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ATTORNEYS AT LAW

JUNE 2011

SUMMER 2011 EMPLOYEE BENEFITS UPDATES

PRACTICE AREAS

- Banking and Financial Services
- Commercial Real Estate and Financing
- Corporate and Securities
- Criminal Defense
- Disability Benefits
- Environmental
- Estates and Trusts
- Family Law
- General Business Representation
- Health Law
- Intellectual Property
- Labor and Employment
- Litigation
- Matrimonial Law
- Oil and Gas Leasing
- Pension and Employee Benefits
- Personal Injury
- Real Property Tax Assessment and Condemnation
- Residential Real Estate
- Taxation
- Zoning, Land Use and Development

CONGRATULATIONS

WE ARE PLEASED TO ANNOUNCE

GARY C. TYLER

RECEIVED AN HONORABLE MENTION IN "INSIDE WORKER'S COMP"

TOP ATTORNEYS OF 2010 "WINNINGEST ATTORNEY" FOR HIS WINS ON COMP APPEALS

Cafeteria Plan Documents May Need To Be Updated by July, 1 2011

If you have a Flexible Spending Account (FSA), Health Reimbursement Account (HRA) or Health Savings Account (HSA) that allows employees to set aside money on a pre-tax basis under Section 125 of the Internal Revenue Code (also known as a "cafeteria plan"), your plan should be reviewed now to be sure that as of January 1, 2011 it does not allow for reimbursement of over-the-counter (OTC) medicines or drugs purchased without a prescription (other than insulin). If a change is required, it must be made by June 30, 2011 (an IRS exception to the general rule against retroactive cafeteria plan amendments). If you purchase your cafeteria plan from a service provider or your payroll provider, you should check with them for the form of any required amendments.

Changes to the Medicare Part D Enrollment Period Impacts Health Plan Notices of Creditable/Non-Creditable Coverage

Group health plans must annually disclose to individuals eligible for Medicare Part D whether the plan's coverage is "creditable" (that is, at least actuarially equivalent to the Part D coverage). Prior to the passage of health care reform legislation last year, the rules required that this notice be provided prior to the start of the annual Part D enrollment period of November 15 to December 31.

Beginning this year, the annual Part D enrollment period has been moved back to run from October 15 through December 7. While most employers and insurers use the model notice issued by the Centers for Medicare & Medicaid Services (CMS), the model notice has not been updated. Until the revised model notice is available, you should at least update the references to the Part D enrollment period and be sure that the notice is provided by October 15th. If you previously provided the notice with your annual enrollment materials, you need to be sure that at least the notice is delivered by October 15th. If your insurer provides the notice on your behalf, you should confirm that they will comply with these requirements.

(On a related note, Part D coverage has been expanded to provide coverage in the "donut hole" and, while further guidance is necessary, it appears that the determination of creditable coverage for the 2012 calendar year will be made against the expanded Part D coverage.)

Article written by Thomas A. Conlon, Esq. For more information, contact Mr. Conlon at (607) 231-6744 or via email at taconlon@hbk.com, Miriam R. Schindel, Esq. at (914) 694-4102 or via email at mschindel@hbk.com or your HH&K attorney if you have questions about these or other employee benefits topics.

THIS ISSUE FEATURES

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REMINDER!!

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SATURDAY, JUNE 25TH 2011

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In our March 2011 newsletter, we reviewed the procedures attendant to one of the two types of adoption available in New York: agency adoption, wherein 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 focus of this article is the second type of adoption: private-placement adoption (“private adoption”). Private adoptions are where the child was not placed by an authorized agency and the agreement and consent is between the birth parents and the adoptive parents.

