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CONGRATULATIONS

WE ARE PLEASED TO ANNOUNCE THAT

GARY C. TYLER

GRADUATED FROM BROOME LEADERSHIP INSTITUTE (BLI)

TAX UPDATE:

DON'T JUST GIVE AWAY THE FARM. OR SHOULD YOU?

On December 17, 2010, President Obama signed the 2010 Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 (the "Act"). The Act implements change to the Federal Gift Tax for the 2011 and 2012 tax years, creating a great opportunity to save on taxes for many individuals and couples.

The Act provides that the lifetime gift tax exemption amount has been re-coupled with the estate tax exemption amount of \$5 million per person, and has spousal portability to make the total \$10 million per couple. Prior to the Act, the lifetime gift tax exemption amount was \$1 million per person or \$2 million per couple. Furthermore, the federal gift tax on gifts in excess of \$5 million per person (\$10 million per couple) is thirty five percent (35%). The Act did not change the \$13,000 annual gift tax exclusion per donee (or recipient). Lastly, it is significant to note that New York State does not presently have a gift tax.

Consider the following example: a single person has an estate worth \$5 million (thus not subject to federal estate tax). Suppose that he makes gifts of \$4 million in 2011, living off the remaining \$1 million until death. He will not pay any federal or New York gift tax in 2011. He will not pay any federal or New York estate tax when he dies, saving his heirs \$393,000 in New York estate tax under present federal and New York law.

Consider the following additional example: Suppose a single person has an estate worth \$10 million and gives away \$5 million in 2011, living off the remaining \$5 million until death. She will not pay any federal or New York gift tax in 2011. Although the estate is still subject to federal and New York estate tax, she has just saved her heirs \$845,000 in New York estate tax under present New York law.

In order to be included under the new gift tax exemption, the gift must be completed by the end of 2012. The competent donor must make the gift in full, and not retain any interest, contingencies or qualifications on the property given. The gift must be delivered to the donee, and the donee must formally accept the gift. Lastly, even though the property given may be worth less than the \$5 million exemption amount, it is important that the donor file a gift tax return with the IRS, claiming no gift tax owed so that the statute of limitations begins to run.

Property that the donor expects to appreciate in value prior to the donor's death is particularly well suited for gifting in 2011 and/or for 2012. This allows the property to increase in value outside of the donor's estate while at the same time relieving the heirs from having to pay future estate tax. A good example of appreciable property would be real property that may escalate in value due to future gas drilling and production. One item of caution on any gift transfer is that the donee receives the donor's basis in the property. Thus it is important to consult with your accountant and attorney to ensure that the proposed property is the right type to give to a donee and that the gift is legally completed.

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CONGRATULATIONS

WE ARE PLEASED TO ANNOUNCE THAT

JACQUELINE A. BAIN

WAS SELECTED AS A MEMBER OF THE 2011 CLASS OF "20 IN THEIR TWENTIES" BY THE SOUTHERN TIER OPPORTUNITY COALITION!



TAX UPDATE (CONTINUED)

(Continued from page 1)

The new Act has created a unique gifting opportunity, especially when one considers the pending natural gas activity in our local area. You may just want to consider “giving away the farm,” thereby creating substantial estate tax savings for your heirs.

Article written by Ryan M. Mead, Esq. For more information, contact Mr. Mead at (607) 231-6928 or rmead@hbkc.com.

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THE HIPAA PRIVACY RULE AND THE HITECH ACT: WHY YOU SHOULD BE CONCERNED

On February 22, 2011, the United States Department of Health and Human Services (“HHS”) Office for Civil Rights (“OCR”) announced a \$4.3 million civil monetary penalty for violations of the Health Insurance Portability and Accountability Act of 1996 (the “HIPAA Privacy Rule”). This represents the first civil monetary penalty issued by HHS for violation of the HIPAA Privacy Rule. The OCR found that Cignet Health of Prince George’s County, Maryland, violated 41 patients’ rights by denying them access to their medical records when requested. The HIPAA Privacy Rule requires that a covered entity provide a patient with a copy of his/her medical record within 30 days and not later than 60 days of the request. The civil monetary penalty for these violations was \$1.3 million. The remaining \$3 million penalty was a result of Cignet Health’s failure to cooperate with OCR’s investigation.

