Delaware Banker

Summer 2017
Vol. 13 No. 3

After the Client Has Passed

Post-Mortem Tax Planning

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View from the Chair

by
P. Randolph Taylor
EVP & Director of Private Banking
Fulton Bank

Chair
Delaware Bankers Association

"There are some welcome regulatory changes coming, and thankfully at a good clip."

Change: the word excites some while filling others with dread. Back in 1829 railroads were just beginning to link one city with another. Martin Van Buren, who was Governor of New York at the time, wrote to President Andrew Jackson on his opinion of the burgeoning mode of transportation. Van Buren observed: "Railroad carriages are pulled at the enormous speed of 15 miles per hour by engines which, in addition to endangering life and limb of passengers, roar and snort their way through the countryside, setting fire to crops, scaring the livestock and frightening women and children. The Almighty certainly never intended that people should travel at such breakneck speed."

As you read this, no doubt sitting on horseback, traveling at the sane speed of two miles an hour, you'll agree with Van Buren about the pace of change. There are some welcome regulatory changes coming, however, and thankfully at a good clip. According to Rob Nichols, American Bankers Association President & CEO, speaking at the 2017 Summer Leadership meeting, significant change is coming soon.

Long needed changes to Dodd-Frank are in the pipeline, though those coming through the legislative process are moving slower than we'd hope. The latest estimate is that institutions will start seeing relief by the 4th quarter of this year. Fortunately, Nichols reports, fifty to seventy percent of the fixes need in Dodd-Frank can be achieved via new appointments. These include new leaders for the OCC, FDIC, Federal Reserve, and the CFPB. At the OCC, former OneWest CEO John Otting has been nominated to head that agency. The FDIC is scheduled for a new chair in November, while the current Fed chair is due for replacement in February of 2018. The CFPB chair is open next July. President Trump has already nominated Randal Quarles as the Fed's vice chairman for supervision, a key role for shaping the regulation of financial institutions. In addition, there are another two Federal Reserve governor positions open with great potential for positive regulatory relief.

In addition, the Leadership meeting also featured a summary of key recommendations from the Treasury Secretary to the President. These included such items as: Raising the threshold in Dodd-Frank for enhanced prudential standards to tailor it better to the complexity of bank holding companies; Creating a 'regulatory off-ramp' for well-capitalized banks (such as 10% non-risk-weighted leverage ratio) from all capital and liquidity requirements, nearly all enhanced prudential standards, and the Volcker Rule; not allowing the CFPB to engage in regulation by enforcement, bringing enforcement cases only for violations of law and/or existing regulations; and, delaying the implementation of expanded HMDA data gathering until banks are better positioned to implement. The full listing of items can be found at www.aba.com/Advocacy/Documents/treasury-summary-regional-banks.pdf.

Hopefully, with these industry-friendly recommendations, along with new regulatory appointments we will start seeing some welcome changes. Even Martin Van Buren would be proud.

Randy

Pictured: Rachel A. Dwares, David S. Conway, Arthur "Chip" Connolly

Creativity and Savvy

The path from handshake to closing can be a waltz or a marathon. Negotiations can be collaborative or tense. Undertakings must be secured. The ownership structure must be designed beyond the honeymoon, with long-term tax efficiency. Delaware's commercial laws can provide opportunities, or impose severe liabilities.

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President's Report

by
Sarah A. Long
President, CEO & Treasurer
Delaware Bankers Association

"As a member of Delaware's banking industry you have a lot of which to be proud."

Growing with the First State!

This year's Annual Dinner theme, "Growing with the First State!" seems particularly relevant. Delaware's banks are indeed growing with the First State. In Delaware we are blessed with unique advantages that make this possible. Responsive representatives, both in Congress and in the State; a business-friendly environment; pro-growth banking and trust laws; and, of course Delaware's own Chancery Court.

But you already know that.

What might surprise you is what that growth looks like. The financial services sector has been a key driver of Delaware's economy since 1981, when the State passed the Financial Center Development Act — landmark legislation that paved the way for new investment. In 1982, there were 4,500 bank employees in the State. Today, that number has risen to almost 38,000. In 1982, Delaware's banks paid a little over $2 million in franchise taxes. Bank franchise taxes paid to the State now eclipse $92 million.