In New York, Family Court and Surrogate’s Court both have jurisdiction to hear adoption cases. However, in some counties, only one of the courts—either the Family Court or only the Surrogate’s Court—will hear adoption petitions. The county of residence of the petitioning adoptive family is the customary venue for adoption court proceedings. There are many steps in the adoption process, and many of these steps can take several months. If you are considering a private adoption, the following is a summary of the steps you can expect to encounter:

Pre-Adoption Certification

Prior to taking custody of a child for the purpose a private adoption in New York, each prospective adoptive parent must be pre-certified as a qualified adoptive parent. This is accomplished by submitting a petition for certification either to the Surrogate’s Court or the Family Court. The petition must include information such as the applicants’ name and residence; telephone numbers; a statement indicating whether the petitioners have been involved in any abuse or neglect situations; the marital and family status of the petitioners; their physical and mental health; disclosure regarding all property owned by them; their income; and a statement that a pre-placement investigation will be undertaken by a disinterested party, or that it is included. Generally, any licensed M.S.W (Master of Social Work) or Certified Social Worker with State licensure is considered a qualified disinterested party. Some Courts, however, will provide a list of qualified disinterested parties who may not hold either of those degrees. The Court also has the authority to request the appointment of a disinterested party to conduct the investigation if the petitioners do not wish to hire one themselves. The petitioners pay the cost for the disinterested party to do a pre-adoption homestudy.

Prospective adoptive parents must be certified as qualified adoptive parents prior to

the submission of a petition for adoption and prior to any transfer to them of physical custody of an adoptive child. There are limited circumstances under which the certification process may be waived upon the Court’s own motion or upon application of a party for good cause shown. Pre-adoption certification is not required when the adoption petition is brought by a step-parent where the step-child has resided with the biological parent and step-parent for a continuous period of at least one year.

Depending upon the county in which the petition is filed, the Court may request the petitioners and their attorney to appear in court prior to the granting of a pre-adoption certification. In many jurisdictions, however, no court appearance is required and the process is carried out on paper.

Consents to Adopt

Generally speaking, written consent is required from the child’s two biological parents. When the child is over 14 years old, the child’s consent is also required. Under certain circumstances, however, a biological parent’s consent may not be required (e.g. where the parent has had no contact with the child for six months or where the parent has surrendered the child to an agency). If written consent is required, the biological parent has the option of signing either a judicial or extrajudicial written consent to a child’s adoption. A judicial consent to adoption is a parental consent that is executed or acknowledged before a Family Court Judge or Surrogate. The judicial consent form signed by the biological parent before the Court states that the consent is irrevocable upon its signing. An extrajudicial consent is one that is signed out of court (usually at the office of an attorney) and becomes irrevocable after the passage of 45 days from the date it is signed.

If the Court receives timely notice of revocation, the Court will notify the adoptive parents and their attorney of the biological parent’s wish to revoke consent. If the adoptive parents

wish to oppose the biological parent’s revocation, they must notify the Court or the adoption proceeding will be dismissed. If the adoptive parents oppose the revocation, a hearing will be held to determine whether the revocation should be given effect and what determination should be made as to the child’s custody.

Filing of Adoption Petition

After the child is born, pre-adoption certification has been granted or waived, and the appropriate consents are signed, the petitioning adoptive family takes physical custody of the child. The adoptive family must then file either a petition for temporary guardianship or a petition for adoption. The petition must be filed within ten days of taking physical custody if pre-adoption certification has been granted, or within five days if a waiver was previously granted.

The adoption petition provides background information about the petitioning adoptive family and members of their household, the adoptive child, and the biological parents, if that information is known. In addition to the adoption petition, there are numerous other forms that must be submitted to the Court along with the adoption petition, including, for example: forms concerning the health and medical history of the child; an Agreement of Adoption (which provides that the proposed adoptive parents will treat the child in all respects as their own lawful child as if they were his or her biological parents); three letters of

(Continued on page 3)



Photographer: Chabruken

ADOPTION IN NEW YORK STATE: (CONTINUED)

(Continued from page 2)

reference; certified copies of any divorce decrees and separation agreements of the proposed adoptive parents, as well as their marriage certificate (if applicable); and an affidavit describing all fees and compensation paid by the adoptive parents on account of or incidental to the birth or care of the adoptive child, the pregnancy or care of the biological mother, or to assist in arranging for the child's placement or adoption.

Order of Investigation and Order of Adoption

If the adoptive child is under the age of 18, the Court may not make an order of adoption until six months after the adoption petition is filed. However, the Court may shorten the six-month waiting period on a showing of good cause.

