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A Resource For Any Small Business

Ganz Wolkenbreit & Friedman LLP is proud to have been a founding sponsor of the Capital Region Family Business Resource Center ("Resource Center") during the past twelve months, and has pledged to continue that support in the future.

The Resource Center's main mission is to foster the continuity of family and closely held businesses. According to the Small Business Administration, there are 25 million small businesses in the United States, of which 90 percent are family owned. Studies have shown that two out of three family businesses fail to make it to the third generation and six out of seven fail to make it past the third generation. The Resource Center acts as a facilitator to assist with communication, conflict resolution, solving compensation issues and planning for the continuity of the business in an effort to reduce these staggering statistics. Each member of the Resource Center appreciates the concept of keeping the "family in the business" and desires to keep the "business in the family." Although the focus of the Resource Center is on family businesses, many small businesses that are non-family owned and controlled face the same business issues on a daily basis.

The Center accomplishes its goals through its monthly roundtable meetings and seminars. These roundtable meetings allow owners and managers to discuss various aspects of their business with other business members in the community, as well as to take advantage of the professional advice of the Resource Center's professional sponsors, who are attorneys, accountants, bankers, financial and human resource consultants, and marketers. At the roundtables, other members and sponsors serve as a sounding board to listen to individual problems and suggest ways to address business issues that range from routine human resource matters to complicated succession plans. The Resource Center also conducts monthly seminars on a variety of different topics, including succession planning and management strategies. Attorneys from our firm have presented or participated in seminars on credit and collections, employee handbooks and estate planning for the family business.

The Resource Center and the roundtables are facilitated by Stanley Simkins, a business consultant who previously served as director of the Siena Family Business Center. Mr. Simkins has stated, "If you are one of the many business owners who feel that you do not have time to attend these roundtables and/or seminars, then the Resource Center probably is just what you require to understand why you do not have the time!" Small business owners must address the question of whether they actually own a business or have a job. Mr. Simkins asserts that if the owner is unable to leave his business for a few weeks without operations continuing as usual, then he merely has a job; but if this can be accomplished, he owns a business.

Additional information can be obtained at the Resource Center's website located at CapitalFamilyBusiness.com, by calling Stan Simkins at (518) 369-7101, or by contacting any of the attorneys at our firm. ■

NEWS OF THE FIRM

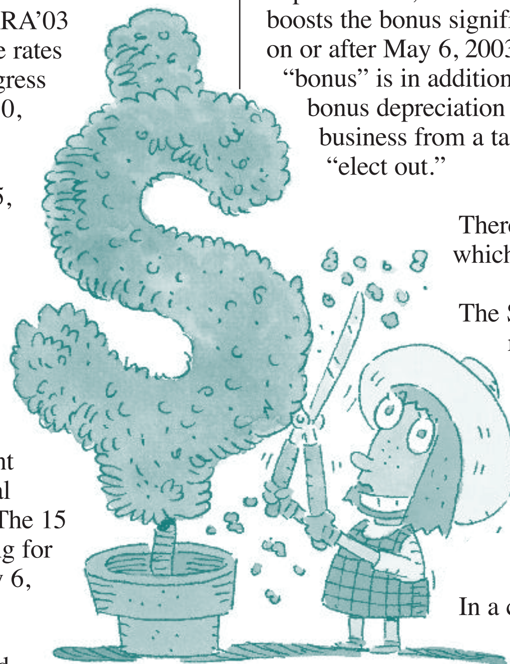
*We are pleased to announce that **David E. Siegfeld** has become a partner in our firm. David is in his fifth year of association with Ganz Wolkenbreit & Friedman LLP and focuses his practice on the areas of estate planning and administration as well as business formation and contracts. He is a graduate of the State University of New York at Albany and Albany Law School. He serves on the Board of Governors of the Endowment Fund of the Northeast New York United Jewish Federation. He is married to the former Shara Waldman of Albany and is the proud father of two children, ages 2 and 3 months.* ■

***Andrea Sibincich** has joined our office as receptionist and assistant to Rick Friedman in our collection practice. After only two months on the job, Andrea has demonstrated a high level of enthusiasm for her work and provides a friendly warm reception for clients calling or coming to the office. She lives in Troy, New York and is a graduate of Catholic Central High School.* ■

TAX UPDATE - You Should Be Paying Less

There have been a number of legislative changes and court cases affecting the tax area in the last several months. Some may directly affect your business or personal affairs and others are just interesting to hear about.