As Delaware's banks grow, they are diligent to share the fruits of that growth with the community. Hundreds of organizations throughout the State are generously supported by Delaware's banks both through grants as well as volunteer hours. A shining example is Teach Children to Save – this year over 8,200 third and fourth graders were taught a financial lesson by 185 banker volunteers, which encompassed 75 public, private and parochial schools from all over the State.

We all know that there is much more that we can do to support financial education in our State.

The Delaware Financial Education Alliance is involved in many financial literacy initiatives that benefit all segments of Delaware's population, especially persons of low and moderate income. These programs focus on specific knowledge and concepts that individuals need to manage their finances and increase their economic security. This year, we will launch a dedicated website to showcase all Alliance activities, which will have dedicated space specific to a full range of financial literacy topics and audiences. On the website, community groups, senior centers, and other organizations will be able to find lessons on a variety of topics such as Financial Exploitation Prevention; Fraud Prevention; and, Personal Finance for Individuals in Transition.

As a member of Delaware's banking industry you have a lot of which to be proud. As the preeminent State for financial services, we shape the future of the industry and ensure that it remains safe and viable for all. United in purpose, we can secure for our industry the best that can be. There is nothing out of the realm of possibilities for what we can accomplish together.

Here's to another year of growing together with the First State!

Sarah

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All Around the Hall

by
Thomas P. Collins
Executive Vice President
Government Affairs
Delaware Bankers Association

"Of principle concern to the DBA this session was HB 54 that attempted to reform payday and title lending."

The DBA fared well this session pursuing our agenda and protecting the interests of the banking and trust industry in Delaware from ill-conceived legislative notions. It was a good year.

For the first time since the 1970's, the General Assembly did not pass a budget before June 30th, the end of the legislative year. Trying to close a $350 + million deficit, there were proposals to raise the personal income tax and to eliminate all itemized deductions (including charitable and mortgage interest deductions) and grants-in-aid provided to the state's non-profits.

During the "extraordinary session", it was agreed that additional revenue will come from higher alcohol and tobacco taxes and increases in the real estate transfer tax and the corporate franchise tax. Spending cuts will come from education flexible spending, the senior citizen property tax credit, pension adjustments and the state's share of state employee healthcare costs and trimming grants-in-aid. Fortunately and quite interestingly, changes to the bank franchise tax were not considered as it is the opinion of the Administration that such changes typically result in the banks paying less.

Specific Bills Supported or Monitored:

Pay Day Lending - Of principle concern to the DBA this session was HB 54 that attempted to reform payday and title lending. While not directly impacting banks, the fact that Delaware legislators would consider an interest rate cap challenges the state's progressive banking reputation. The elimination of interest rate caps was the cornerstone of the Financial Center Development Act in 1981 which launched Delaware's banking industry. In several meetings with stakeholders, the DBA vigorously opposed a cap and further expressed concern that the unintended consequences, supported by research into similar reform efforts in other states, would result in the unavailability of credit to payday borrowers. A substitute bill addressing our objections was circulated but never filed and the current bill remains in committee. I am confident that we will see further action on this bill come January.

Trust Bills - The annual trust bill, HB 169, a comprehensive updating of Delaware's trust laws and HB 154 which altered treatment of claims against the decedent's estate at the time of death, initially passed through the House and the Senate Banking committee without issues earlier in the session. However, it took the combined effort of the DBA and the State Bar Association on the last day of the session, July 1, to finalize passage.

Estate Tax - DBA supported HB 16 repealing the estate tax effective January 1, 2018.

Abandoned Property - DBA supported Senate Substitute 1 for SB 79 which made further refinements to the abandoned property laws ensuring sufficient time for due diligence, clarifying certain state indemnification obligations and altering the State Escheator's authority to grant interest waivers.

Security Breaches - HB 180, as substituted and amended, addresses data security breaches, broadly defines personal information, imposes obligations to safeguard data involving personal information and sets forth obligations for reporting security breaches. The DBA ensured that the bill provided a carve-out for those already in compliance with requirements of its primary state or federal regulator.

Sheriff Sales - HB 187 provides that counties or municipalities may require bidder certifications in order to participate in a sheriff's sale to ensure, among other things, that the bidder has not failed to maintain other properties.

Municipal Liens - HB 188 empowers political subdivisions to assess and collect liens to recoup the costs of enforcing various public codes, including maintenance of vacant properties, housing, sanitation, etc. and such costs may be collected through local taxes.