Once all the papers are in order, the waiting period has expired, and it appears as though the adoption may be in the child's best interest, the Court will issue an Order of Investigation. The investigation is made by a disinterested person designated by the Court (unlike the pre-adoption certification process, the adoptive parents do not have the option of submitting their own investigation report) to verify the statements made in the adoption petition and other documentation submitted to the Court. Once the investigation is complete, a written report of the investigation is submitted to the Court within 30 days.

Prior to granting the Order of Adoption, the Court usually will hold a final hearing to review any factors it considers relevant to the best interests of the child. During the hearing, the Court will speak to the adoptive parents, review the paperwork and the central register check of abuse and neglect. If the investigation raised any questions about the adoptive parents' fitness to retain custody of the child, the Court will require the adoptive parents to demonstrate why the child should not be removed from their home. Finally, if the Court is satisfied that the best interests of the child will be promoted by the adoption, the Court will grant the Order of Adoption. After the Order



Photographer: James Porter

of Adoption is signed, the adoptive child will be treated in all respects as the child of the adoptive parents.

Confidentiality of Adoption Proceedings

After the Order of Adoption is issued by the Court, all documents filed with the Court are then sealed under court order and cannot be inspected by any other party. Generally speaking, the adopted child does not have access to information concerning the biological parents. Only under limited circumstances, including where there is an "immediate medical need," may the adopted child gain access to limited, non-identifying information regarding the biological parents.

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1099 REPEAL BILL

On April 15, President Obama signed into law the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011. This Act repeals the controversial expanded information reporting requirements that were part of the Patient Protection and Affordable Care Act (PPACA).

Effective, December 31, 2011, the PPACA would have required businesses—including small businesses—to file a Form 1099 whenever they made annual payments of \$600 or more to a single provider of goods or services. The Act repeals this requirement.

The Act also contains some technical provisions concerning the Health Benefit Exchanges (HBEs) established under PPACA. HBEs are expected to be operational by January 1, 2014 and are intended to provide "one-stop shopping" for individuals and businesses. The HBEs are expected to allow everyone to find and compare affordable, quality health insurance options. The Act increases the amount of overpayment subject to repayment of premium assistance tax credits for health insurance coverage purchased through the HBEs established under PPACA.

The IRS has estimated that approximately 40 million taxpayers, including self-employed individuals, small businesses and charitable organizations, are affected by the passage of the Act.

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Photographer: Gregor Schuster

WAIT, WASN'T THAT MY IDEA?: COPYRIGHT INFRINGEMENT AND SUBSTANTIAL SIMILARITY

Enforcement of copyright rights is a sensitive subject. Copyright infringement is the act of violating a copyright holder's exclusive rights granted by the federal Copyright Act, and is nothing short of theft. The Supreme Court recognizes copying as "that which comes so near the original as to give every person seeing it the idea created by the original." The severity of the subject is indicated by the fact that an infringer could be fined from \$200 (unintentional infringement) to \$150,000 (willful infringement) per act of infringement, or even by a jail sentence.

Infringement is dependent on three components: the holder must have an active or enforceable copyright; the alleged violator must have access to the copyrighted material; and the duplication must be "substantially similar" to the copyrighted material. Copyright infringement relies heavily on these three prerequisites, with the absence of only one stultifying the infringement process.

Not surprisingly, whether or not these elements exist in any particular case is subject to extensive debate. It ultimately falls to the courts to define and determine what is indeed infringement. With this thought in mind, what exactly does the court deem copyright infringement, and what exactly constitutes substantial similarity? The answers to these questions vary vastly from court to court.

The federal Copyright Act establishes the grounds for copyright protection. As the initial creator of a work, you are granted the privilege of the first owner. For a copyright to be valid you must reduce your work to a tangible medium like paper, CD, or a DVD. In the United States, copyright attaches automatically upon conception of a work and registration is not necessary, although you should register your work in the U.S. Copyright Office if you wish to sue an infringer.