Why is this ruling important?

The imposition of a civil monetary penalty for violation of the HIPAA Privacy Rule is important because the HIPAA Privacy Rule and the Health Information Technology for Economic and Clinical Health Act (“HITECH” Act), which was passed as part of the American Recovery and Reinvestment Act of 2009, apply to more than just hospitals and physicians.

All “covered entities” must comply with the HIPAA Privacy Rule. A Covered Entity is a health care provider that submits claims electronically, a health plan, including employer group health plans, or a health care clearinghouse which translates data for another entity from nonstandard to standard and vice versa. Generally, pharmaceutical companies, durable medical equipment suppliers, employers and health care providers who do not submit claims electronically, are not Covered Entities.

Even if an entity is not a Covered Entity, it may still be subject to the HIPAA Privacy Rule and the HITECH Act if it is a “business associate.” A Business Associate is a person or entity who performs activities or functions or provides services for, or on behalf of, a Covered Entity that involves disclosure of Protected Health Information (“PHI”) to the person or entity. Business Associates may include, but are not limited to, lawyers, banks and other financial institutions, consultants, certified public accounting firms, and other third party vendors who perform services for, or on behalf of, the Covered Entity. Although Business Associates are not required to directly comply with the HIPAA Privacy Rule, they are required to directly comply with the HITECH Act. The HIPAA Privacy Rule requires that Covered Entities enter into business associate agreements with each of its Business Associates. The business associate agreement must provide “reasonable assurances” that both parties will appropriately safeguard the PHI. Many of the provisions required for business associates mirror those of the Covered Entity. Further, if it is necessary for the Business Associate to disclose PHI to another person or entity to assist that Business Associate in providing services to the Covered Entity, the Business Associate must ensure that the third party or entity agrees to the same restrictions the

Business Associate agreed to in its business associate agreement.

In addition, the HITECH Act increased liability for Business Associates who do not provide adequate safeguards for PHI. Business

Associates are required to comply with the HITECH Act. Pursuant to the terms of the HITECH Act, a Business Associate must continue to provide reasonable assurances that it will appropriately safeguard PHI. Furthermore, if a Business Associate violates any provision of the business associate agreement, it will be subject to the same civil and criminal penalties for HIPAA violations as covered entities. Thus, if a Business Associate failed to respond to patient requests for medical records or failed to cooperate with OCR’s investigation, the potential liability is the same as that of Cignet Health above.

What information is protected by HIPAA?

The HIPAA Privacy Rule applies to protected health information or individually identifiable health information, including demographic information that was created or received by a health care provider, health plan, employer or health care clearinghouse. The PHI might relate to: the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care by an individual. Essentially, any information that identifies the individual (or if there is a reasonable basis to believe the information could be used to identify the person) could be considered PHI. The HITECH Act applies to electronic PHI. A Covered Entity (or a Business Associate of a Covered Entity) may not use or disclose PHI without an individual’s authorization unless the use or disclosure is otherwise permitted under the HIPAA Privacy Rule.

What should be done going forward?

An entity should take appropriate steps to determine what, if any, PHI it may be handling with respect to health care clients. Business entities should also look at possible indirect third party relationships with health care institutions. If PHI is being handled, privacy and security policies should be reviewed to ensure that they are HIPAA compliant to protect from the broad reach of new enforcement efforts.

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Photographer: Brand Images

**ADOPTION IN NEW YORK STATE:
PART I - AGENCY ADOPTIONS**

Adoption is a legal proceeding whereby one person takes another person (usually a child) into the relationship of child and thereby acquires full rights to the child as if the child was born to them. There are two types of adoption in New York State: adoption from an authorized agency (“agency adoption”) and private-placement adoption (“private adoption”). In an agency adoption, an authorized agency places a child in a certified foster home for the purpose of foster care, adoption, or both, and supervises the placement until the child is adopted. The child remains in the custody of the authorized agency until the order of adoption is issued. Private adoptions are where the child was not placed by an authorized agency and the agreement and consent is between the birth parent and the adoptive parent.