The following bills of interest to the DBA membership were actively lobbied or monitored:

Public/Private Partnerships - HB 226 authorizes the creation of a public/private partnership in Delaware to focus on attracting investment, entrepreneurship and innovation, talent development and retention, and research and analysis. It eliminates the Delaware Economic Development Office because the public/private partnership will be conducting business development functions formerly performed by DEDO. The bill transfers duties related to administration and the financial analysis of proposed economic development projects to the Department of State.

Coastal Zone Act - HB 190 amends the Coastal Zone Act and establishes a procedure to allow for the responsible, productive reuse of 14 existing sites of heavy industrial use within the coastal zone.

Marijuana Control Act - HB 110 establishes the Marijuana Control Act, which seeks to regulate marijuana, legalizing its recreational use. The DBA remains neutral on the bill. For the last year, the DBA has participated in a group of state bankers associations monitoring the legal developments regarding marijuana, the challenges facing banks to service the legal marijuana - related businesses and advocating for clarification of the conflict between state and federal law on the matter. Delaware HB 110, has received a lot of attention this session and will likely be addressed by the House next session.

PACE Loans - SB 113 authorizes the creation of a Delaware Voluntary Property Assessed Clean Energy (D-PACE) program to establish a clean energy financing program for the installation of energy efficiency technologies and clean energy systems for qualifying commercial real properties statewide. Over the past year, the DBA has worked with the Sustainable Energy Utility to protect the interests of mortgagees to insure their liens are not primed by this program. Further action is expected on this bill next session.

Conclusion: While banking in Delaware successfully survived another legislative season, there is concern for the future. The collaborative process which ensures genuine consideration and open debate in the legislature (the Delaware Way) was less evident generally and was dealt a substantial blow when the House Republicans walked out en masse over the proposed changes to the personal income tax. Such polarization pulls energy from Legislative Hall and adds to the existing risk factors currently facing our state, which include public safety, education, economic development and jobs.

Tom

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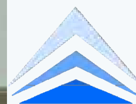

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What's New at the DBA

DBA Annual Meeting

Keynote speaker, James Olson, Professor, George Bush School of Government and Public Service, former CIA Chief of Counterintelligence, and author, at the DBA Annual Meeting.

P. Randolph Taylor, Executive Vice President and Director of Private Banking, Fulton Bank, N.A., was elected the Chair of the Delaware Bankers Association (DBA) on May 18th at the DBA's 122nd Annual Meeting in Wilmington. The DBA also elected and installed Cynthia D.M. Brown, President, Commonwealth Trust Company, to the position of Chair-Elect. Other Members of the DBA Board of Directors are: Elizabeth D. Albano, Chief Financial Officer, Artisans' Bank; Bruce Colbourn, Market Executive, PNC Bank Delaware; Larry Drexler, General Counsel, Head of Legal & Chief Privacy Officer, Barclaycard US; Eric G. Hoerner, Chief Executive Officer, MidCoast Community Bank; Thomas M. Forrest, President & CEO, U.S. Trust Company of Delaware; Lisa P. Kirkwood, SVP, Regional Vice President, TD Bank; Nicholas P. Lambrow, President, Delaware Region, M&T Bank; Donna G. Mitchell, President & CEO, Deutsche Bank Trust Company Delaware; James Roszkowski, President, Discover Bank; William S. Wallace, COO, Chase Consumer & Community Banking; and, Joe Westcott, Market President, Delaware, Capital One.

Keys to Financial Success Scholarships

The DBA announced the winners of the 2017 Keys to Financial Success Scholarship Award: Mike Brown, of Caesar Rodney High School, and Brett Kelly, of Middletown High School. Each winner received a $2,500 scholarship. Keys to Financial Success is a full-semester elective taught in 28 high schools throughout Delaware to over 4,500 students. The course was developed in partnership with the University of Delaware's Center for Economic Education and Entrepreneurship (CEEE), Delaware Bankers Association, Federal Reserve Bank of Philadelphia, and Consumer Credit Counseling Service of Maryland and Delaware. Keys to Financial Success introduces students to the fundamentals of sound money management skills and basic financial planning concepts including Goals and Decision Making, Career Research, Money Management, Consumer Skills, and Risk Protection.