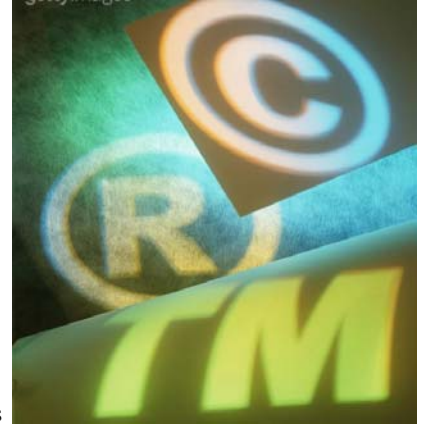
You can usually prove presence of the information or "access" easily. Presence of the information requires that the copyright infringer of your copyrighted material had access to the material before he copied it. Courts typically will revert to a question of public access to prove presence of the information. For instance, was your copyrighted material displayed on YouTube or at a film festival, or was it stowed away in your basement? A court ruled in *O'Keefe v. Ogilvy & Mather Worldwide, Inc.* that although the copyrighted work, the tagline "My card. My work," was posted on the Internet, the copyright holder failed to prove the defendant had reasonable opportunity to view the work. Therefore, the infringement claim was dismissed. From this you can see that an opportunity to view the work is not always the same as open display.



Photographer: Oliver Cleve

Substantial similarity is the standard used to determine the level of similarity between two materials. The first rule of substantial similarity is there are no rules. There is no quantitative method to decide whether a duplicate is substantially similar to your copyrighted material. This is arguably the grayest area of the criteria for infringement, and the topic on which most courts vary. Substantial similarity is relied on because you may find direct evidence of copying difficult or impossible to prove. Courts use the judgments of the ordinary lay observer to determine similarities.

There are two categories of substantial similarity: comprehensive and fragmented. Comprehensive similarities are non-literal and often implied, where fragmented similarities are literal, but minor segments. This is the traditional method of approaching an infringement claim. Has the duplicate taken so much of the copyrighted material in either of these categories to have wrongly appropriated something that belongs to the owner?



Photographer: Geoff Brightling

Different courts have since adopted their own methods for determining similarities. The Ninth Circuit created a test named the Total-Concept-and-Feel Test. This test relies on a subjective view to determine whether the "concept and feel" of one work is similar to another. The Second Circuit Court of Appeals uses a test named the Abstraction-Filtration-Comparison Test. This test compares the elements of a work at increasing levels of abstraction, excluding the elements of that work that are not copyrightable. As you can surely predict, different methods will inevitably lead to a spectrum of infringement results.

Movies themselves are copyrightable works, of course, with copyrighted material in them requiring approval from the copyright holder. A problem of substantial similarity arose in the production of the film "Batman Forever." It would make sense that a popular song requires permission before you use it in your video. In the "Batman" case, however, the court was faced with the issue of visual elements. The opening scene sets the scenery, sweeping from street level up to the peak of a downtown building, where a hostage victim stands in peril. In these few seconds a glimpse of copyrighted artwork, primarily the tops of wrought iron sculptures, are captured. Does this scene violate the sculptor's copyright? In the decision *Leicester v. Warner Bros.*, the court ruled that, since the sculpture was part of the architectural work of the building, it was exempt from copyright infringement. The court basically decided that, in this case, a private sculpture was somehow equivalent to public property.

On the other hand, a 1991 decision, *Grand Upright Music, Ltd v. Warner Bros. Records Inc.*, heard by the United States District Court for the Southern District of New York, changed the face of the music industry in a more conservative direction. The court ruled that any sampling of music must be preapproved by the original copyright owner. Sampling was held to be a direct infringement of a holder's copyright. The court stated "it is clear that the defendants knew that they were violating the plaintiff's rights as well as the rights of others."

By now you are probably thinking: Is there any way to avoid copyright infringement? Although the guidelines for

COPYRIGHT INFRINGEMENT (CONTINUED)

(Continued from page 4)

infringement are vague, you can take precautions to avoid an infringement confrontation. The first and probably the most important guideline is: do not copy any material from the Internet or anywhere else for that matter. By default, all of this material is already copyrighted; copying would constitute clear-cut copyright infringement. This holds true for derivative works, too. If your video is derived from a copyrighted work, you will not be able to use it without written permission from the copyright holder. So no, you cannot change “just a little bit” of the original work.

