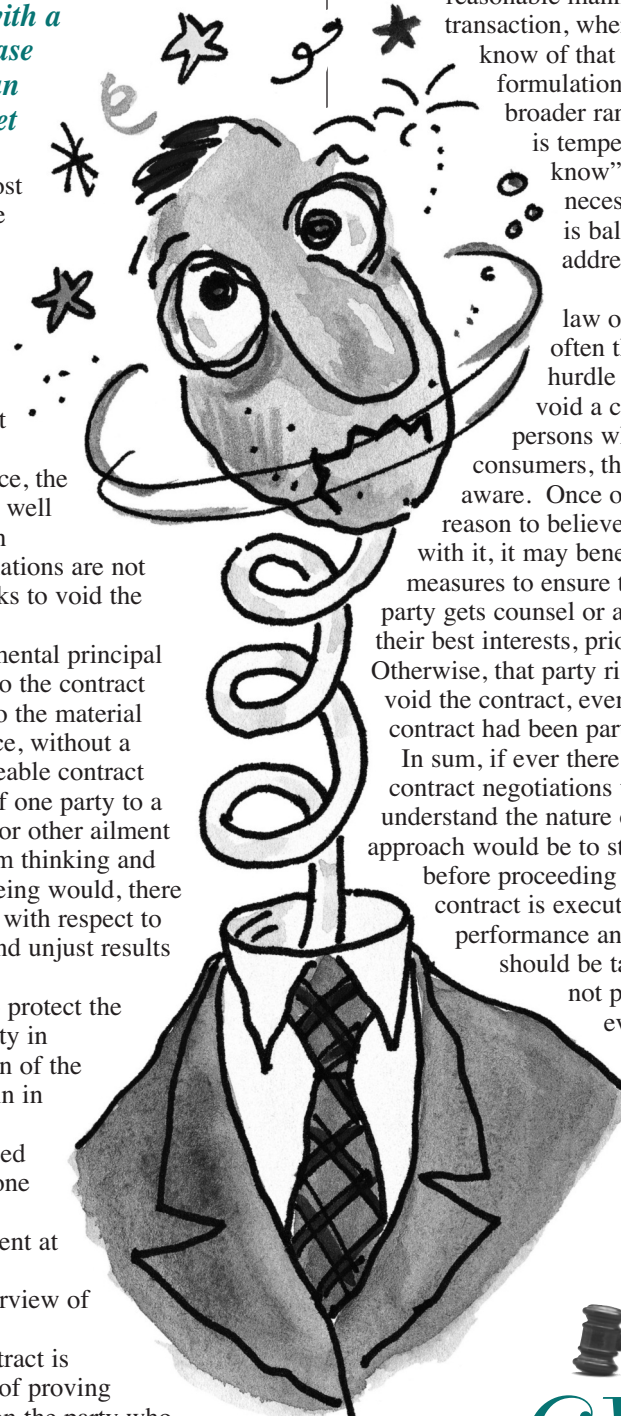
In New York, capacity to contract is presumed. Therefore, the burden of proving incompetency is placed squarely on the party who is attempting to void a particular contract. According to most case law, proving incompetency requires overcoming an extremely heavy burden. The traditional rule which governed incompetency stated that, a party is said to lack the requisite contractual mental capacity if his mind is so

affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction.

New York’s highest court, the Court of Appeals, in Ortelere v. Teachers' Retirement Bd., 25 N.Y.2d 196 (1969) recognized, however, the potential unfairness which might arise if application of the traditional rule was strictly applied. Therefore, the Court expanded the test to include, in addition to those parties covered by the traditional rule, parties who, because of a mental defect or illness, are unable to act in a reasonable manner in relation to a particular transaction, when the other party has reason to know of that affected person’s condition. This formulation, therefore, would seem to include a broader range of people and circumstances, but is tempered by the “other party has reason to know” language. Establishing this as a necessary element for proof, the Court is balancing the competing factors addressed above.

While a review of the body of case law on this subject reveals that, more often than not, the party attempting to hurdle the “extremely heavy burden” and void a contract is unsuccessful, for those persons who contract on a regular basis with consumers, this is certainly a rule of which to be aware. Once one party to a potential contract has reason to believe the other party may not be entirely with it, it may be beneficial to take extra precautionary measures to ensure that the potentially incompetent party gets counsel or a official guardian appointed to act in their best interests, prior to performing on a contract. Otherwise, that party risks having the incompetent party void the contract, even if, in some circumstances, the contract had been partially or fully performed.

In sum, if ever there is a doubt during the course of contract negotiations that one party potentially does not understand the nature of the proceedings, the most prudent approach would be to stop and seek the advice of counsel before proceeding further. At the very least, if the contract is executed and calls for immediate performance and out-of-pocket costs, such expenses should be taken cautiously, as the Court may not permit them to be recovered in the event the contract is voided for competency reasons. ■



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DISCLAIMER Actual resolution of legal issues depends upon many factors, including variations of facts and the application of such facts to state and federal statutory and common law. This Newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this Newsletter.