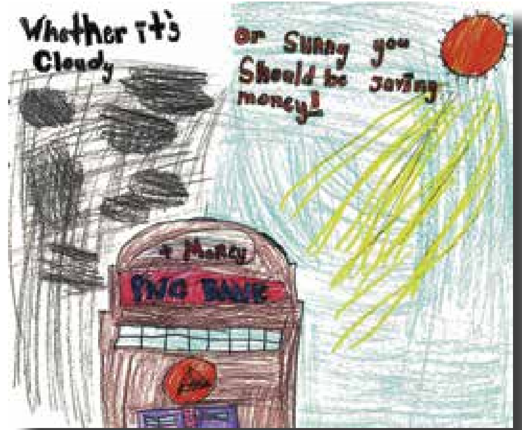
(l. to r.) Patrick Harker, President, Federal Reserve Bank of Philadelphia, Keys to Financial Success Scholarship winners Mike Brown, and Brett Kelly, and P. Randolph Taylor, EVP and Director of Private Banking, Fulton Bank, N.A. and DBA Chair.

2017 Teach Children to Save Day

Over 185 banker volunteers taught an estimated 8,200 students in over 75 public, private, and parochial schools, throughout Delaware as part of the 2017 Teach Children to Save Day effort held April 24 to 28. Several bank presidents and special guests also volunteered as teachers for the event, these include: Joe Westcott, Market President, Delaware, Capital One; Chip Rossi, Delaware Market President, Bank of America; Randy Taylor, Executive Vice President & Director of Private Banking, Fulton Bank; and, Sarah Long, President, Delaware Financial Education Alliance.

This year's Teach Children to Save Day lesson was taken from the new book *The Great Investo and the Million Pennies*. The book teaches the value of saving consistently to build a financially secure future. The book was written and illustrated by Greg Koseluk of the Delaware Bankers Association. The book was created specifically for the 2017 Teach Children to Save Day event and was made possible by a grant from Capital One

Governor John Carney proclaims "Teach Children to Save Week" in a ceremony at North Georgetown Elementary School.



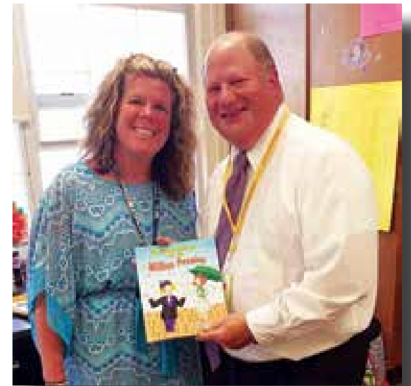
Grace Starrett's Winning Poster: "Whether It's Cloudy or Sunny You Should Be Saving Money!"

Teach Children to Save Day Poster Winner

The DBA announced the winners of the 2017 Teach Children to Save Day Poster Contest. Each year students are invited to participate in a poster to illustrate the importance of saving. The winner of the 2017 Teach Children to Save Day poster contest is Grace Starrett of Brandywine Springs School in Wilmington. Grace's poster - "Whether It's Cloudy or Sunny You Should Be Saving Money" - is shown. Grace received $100 and a copy of *The Great Investo and the Million Pennies*. Brian Murphy, also from Brandywine Springs School, and Sean Kozicki, St. Mary Magdalen School, were the second place winners and received $50 and copies of the book. Congratulations to all the winners and participants!

Another Reason to Love Teach Children to Save Day!

This year also marked the 10th anniversary of Bank of America's David Voell met his future wife, Tara, a teacher at Richardson Park Elementary, through Teach Children to Save Day! Now David not only returns each year to teach at Tara's class, but this year he also volunteered to teach at the classroom of his daughter! Congratulations to all the Voell family!



Tara and David Voell.

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Post-Mortem Tax Planning

A Guide After the Client Has Passed

Part 1 of a 2-Part Series

by
Jordon N. Rosen, CPA, AEP®
Belfint, Lyons & Shuman, P.A.

While estate planners generally focus on helping their clients with their estate plan while the client is still alive, there are many elections and opportunities to consider after the client has passed. These generally fall into the following categories:

- Electing portability
- Decedent's final income tax return elections
- Administrative elections
- Gift tax elections
- Fiduciary tax elections
- Business related elections
- Elections specific to larger estates

Part I of this series will deal with various fiduciary tax elections, administrative elections, gift tax issues and elections that can protect the trustee. These issues will also be the topic of a session at the upcoming Delaware Trust Conference in October.