Secondly, be aware of the scope of copyright. Copyright pertains to drawings, paintings, music, still photographs, film, video, literary works, and choreographic works. It does not pertain to names and ideas. Crossing this boundary might lead you into the domain of trademarks or patents.

Thirdly, and lastly, stay innovative. Being original and creative will help ensure that you are not violating any copyright laws.

You should make note though that, as always, there are some loopholes. If the source you are copying was created before 1922, you are safe from allegations of infringement. Also in the list of exceptions is music or sound effects that are royalty-free. Exceptions to copying have additionally been granted under the fair use doctrine. Fair use permits limited copying solely for the purposes of reporting, criticism, commentary, and teaching. Lastly, and probably the most straightforward approach is for you to ask the copyright holder for written permission to use his or her work.

As you have probably concluded, copyright infringement is sometimes hard to pin down. If not obvious, it is certainly a demon to be avoided. By abiding with a few guidelines, you can help ensure an unobstructed life in the realm of copyrights.

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MIND THE GAP: UTILIZING INCOTERMS TO FILL THE VOID LEFT BY THE UNIFORM COMMERCIAL CODE

From the time it was initially adopted by individual states, the Uniform Commercial Code (UCC) has ensured contract uniformity from state to state. This uniformity has been crucial in the area of sales, more specifically with respect to the shipping terms contained in sales contracts. In 2004, the UCC underwent a major revision which eliminated Sections 2-319 through 2-324. This removed the “Free On Board” or “F.O.B.” language from the UCC. While no individual states have adopted the 2004 changes, these changes threaten to create a significant problem for logistics clients in ensuring that their contracts have uniform meaning wherever their customers are located. This problem can be circumvented by using Incoterms 2010.

Many logistics clients that ship internationally are already familiar with Incoterms 2000. The International Chamber of Commerce first published Incoterms—or International Commercial Terms—in 1936, as an attempt to create uniformity in international trade. The terms themselves may be incorporated into contracts to delineate the risk of loss or damage to goods. Unlike the UCC, Incoterms do not address the transfer of title. Incoterms 2010 became effective January 1, 2011 replacing the 13 shipping terms with 11. The terms are grouped based on the mode of transportation that is used. The first group applies to all modes of transportation, while the last group applies only to ocean shipping. Note that ocean shipping terms can only be used for ocean transport and not air or land. The following is brief description of each term:

All Modes

EXW (Ex Works): Delivery takes place once the good are made available to the buyer at the named place. The seller must help the buyer with all documents and security information in a timely manner. However, the risk of loading is on the buyer, not the seller.

FCA (Free Carrier): Delivery takes place at the seller’s premises once the goods are loaded onto the first carrier. With FCA and EXW, it is should be noted that the seller or exporter is the one responsible for export formalities. This is significant, as it requires a foreign company to negotiate foreign customs requirements.

CPT (Carriage Paid To): Delivery occurs once the good are loaded onto the first carrier. The seller pays freight to a named the named place.

DAT (Delivery at Terminal): Delivery occurs once the goods have been unloaded at the terminal. The seller pays for carriage to the destination terminal and is responsible for unloading the goods. The buyer is responsible for import clearance.

DAP (Delivered at Place): Delivery takes place at a named destination and the seller pays all transportation costs. The buyer is responsible for unloading and import clearance.

DDP (Delivery Duty Paid): The seller bears all risk up to the buyer’s door. By default, the seller is responsible for the Value Added Tax (VAT).

CIP (Carriage and Insurance Paid To): This is the same as CPT, except the seller is responsible for obtaining and paying for insurance.

Ocean Shipping

FAS (Free Alongside Ship): Delivery takes place once the goods are positioned alongside the ship. This term should be used for uncontainerized cargo. The buyer is responsible for loading the goods.

FOB (Free on Board): Delivery takes place once the goods are actually on board the ship. The seller is responsible for handling onto the ship.

CFR (Cost and Freight): Delivery occurs once the goods are on board the ship. However the seller pays for freight to the destination port.