The recent tax package know as JGTRRA'03 has effects for all of us in that it reduces the rates at which we pay income tax. In 2001, Congress lowered the marginal income tax rates to 10, 15, 27, 30, 35, and 38.6 percent. The new law changes the marginal rates for 2003 retroactive to January 1, 2003, to 10, 15, 25, 28, 33, and 35 percent.



Inclusion of capital gains relief in this legislation came as a surprise and was part of a compromise for lowering taxes on dividends. The tax rate on capital gains drops from 20 to 15 percent for all taxpayers except those in the lowest brackets. Taxpayers in the 10 and 15 percent brackets will pay five percent on any capital gains recognized (down from 10 percent). The 15 percent rate applies to transactions occurring for gains able to be recognized on or after May 6, 2003, and remains in effect only through December 31, 2008. In 2008, taxpayers in the 10 and 15 percent brackets will be taxed on their capital gains at zero percent. In 2009, the capital gains rates are scheduled to return to 20 and 10 percent levels. The reduced rates and the temporary nature of the reductions call for immediate revisions in many taxpayers' investment strategies.

Dividends paid on stock, which had been taxed at the same rate as ordinary income, will be taxed at 15 percent for most taxpayers effective January 1, 2003. This rate remains in effect until December 31, 2008. Lower income taxpayers will pay taxes on dividends at five percent effective January 1, 2003 through December 31, 2007. In 2008, lower income taxpayers will pay a zero percent tax on dividends. However, not all corporate distributions are entitled to tax-reduced dividend treatment, creating a new web of complex rules for both shareholders and corporations alike.

The new law increases the child tax credit from $600 to $1,000. Beginning around July, the IRS sent rebate checks ($400 per child) to qualifying individuals based on 2002 tax returns. After 2004, the child tax credit will revert back to the previously scheduled amount.

The new law also immediately raises the standard deduction for married couples filing jointly to twice the standard deduction for single taxpayers for 2003 and 2004. In 2005 the standard deduction for married couples falls to 174 percent of the standard deduction for single taxpayers but doubles again in 2009. Included in marriage penalty relief is also a doubling of the income range in the 15 percent tax bracket for couples filing joint returns.

The new law also has some benefits for businesses in that it quadruples the amount of qualified property that a business can annually expense from $25,000 to $100,000 for 2003, 2004, and 2005. It also changes the definition of qualifying property to include off-the-shelf computer software.

Under last year's tax legislation, businesses were given a 30 percent depreciation bonus for assets acquired between September 11, 2001 and September 10, 2004. The new law boosts the bonus significantly to 50 percent for assets acquired on or after May 6, 2003, and before January 1, 2005. This "bonus" is in addition to regular first-year depreciation. If bonus depreciation will not be advantageous to your business from a tax perspective, the law allows you to "elect out."

There have also been some court decisions which are of some interest.

The Seventh Circuit Court of Appeals has rejected a taxpayer's bid to turn the IRS's long delay in issuing a refund check into a "tortuous act" covered under the Federal Tort Claims Act. Even though the taxpayer had to wait a long time for his refund check, the court held he had no valid claim against the IRS.

In a case dealing with a novel claim for a deduction, a federal claims court recently held that a taxpayer was not entitled to a tax refund for slavery reparations. While the court didn't doubt the historical aspects of the taxpayer's reasons for asserting the claim, it simply found that there is no provision in the Internal Revenue Code that provides a tax refund based on reparations for slavery. In addition, the taxpayer's Form 2439 was not valid and did not support a refund claim because it was filled in with a nonexistent regulated investment company or real estate investment trust.

Married taxpayer couples were not entitled to deduct mortgage loan interest with respect to certain real property. The husband contended that the interest payments related to a mortgage taken out by his mother on her house for the husband's business and, as such, constituted security for a loan made to him. The record and evidence indicated, however, that the husband was neither directly liable on the mortgage, nor was he a legal or equitable owner. Thus, he was not entitled to a deduction for interest paid.

And in a strange case proving that even criminals must pay taxes, one court held that the IRS could file a tax return for a drug dealer who failed to report his income from the illegal sale of cocaine. Because the taxpayer failed to provide any books, records or other evidence to document his cocaine business, it was proper for the IRS to reconstruct his income based on the bank deposits and cash expenditures method. In another case the court held that in the absence of evidence to the contrary, a drug smuggler was liable for the penalty for failure to file returns. ■

Use of Gifts in Tax Planning

Gifts can serve a function in your income tax planning by shifting income-producing or appreciated property to others who are in a lower tax bracket. Even with the maximum estate tax rates being phased down from as high as 55 percent before 2002, to 45 percent by 2007, and with the income tax rates for individuals also being reduced by about 3 or 4 percentage points (depending on the bracket), gift giving can still yield significant benefits.