Most children available for adoption in New York are in foster care. According to the New York State Office of Children and Family Services, nearly one-half of those children are between the ages of 6 and 13 and nearly one-third are between the ages of 14 and 17.

Adoptive families vary by age, income, lifestyle, sexual orientation and marital status. To adopt, you do not need to be married, own your own home, or earn a high income. You may apply to adopt a child if you are single or married, young or old, childless or a parent, a renter or a homeowner.

There are many steps in the adoption process, and many of these steps can take several months. If you are considering an agency adoption, the following is a summary of the steps you can expect to encounter:

Step 1 – Choose an Adoption Agency

Adoption agencies can be public (i.e. the local department of social services in the county you live) or voluntary authorized agencies (i.e. those that have contracts with the local department of social services to provide adoption services). When foster children are in the legal guardianship of the local department of social services commissioner, a fee will not be charged for adoption services. When they are in the legal guardianship of voluntary authorized agencies, fees may be based on the adoptive family’s income. However, they do not usually charge fees when families adopt children with special needs. Lists of local departments of social services and voluntary authorized adoption agencies are available on the State Adoption Services website www.ocfs.state.ny.us/adopt.

Step 2 – Submit an Application and Medical History; Complete a Criminal Background Check and a Check by the Statewide Central Register of Child Abuse and Maltreatment

Once you have chosen an agency to work with, you will be asked to submit an application for approval as an adoptive parent. The application is provided by the agency and it includes information on your background, family makeup, and number of people living in your home. You will also be asked to describe the type of child you are interested in adopting. An FBI and New York State criminal history record check (and fingerprinting) will be required for you and any other person over the age of 18 currently living in your home. Additionally, the Statewide Central Register of Child Abuse and Maltreatment will determine whether you or any person over the age of 18 who lives with you has had an indicated report of child abuse or maltreatment.

Step 3 – Complete the Home Study Process

The home study is a required step in the adoption process and it includes visits to your home, interviews, medical history and training. When the home study is complete, the caseworker writes a summary about the family, which ends with the decision of whether to approve the family to adopt. If the family is approved, the agency uses the summary in the placement process. Prospective adoptive families are also provided the opportunity to review and discuss the written summary and add their own comments.

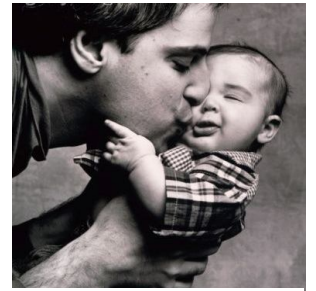
Step 4 – Attend Agency-Sponsored Training

Each adoption agency provides parent training, which is done in individual or group sessions, to prospective adoptive parents.

Step 5 – Work with a Caseworker to Find an Adoptable Child

Once a family is approved to adopt, the family and the agency work together to place a child with the family. The Adoption Album – Our Children, Our Families is a website that contains adoption information and photolistings of New York State children waiting for adoption. The website address is www.ocfs.state.ny.us/adopt. Each page has a photograph and a brief description

of a child available for adoption. It also has a registry called the “Family Adoption Registry” that gives



Photographer: Jonathan Levine

prospective adoptive parents an opportunity to register their interest in adopting. Due to the large pool of prospective adoptive families, individuals are encouraged to inquire about several children at once when considering which child to adopt.

Step 6 – Visit With the Child

Once the agency has determined it would be appropriate, you can begin visiting with the child. Visits can take place at the agency, in the prospective adoptive family’s home, or in the home where the child lives. Generally, visitation should last for a period of weeks or months before the child moves in with the adoptive family.