CIF (Cost, Freight and Insurance): This is the same as CFR, except the seller is responsible for obtaining and paying for insurance.

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HH&K SPOTLIGHT: THE WHITE PLAINS OFFICE

Over the coming months, we intend to feature certain HH&K offices, practice areas and/or attorneys. We begin with our White Plains, New York office. Since 2000, HH&K has maintained an office in White Plains at 106 Corporate Park Drive. This ever-expanding office includes four experienced attorneys who offer our clients a broad base of legal experience, with a special focus on banking, corporate, securities, executive compensation, benefits, employment and real estate law.

We are pleased to introduce you to our White Plains attorneys with the following profiles:



CLIFFORD S. WEBER

A partner at HH&K since 2000, Mr Weber has represented financial service providers for more than 20 years. His practice includes corporate, securities, transactional, advisory, and regulatory work, with a strong focus on community banks. He has handled holding company formations, mergers, asset and business purchases, branch acquisitions, trust preferred securities issuances, charter conversions, mutual to stock conversions, public and private securities offerings, new bank charters, enforcement proceedings and compliance matters.

A graduate of Brooklyn Law School, Mr. Weber served as General Counsel to CBANYS, a trade association representing New York banks and thrifts and is a past Chairman of the New York State Bar Association Banking Committee. He has spoken at banking and financial services industry programs, and has written on a wide range of industry topics.



JACQUELINE J. WARNER

Ms. Warner is a seasoned attorney with over 19 years of practical experience with corporate, securities, real estate, and estate administration matters. Ms. Warner regularly advises clients on starting and growing their business, raising capital via private offerings and negotiates a wide array of contracts. She is the author of a book entitled *The Mini Legal Toolbox™ for Entrepreneurs and Small Business Owners* and a soon to be released second book in *The Mini Legal Toolbox™* series entitled *Raising Capital for Your Business: Understanding Private Offerings*.

A graduate of Howard University School of Law where she was a member of The Howard Law Journal. Ms. Warner has appeared on TV and radio talk shows discussing a variety of legal topics, frequently speaks on various legal topics and has written numerous articles for various business-related publications. Since 2007, Ms. Warner has been an Instructor for CEO Space International, Inc., a recognized organization which assists business owners and entrepreneurs reach their full potential.

Ms. Warner is also active in various bar associations, serves as a board member for several not-for-profit organizations, mentors youth and is actively involved in an adult literacy program that she formally chaired. She was recently honored by the African-American Chamber of Commerce of Westchester & Rockland Counties, Inc. as one of Ten Influential Blacks.



MIRIAM R. SCHINDEL

Ms. Schindel practices in the area of executive compensation, employee benefits and employment law representing multinational and domestic companies, CEOs, senior executives and boards of directors of publicly and privately held companies. Prior to joining HH&K, Ms. Schindel was Deputy General Counsel of Unilever; and Associate General Counsel and Asst. Corporate Secretary of Sears, Roebuck & Co., having commenced her law career as an associate with the international firms of Proskauer Rose and Kaye Scholer. Ms. Schindel speaks on various compensation topics before professional and international groups, including The Conference Board, the International Foundation of Employee Benefits Plans, the International Research Institute, the New York State Bar Association, the New York Bankers Association, and she conducts seminars for human resources professionals through the National Business Institute.

A graduate of Hunter College, Ms. Schindel received a J.D. from Fordham University of Law in 1981. She serves on several boards, is active in pro-bono and civic affairs, and was recently elected to a trustee position on the Pound Ridge District Library. During her doctoral studies in Linguistics, Ms. Schindel was co-editor of *Language and Cognition* (Plenum Press, 1984).



RALPH K. KESSLER

Mr. Kessler has practiced for 40 years in the area of general corporate law, SEC regulation, corporate transactions, U.S. government contracts with a strong concentration in international business for U.S. and European clients. Mr. Kessler graduated from St. John's College and St. John's Law School where he was a Thomas Moore Scholar and a member of the Law Review. He obtained an L.L.M. degree in Corporate Law from New York University Law School and served as a trial attorney with the U.S. Securities and Exchange Commission for a number of years before entering private practice with an international law firm based in New York. He served as a senior legal officer for two international corporations and was responsible for many corporate transaction in Europe, Latin America and Canada.