While large gifts are subject to gift taxation, you can give away up to $11,000 per recipient per year free of gift tax. (This inflation indexed amount had been $10,000 before 2002.) These gifts also do not reduce the amount that you can pass free of gift tax ($1 million lifetime exclusion, adjusted for inflation each year; $2 million if gifts are "split" with a spouse).

There is a great deal of flexibility in the types of property that can be transferred. Gifts that qualify for the $11,000 annual exclusion can be made in money, property such as stocks or bonds, or even a life insurance policy, as long as the recipient gets the present right to possess or use the property. The gift may be in trust, if the terms of the trust give the recipient the immediate right to the property or income from the property. If the recipient is a minor, the gift may be made to a custodian or legally appointed guardian of the minor's property. If the recipient is a child under 14, however, income from the property may be taxed at the parent's marginal rate.

You can give up to $22,000 per recipient per year, if you're married and your spouse consents to "split" your gifts. This is useful for spouses who do not own an equal amount of property. The spouse with less property can consent to gifts made by the wealthier spouse, thereby effectively doubling the amount that the wealthier spouse can give away tax free. To take advantage of "gift splitting," both spouses must be U.S. citizens or residents. The consent must be given on a gift tax return, so a return must be filed even if no gift tax is due. However, a short form gift tax return is available.

One important thing to remember when you make a gift is that the recipient must take your basis in the property. This means that if the recipient sells the property, any gain on the sale will be measured using what you paid for the property, not what the property was worth when he or she received it. In contrast, if property is transferred to another through your estate, the recipient can use the value of the property at that time in measuring any gain on the sale of the property. Consequently, choosing the right property to achieve your goals is an important aspect of any gift giving program.

Another way to further the financial security of others without incurring gift tax is by payment of medical and educational expenses. You can pay an unlimited amount for these expenses tax free as long as the payments are made directly to the medical services provider or educational institution. The person you benefit does not need to qualify as a dependent for tax purposes. Any medical expenses, however, must not be reimbursed by insurance, to either you or to the beneficiary. ■

A Possible Problem With Single Member LLC's

The LLC has been touted for its many advantages, one of which is the ability of an LLC to protect the assets from claims of creditors of persons that are members in the LLC. In a recent case, however, the Bankruptcy Court for the District of Colorado held that a trustee in bankruptcy had the authority to control the management, liquidation and sale of the property of an LLC to satisfy the claims of the creditors of the LLC's single owner. This seems to be the first case in which a court has considered the consequences of the bankruptcy of the sole member of a single-member LLC. The case raises concerns for owners of such entities.

The concern is that some other courts may use this case, not only with respect to the owner of a single member LLC for which a bankruptcy petition has been filed, but also with respect to the owner of a single member LLC that has defaulted on any debt. Owners of single-member LLCs should be aware of the potential problem this case raises and may want to consider the addition of a second owner. ■

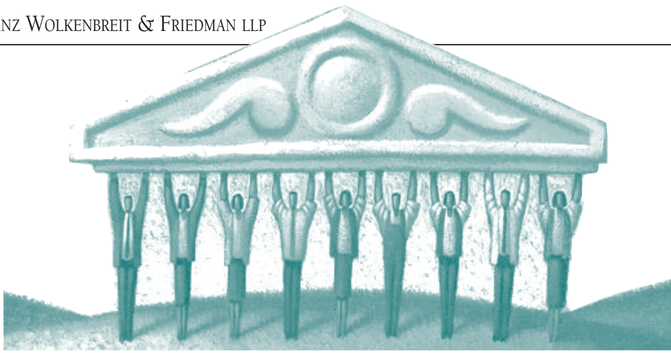
What We're Up To

Robert Ganz, representing doctors who were denied participation in the independent medical examination system by Workers' Compensation Board interpretation of a newly enacted statute, won an Appellate Court victory striking down the State's interpretation of the Rule. He is also involved in litigation relating to a former employee's diversion of corporate opportunities. ■

Richard Friedman is representing several clients challenging dramatic raises in the City of Albany's tax assessment of their commercial property. ■

Jed Wolkenbreit is assisting clients both in acquiring and selling portions of their ongoing business operations. ■

David Siegfeld is extensively involved in assisting transportation and real estate enterprises in the Oneonta area expanding their business activities. ■



Court Supporting Employers

In recent months, courts have been very favorably disposed to the position taken by employers in various litigation.