Step 7 – Work with the Child’s Caseworker for a Period of Supervision

New York State law requires that agencies supervise prospective adoptive families for at least three months after placement before an adoption can become legal. This period allows the child to become comfortable and allows the agency to assist the family in meeting the needs of the child. A family adopting a child who has been in foster care in their own home may have a shorter waiting period because the agency is already familiar with the family. Once all of the parties agree that the family is ready to move forward, the agency will consent to the family’s petition to adopt.

Step 8 – Work With Your Agency to Complete the Necessary Steps to Receive Adoption Maintenance, Medical Subsidies, and Reimbursement of Non-Recurring Adoption Expenses

Adoption subsidies are monthly payments made to help with the care and support of a child who is considered handicapped (i.e. has a physical, mental or emotional condition or disability that is so severe it would

(Continued on page 4)

ADOPTION IN NEW YORK STATE (CONTINUED)

(Continued from page 3)

create a significant obstacle to the child's adoption) or hard-to-place (i.e. one who meets specific criteria defined in federal and state statutes and regulations, examples of which include child's age, sibling group status, and time in foster care). Generally, subsidy payments are made monthly and commence when the adoption is finalized. Payments may continue until the child is 21 years old, as long as the adoptive parent remains legally responsible for the child and continues to provide support for the child. If the child is eligible for a subsidy, you will need to sign an Adoption Subsidy Agreement and submit it with the necessary paperwork. Applications for adoption subsidies must be submitted before the adoption is finalized. Medical coverage may also be available for children with special needs to help the family meet the cost of health care.

Since finalizing an adoption in court usually requires a lawyer, families adopting children with special needs may also be eligible for reimbursement of legal fees and court costs. These expenses are called "non-recurring adoption expenses." Families must sign an agreement for payment of these costs before the adoption finalization date and these expenses are reimbursed after the child's adoption is finalized.

Step 9 – Hire and Work with Your Attorney to Submit the Adoption Petition

In order to finalize the adoption, you should hire a lawyer to petition the court and ask the judge to issue an order granting the adoption. After reviewing all of the paperwork submitted to the Court, the Judge decides whether to grant the adoptive parents' petition to adopt. When the Judge grants the petition, the adoption is finalized in court and the family now has full legal rights and obligations for the child's care, and agency supervision is no longer required. Once the adoption is finalized, the family may also want to retain a lawyer to change the child's name on all legal records and change their wills to name legal guardians for the child in case something happens to them.

This article is the first of a two-part series on adoption in New York. Look for an article on private adoptions in our next issue.

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PREPARING NOW TO AVOID LITIGATION PITFALLS WITH ELECTRONICALLY STORED INFORMATION

Benjamin Franklin wisely advised that "by failing to prepare, you are preparing to fail." While this is often true in the legal arena, it has become even more evident in court decisions relating to Electronically Stored Information (ESI). By some estimates, the average person now create four gigabytes of information each day and receives over 30,000 e-mails each year. There is no doubt that ESI, including e-mails, documents, accounting programs, etc., has become a part of our everyday life. Even clients who do not foresee any litigation on the horizon would be wise to review their document retention and destruction policies, particularly as they relate to ESI, to ensure that they are prepared in the event of litigation.

Background and History

In 2006, the rules governing litigation in federal courts were amended to specifically address ESI. The rules set forth certain requirements for maintaining ESI in the face of a lawsuit and also addressed issues concerning the format of ESI and inadvertent disclosure of privileged ESI. Since then, several courts, particularly in New York, have attempted to clarify the rules and advise attorneys and their clients what is expected. In the past year, these courts have increasingly awarded monetary sanctions against businesses, their in-house counsel, and their personnel, for the accidental destruction of ESI.

The Duty to Preserve

In simplest terms, the duty to preserve electronic information begins at the earliest time a company is aware of a possible claim. In the employment context, for instance, the duty to preserve ESI begins, at the latest, when notice of a Division of Human Rights or EEOC claim is filed. If an internal complaint is received, the duty is likely triggered at that time.