Mr. Kessler has participated in many seminars for business and academic audiences and is an Adjunct Professor of Corporate and International Law at Iona College Hagan School of Business.

NEW DEVELOPMENT TOOL ON ITS WAY TO PASSAGE IN NEW YORK?

There are some who view New York State as a land of high taxes, pervasive legislative dysfunction, and meager development incentives. It is also home to every shape and size of local government—including a vast multitude of counties, cities, towns, and villages, and innumerable legislative creations such as public authorities and public benefit corporations. But despite this profusion of governing units, while the power to tax and spend is spread around by the truckload, the power to invest in new jobs and tax base is dispensed and cultivated in tiny thimblefuls.

Those who have not fled for more business-friendly climes must be ever vigilant for job-promoting, development-stimulating initiatives that actually make it into law in New York. Such legislation is rare, but one such bill has been steadily wending its way through the legislative gauntlet this year and may actually make it into law by the end of session. The bill (A.5296 /S.2446), sometimes known as the Schimminger-Young legislation, would give New York what nearly every other state already has: a properly functioning “tax increment financing” (TIF) law.

This is exciting news because it would give New York municipalities the ability for the first time to effectively do what a 1983 constitutional amendment and a 1984 law intended to allow: issuance of TIF bonds to raise capital to promote economic development through public works investments in blighted areas. The new law would correct a key deficiency in the earlier law by allowing (but not requiring) school districts to participate in the TIF plan, which is currently open only to municipalities. It would also make several other beneficial changes.

The concept of TIF is simple but powerful. Municipalities are empowered to issue TIF bonds (or notes) for certain allowed public purposes to stimulate private sector economic development in blighted and underutilized areas. Instead of using new taxes to repay the bonds, the bonds are repaid by the increased revenues generated by the new development and tax base enabled by TIF financing. Since school districts account for the lion’s share of property taxes in most areas of the state, allowing these districts to participate (and to pledge their incremental tax revenues) greatly increases the security and attractiveness of TIF bonds to investors. If the expected revenue growth fails to occur, the loss is borne by the investor and/or the developer—not the municipality or its taxpayers. In other words, TIF bonds are “revenue bonds” backed by an earmarked revenue stream, and not “general obligation bonds” backed by the municipality’s “full

faith and credit.” They don’t count against the municipality’s constitutional debt limit. That’s a good thing for Upstate municipalities like Rochester that are rapidly approaching that limit.

TIF funding can be used to facilitate commercial and industrial development or to promote low-and moderate-income housing—but only when such redevelopment cannot be accomplished by private enterprise alone. Allowed “objects and purposes” of TIF include the following:

Acquisition of land and site preparation and, most likely, cleanup of contaminated sites or “brownfields”

Installation, construction or reconstruction of public utilities (including streets, walkways, parking facilities, and water and sewer systems), parks and playgrounds

Other public improvements or services integral to the redevelopment plan

As of 2004-05, TIF was the economic development tool most widely used by U.S. municipalities of 10,000 or more and counties of 50,000 or more, second only to general fund revenues. Between 2005 and 2010, seven states generated more than \$500 million apiece in revenues from TIF bonds: California (\$12.7 billion); Colorado (\$846 million); Missouri (\$722 million); Pennsylvania (\$637 million); Minnesota (\$558 million); Georgia (\$554 million); and Connecticut (\$544 million). Ten additional states generated more than \$100 million apiece. TIF bond sales nationwide have grown from about \$1.7 billion a year in 1990-95 to \$3.3 billion a year in 2005-2010. New York is missing out on a lot of economic activity.

If a functioning TIF law is enacted in New York this year, it will not come a moment too soon. New York municipalities need all the help they can get to build their economies, broaden their tax bases, and keep residential and business taxpayers from abandoning ship. And private developers and entrepreneurs need municipalities to give them a boost instead of holding them back. TIF may not be the whole answer, but it is a big part of the solution.

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**DICK'S SPORTING
GOODS OPEN 2011**

JUNE 25TH 2011

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