In Abeles v. Mellon Bank Corporation, an Appellate Court dismissed a claim made by an employee that she had an actionable claim for intentional infliction of emotional distress and defamation when the employer investigated forged signatures of her supervisor on her expense account. After questioning the employee about the forgeries and terminating her employment, she was immediately escorted from the premises. The court held that such conduct was not so extreme and outrageous so as to support a claim for intentional infliction of emotional distress. It said that even if the employer's statements relating to the employee's conduct, were wrong, they were made in the course of an investigation and consequent termination of an at will employee and thus were qualifiedly privileged. The court said that no valid claim could be maintained unless there was a showing that the employer had acted with malice against the particular employee.

This certainly should strengthen an employer's confidence when it suspects wrongdoing that it is not at risk of substantial damages, by investigating the wrongdoing, terminating the employee and immediately removing the employee from the workplace.

In the unemployment realm, an Appellate Court upheld the denial of benefits in Micara v. Commissioner of Labor. In that case, an employee quit a job because of her dissatisfaction with a rude and insensitive supervisor and because she felt the working conditions were unsanitary. The court determined that having an unduly critical boss is not good cause for voluntarily leaving employment and that absent a showing that the employee's health was actually endangered by the allegedly poor conditions, the employee could not claim a constructive discharge and thus be entitled to unemployment benefits.

In the discrimination realm, the recent case of Horowitz v. L.&J.G. Stickley, Inc., presents an employee who had a bi-polar disorder which she revealed on a medical questionnaire required to be completed after she had been offered the job. She did not completely fill out the questionnaire relating to her medical history omitting her recent treatment and her present use of prescription medications. The supervisor, having concerns relating to the discrepancies in the forms, sent the brand new employee home for the day and thereafter terminated her. The employee claimed discrimination due to disability, and the employer defended its decision on the basis that the discrepancies in the forms indicated that the employee had not been truthful in answering the questionnaires. The court upheld the employer's position and dismissed the complaint. Employers are entitled to truthful and complete answers concerning an employee's physical condition once a job offer has been extended. Termination for failure to provide such information is not discrimination. This employer prevailed because it took this action immediately.

Finally, in Todd v. Grandoe Corporation, an employer who hired an executive under a letter agreement at a fixed annual salary was permitted to terminate the executive without long-term liability because the court held that "the mere fact that the hiring is at so much a year, without a specified duration, is not evidence that the hiring is for such a period." Rather, the court held that when the written agreement is silent as to duration of the employment and places no explicit limits on the employer's right to terminate, the agreement must be construed as employment at will. Further, the letter agreement promising the executive "full operational authority" is a promise of future events which is not actionable as fraud. While the employer did bear some responsibility to the fired employee, it was not as great as it could have been if the court had ruled otherwise. ■

Are You Really Ready To Close?

Do you really know your closing date? Most real property contracts for the purchase and sale of residential property contain a paragraph setting forth a date when the seller will transfer title and the purchaser pay for the property. This is known as the "Closing Date". In this area, residential contracts usually state that closing will occur "on or before" a specific date. New York case law has consistently held that a seller and buyer are provided with a "reasonable" amount of time after the stated date to close without any monetary damages, unless specific language is included in the contract to make "time of the essence." How "reasonable time" is defined depends upon the facts of each particular situation, but, in general, can be as many as 30 days past the original closing date.

It is only when the contract states "time of the essence" that the buyer and/or seller, as the case may be, may be entitled to damages for the failure of the other party to close in accordance with the contract. However, time of the essence does not provide the immediate remedy of specific performance on the date, it only allows the other party to recoup his or her damages. The potential of being responsible for costs for failing to close on that date and facing potential economic damages for delaying the closing often helps the other party do whatever it takes to speed up the closing preparations. In contracts where the closing date has come and passed and time is not declared of the essence, a party may demand a reasonable date on which the other party must attend a closing, effectively making time of the essence. However, the demand must set a date certain that is reasonable and include specific language making it clear that failure to close is a default.

Accordingly, the next time you desire to sell or purchase a property and time is an important factor to you, please consult your attorney with regard to this, so that an attempt can be made to negotiate the proper verbiage. It should be noted that most attorneys representing a party who would be bound by a time of the essence clause would counsel against its inclusion in the contract. Hopefully, you can be comforted in knowing that most home sellers/buyers face the mystery of whether the closing will occur "on or before" the date contemplated in the contract, and most closings eventually are completed. ■

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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.