The company is required to suspend any routine document destruction and take affirmative steps to preserve any relevant or potentially relevant ESI. This typically includes, at a minimum, sending a letter to all employees who potentially have information and talking with tech support to stop document destruction and set up a place to store the ESI being preserved. It may also involve talking to outside vendors who store information for the company, preserving back-up tapes and copying computer hard drives. Attorneys often

refer to this process as a "litigation hold."

Penalties for the Failure to Preserve

The penalties for failing to meet the preservation obligation can be steep. Claims and defenses can be dismissed. Judgment can be entered against a company. Monetary penalties are likely—particularly if information was not preserved and must be restored from back-up tapes. In at least one case, a party was jailed for its failure to comply with a court's order regarding ESI.

What Businesses Should Do Now

The time to conduct an ESI audit of your business is before litigation begins. Businesses should seek to answer the following questions:

1. What electronically stored information does my business have?
2. In what format and where is the information stored?
3. What is our process for preserving/destroying that information?
4. If someone leaves our company, how do we determine whether or not to preserve their electronically stored information? Who makes this determination? Where is undestroyed information stored?
5. What is our document destruction policy? How can we stop document destruction if needed? Who has that authority?
6. What is our litigation hold policy?
7. Do we have vendors we need to contact and coordinate with? Who will do this? How will it be done?

At the very least, answering these questions will prepare you to talk with your attorneys should a lawsuit appear to be a possibility and, at best, having good document destruction, preservation, and litigation hold policies will prevent your business from facing sanctions for failing to preserve ESI.

Article written by Dawn J. Lanouette Esq. For more information, contact Ms. Lanouette at (607) 231-6917 or via email at dlanouette@bhk.com.

Those in favor of horizontal drilling for natural gas into the Marcellus Shale formation have reason to be optimistic that the prohibition on high volume hydro-fracturing (the “Moratorium”), which has been in place since 2008, will eventually be lifted. Governor Andrew Cuomo has made public statements signaling that he supports environmentally responsible drilling, both on the campaign trail and since his election.

When the Moratorium is lifted, leasing activity will almost certainly increase significantly and many landowners will look to join coalitions to attempt to negotiate leases with oil and gas companies. Even with Marcellus Shale horizontal drilling on hold, several issues related to oil and gas leases can affect Southern Tier residents right now.

Here are some common misconceptions relating to oil and gas leases in our area:

“My property is subject to an oil and gas lease, but the term ends next year, so I will be free to negotiate a new lease at that time.”

Oil and Gas Leases do not always terminate automatically. Many people mistakenly believe that their lease terminates at the end of the “Primary Term” stated in their lease. Although your lease may include a termination date at the end of the “Primary Term,” the gas company may be able to extend the term of the lease. Your lease most likely allows the gas company to extend the lease if gas is currently produced or stored on your property, if the gas company is in the process of testing your property for gas potential, or for other reasons if certain other gas related activities are in progress. A lease with a Primary Term of 5 years could be extended for 30 years, or so long as gas is produced from the premises. Further, some gas companies have been asserting a right to extend leases on the grounds that the Moratorium allows an extension under the legal principle of “force majeure.” In other words, since drilling has been delayed for legal reasons outside of the companies’ control, they argue that the Primary Term can be extended at their option.

“I am certain that I own my mineral rights and that my property is not subject to an Oil and Gas Lease because when I purchased the property my attorney did not mention it.”

In our area, attorneys typically review a property’s Abstract of Title back at least 40 years. The Abstract is a compilation of documents relating to a particular property, including deeds, mortgages, liens and other recorded documents. In contrast to the customary legal review for the purposes of a purchase or refinance, a gas company will likely review the title to a property back at least 100 years, and sometimes further. It is possible for landowners to have no knowledge that, because of a past mineral rights severance, they do not own their mineral rights or that there is an oil and gas lease on their property. Once a gas company signs a lease, it will have a title search performed, and if there are any mineral rights problems or leases on the property, the gas company might withdraw the current lease, regardless of whether there are current production activities on the property. If you are concerned about your oil and gas rights, you may want to have a full title search performed to ensure that your property is not already subject to an oil and gas lease and that you are the owner of your mineral rights.

“Once my lease expires, the gas company will send a Termination of Lease.”

It is common for a lease to expire without a gas company sending a release to the landowner. As a result, even if an old oil and gas lease has terminated, the lease may still appear in the County Clerk’s records as an encumbrance on your property. To be certain that an oil and gas lease is terminated, a Termination of Lease should be filed in the Clerk’s

office. This concept is similar to a mortgage that is paid, but not discharged as of record in the Clerk’s office. A mortgage continues to act as a lien against the property until a Discharge of Mortgage is filed in the Clerk’s Office, regardless of whether or not it was paid. If your land is

subject to an oil and gas lease, and you believe the lease has expired, you may want to request a release of the lease from the gas company. There is also a statutory procedure available to landowners who are seeking a Termination of Lease.

“I am opposed to drilling in this area. Therefore, I will not join an Oil and Gas Coalition.”

Coalitions are comprised of people with various opinions regarding oil and gas drilling. Although most coalition members are in favor of gas drilling, a coalition may appeal to people who consider themselves to be “Pro-Gas,” “Anti-Gas,” or to people who are merely seeking information. Coalitions are formed to protect landowners and offer bargaining power when negotiating with oil and gas companies. A single owner who does not want to sign an oil and gas lease will not be able to prevent a gas company from drilling in a certain area. If a gas company has signed leases covering 60% of the acreage in a specific area called a “spacing unit,” it may receive permission from the DEC to include all of the property in the unit through “compulsory integration,” which would give the company the right to remove gas from beneath premises where there is no lease. A negotiated lease may offer additional environmental protections and monetary benefit that are not provided by the compulsory integration process. A person may also consider joining an oil and gas coalition to obtain the most current information on the status of oil and gas leasing in their area.

While the DEC’s environmental review process continues and must be completed before Marcellus horizontal drilling permits can be issued, there are steps that landowners can take now to prepare themselves for the gas drilling that appears likely to occur in this area.

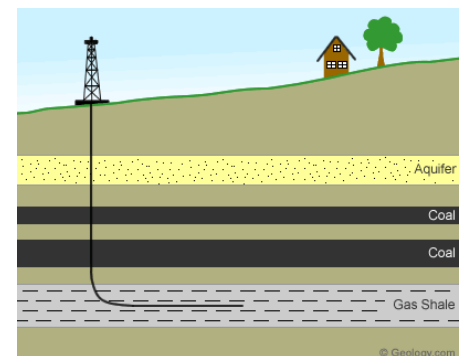
For more information on the status of horizontal fracturing and drilling into the Marcellus Shale, please see the various articles in the “Publications” section of the HH&K website at

www.hhk.com

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Photographer: Thomas Grill



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IF MY PROPERTY IS CONTAMINATED,
AM I ENTITLED TO A PROPERTY TAX REDUCTION?

Environmental contamination is widespread in many parts of the United States, particularly in industrialized areas of the Northeast and Midwest. However, this phenomenon is not limited to big cities. In New York State, for example, the largest number of state “Superfund” sites can be found in western New York; the highest number of “brownfield” sites in all of Upstate New York is in the Syracuse/Central New York region; and the Southern Tier has the second highest concentration of brownfield sites on a per capita basis.

This pattern holds true in “Greater Binghamton,” as demonstrated by the following statistics for Broome County:

- 773 reported oil spills in the past 5 years
- More than 80 recorded “brownfield” sites
- 45 sites on NYSDEC’s “environmental site remediation” database
- 717 sites on DEC’s “bulk storage” database
- 9 National Priorities List (NPL) federal “Superfund” sites
- 15 sites on the U.S. Environmental Protection Agency’s CERCLIS inventory of potential “Superfund” sites
- 837 active RCRA (hazardous waste) facilities

As this year’s Grievance Day (May 24, 2011) approaches, such conditions raise the question of whether real estate parcels stigmatized by environmental contamination must pay the same real property taxes as uncontaminated properties. The answer is “no.”

In New York, the leading case on this issue is the 1996 Court of Appeals decision in *Commerce Holding Corp. v. Board of Assessors*. The case involved a 2.7-acre site improved with a one-story industrial building. A former tenant was a metal plater which discharged contaminated wastewater into onsite leaching pools, resulting in severe subsurface contamination, which led to a federal “Superfund” site designation. Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the property owner was strictly liable for the cleanup costs. In 1988, the owner entered into a consent order with the EPA to remediate the site.

Town tax assessors valued Commerce’s property at between \$1.5 million and \$2.6 million each year. Commerce filed timely challenges to the assessments, followed by annual tax certiorari proceedings, contending that these valuations were excessive and that the assessors should have reduced the assessed value to account for environmental contamination. Both the trial court and the Appellate Division agreed with the property owner.

The Court of Appeals affirmed the lower court decisions, upholding Commerce’s valuation. Specifically, Commerce’s expert valued the property “as if unimpaired” by using income capitalization and comparable sales approaches. The present value of the total remaining cost to cure all the contamination was then subtracted from this hypothetical “clean” value. The Court held that “cleanup costs are an acceptable, if imperfect, surrogate to quantify environmental damage and provide a sound measure of the reduced amount a buyer would be willing to pay for the contaminated property.” In other words, looking at the situation from the perspective of a buyer, the Court agreed that knowledgeable market participants would factor in these ascertainable future remediation costs in arriving at an acceptable value.

Noting the “difficulty in assessing a polluted parcel” because of “the uniqueness of environmental contamination,” and recognizing “the unsuitability of the strict application of traditional valuation techniques” to such properties, the Court endorsed a “flexible approach” wherein “traditional techniques” are “adjusted for environmental contamination.” It cautioned, however, that “a challenge to a property tax assessment must be supported by sound theory and objective data”.

While no one method can be prescribed “to assess the effects of environmental contamination,” the Court stated that “there are certain factors that should be considered.” These include: the property’s status as a Superfund site; the extent of the contamination; the estimated cleanup costs; the present use of the property; the ability to obtain financing and indemnification in connection with the purchase of the property; potential liability to third parties; and the stigma remaining after cleanup.

Among the other guiding principles enunciated by the Court were the following:

(1) “Because environmental contamination can depress a parcel’s true value,... it must be considered in assessing real property tax.”

(2) “[T]he assessment of property value for tax purposes must take into account any factor affecting a property’s marketability.... It follows that when environmental contamination is shown to depress a property’s value, the contamination must be considered in property tax assessment.”

(3) “[S]tatutory and constitutional full value requirements cannot be subordinated to environmental policy concerns” (i.e., the public policy in favor of requiring landowners to remediate their contaminated property, and requiring the polluter to pay, does not weigh against providing an assessment reduction for environmental contamination).

(4) The fact that the property owner, by consent order, has agreed to pay the cleanup costs even if it sells the property does not negate the impact of the contamination on the property’s market value—because any purchaser of the site is nevertheless jointly and severally liable for the cleanup costs under CERCLA.

(5) An owner’s (or a third party’s) agreement to remediate the property does not “resolve the question of whether, and to what extent, the contamination in fact affects the value of the land.” A buyer would likely demand an abatement in the purchase price to account for the contamination notwithstanding the existence of the consent order or an indemnification agreement. “Whether a property owner’s agreement to pay the cleanup costs would affect the property’s value in a given case is a factual matter for the assessment board.”

(6) When the property is capable of productive use, but the high cleanup costs would yield a negative property value, “the cleanup costs could be more appropriately accounted for by adjustments to the projected income stream.”

(7) Finally, the Court approved of valuation approaches which reduce the value of a property by subtracting the “remaining cleanup costs and amount attributable to stigma.”

The Appraisal Foundation, as part of its Uniform Standards of Professional Appraisal Practice, has issued guidance on appraising properties that may be impacted by environmental contamination. The Appraisal Standards Board Advisory Opinion 9 (AO-9) provides an accepted formula geared to an “estimate of two values: the unimpaired value and the impaired.” Taken together, the formula derived

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ENTITLED TO A PROPERTY TAX REDUCTION? (CONTINUED)

(Continued from page 6)

from AO-9 provides that "Impaired Value" equals "Unimpaired Value" minus remediation costs, minus "Effects on Site Usability," minus any risk effects, including Environmental Risk and Stigma. Stigma may be measured objectively by comparing, for example, sales of remediated brownfields with comparable properties which were never contaminated.

In short, there is no reason why environmentally impaired property should be paying the same property taxes as similar uncontaminated properties.

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RECENT CHANGES IN THE NEW YORK LABOR LAW FOR HOTELS AND RESTAURANTS

The New York State Department of Labor recently issued new wage regulations for hotel and restaurant employers. The Hospitality Wage Order, 12 N.Y.C.R.R. Part 146, became effective on January 1, 2011 and the Department of Labor began to enforce the regulations March 1, 2011. Substantial changes in the law are set forth below:

▪ **Tip Credits for Employers:** If a restaurant or hotel employee is eligible to receive tips, his/her employer may take a credit toward the employee's basic minimum hourly rate. For restaurant workers, their basic minimum hourly rate is now \$5.00, so an employer may take a maximum \$2.25 tip credit. For service employees, the basic minimum hourly wage is now \$5.65, so an employer may take a maximum \$1.60 tip credit. Employers must remember that employees must make \$7.25 per hour by a combination of tips and pay from the employer. Further, employers must notify their employees if planning to take a tip credit.

▪ **Records of Tip Sharing or Tip Pooling:** Employees are only eligible to receive shared tips if they perform personal services to patrons. Employer tip sharing or tip pooling policies must keep records of:

- which occupations are eligible to receive tips;
- the shares of tips that each occupation is supposed to receive; and
- the amount in tips that each employee receives directly from patrons and as part of the tip sharing and/or tip pooling program.

▪ **Tips in Credit Card Transactions:** When a patron leaves a tip for an employee on a credit card, a hotel or restaurant employer may deduct the fee charged by the credit card company for the transaction.

▪ **Call-In Pay:** If a hotel or restaurant calls an employee into work who is not scheduled, the employee must be paid his/her customary rate of pay. Additionally, an employer must pay the employee:

- for at least three (3) hours if the employee is expected to work for a single shift;
- for at least six (6) hours if the employee is expected to work a double shift; and
- for at least eight (8) hours if the employee is expected to work a triple shift.

▪ **Split Shifts:** Employees who work split shifts and actually work longer than ten hours must receive one extra hour of pay at the

basic minimum hourly rate. A split shift is defined as nonconsecutive shifts worked by the same employee on the same workday. Split shifts are calculated from the start of the employee's first shift until the end of the employee's last shift that day. Employers must also keep a record of all employees who have worked split shifts exceeding ten hours.

▪ **Uniforms:** If a hotel or restaurant requires its employees to wear uniforms to work, it must either provide each employee with a uniform to wear each day he/she is required to work in a week, or reimburse the employee for the cost of the uniforms in his/her first paycheck. Further, if employees' uniforms require professional laundering, the employer must reimburse each employee a specified amount in their paycheck for such uniform maintenance. If an employee works:

- more than 30 hours per week, he/she must be reimbursed \$9.00 per week;
- between 20 and 30 hours per week, he/she must be reimbursed \$7.10 per week; and
- up to 20 hours per week, he/she must be reimbursed \$4.30 per week.

Note that this provision does not include "wash and wear" uniforms.

▪ **Meal Credits in Restaurants and All-Year Hotels:** If an employee works more than six (6) hours, then an employer's statutory meal obligation applies. An employer must allow employees to bring their own food or must supply employees with a meal at no more than the meal credit of \$2.50. A credit for more than two meals is not permitted for any single employee on any day except that a credit of one meal per shift may be permitted for an employee working on a split shift.

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