Electing Portability

In short, the portability election allows a surviving spouse to utilize their last deceased spouse's unused exclusion amount (DSUE), by adding it to their own basic exclusion amount (currently $5,490,000 in 2017). Unlike the basic exclusion amount, any DSUE amount is stagnant and is not adjusted for inflation. An exception to this rule is in the case of a surviving spouse who is not a U.S citizen and is the beneficiary of a qualified domestic trust (QDOT). In this case the initial DSUE calculation is on a preliminary basis and adjusted each time a distribution is made from the QDOT. The surviving spouse is not allowed to offset any portion of the DSUE against lifetime gifts until such time as the DSUE is finally determined, which would be at such time when the trust terminates or the surviving spouse becomes a U.S. citizen. It should also be noted that the portability election is only relevant to the regular estate exclusion amount, and not to any unused GST amount at the decedent's death.

The portability election needs to be made on a complete and properly prepared Form 706 that is timely filed. An estate that is required to file Form 706 cannot elect portability on a late filed return, although Section 9100 relief may be available. Such relief, however, is not available to smaller estates that are only filing Form 706 to elect portability. In several cases, however, the IRS has granted an extension of time to file to elect portability to smaller estates (see PLR 201722021). On June 9, 2017 the IRS issued Rev. Proc. 2017-34, providing a simplified procedure for obtaining an extension of time for estates that otherwise don't have to file Form 706 but are doing so just to elect portability. The Rev. Proc. states that an extension of time will be automatically granted if the return is filed before the later of January 2, 2018 or on the second anniversary of the decedent's death. This allows smaller estates that have not yet filed (going back to 2011) to timely file and make the portability election. If the estate has an open request for a private letter ruling on file with the IRS as of June 9, 2017, the IRS will close the case, refund any fees paid in with the request and require the executor to file the return in accordance with the new revenue procedure. If a return has been filed under this revenue procedure and later found that it was otherwise required to file an estate return, the extension will be nullified.

Does electing portability make sense and how does it compare to using a credit shelter trust or qualified terminable interest property (QTIP) trust? In the case of smaller estates, the better choice may be to elect portability, although there may be other overriding concerns such as family dynamics and creditor protection that dictate otherwise. Below are some of the considerations:

- Advantages of electing portability
  - o Gets a second basis step-up at the surviving spouse's death
  - o Saves federal and state capital gains tax savings
  - o Lowers administrative expenses
  - o Allows for spousal rollover of IRA/retirement plan assets
  - o Saves income and net investment surtax due to larger individual tax brackets
- Advantages of a credit shelter trust
  - o Asset protection
  - o Appreciation exempt from surviving spouse's estate
  - o GST protection

The use of a QTIP trust which combines many of the features of both strategies may be a good alternative since the assets in the trust will qualify for the marital deduction, will receive a second basis step-up since they will be included in the surviving spouse's gross estate and will enjoy creditor protection within the trust.

A few last thoughts on making the portability election:

- The election can only be made (or opted-out) by the executor, which may not be in line with the wishes of the surviving spouse (but see the case of Vose, 2017OK3, case No. 115424, decided 1/17/2017). The takeaway from this case is to clearly state in the will if the decedent wishes to require the executor to make the portability election (consider going back on existing wills to address this point as well).
- The executor can opt-out of electing portability on the Form 706.
- If your client does not want to elect portability, get it in writing to avoid problems with future beneficiaries.
- Electing portability keeps the statute of limitations open on the first spouse's estate return until such time as the statute has run on the second spouse's estate return, but only with respect to the DSUE computation.

Decedent's Final Income Tax Return

There are several basic considerations that the executor needs to keep in mind when preparing the decedent's final income tax return –

Filing status election. Generally, filing a joint return results in the lower overall tax liability for a married couple. However, consideration needs to be given in cases where the decedent may have little income, but high medical expenses (which are subject to a 7½ or 10 percent AGI floor) which would otherwise be lost or greatly reduced if filing a joint return with a surviving spouse who had high income.

Medical expense election. Section 213(c) allows the executor to deduct medical expenses on the decedent's final income tax return for the year the expense was incurred if it was paid by the estate within one year of death. The election must be filed in duplicate, which includes a statement of the nature and amount of the medical expenses and that the deduction against the gross estate for those expenses has not been taken and waives the right to claim them at any time for estate tax purpose.

(continued on p. 14)

(continued from p. 13)

Interest on Series E/EE Bonds. Section 454(a) allows the executor to elect to report all previously accrued, but otherwise unreported Series E/EE U.S. bond interest through the date of death on the decedent's final income tax return. This would be advantageous where the decedent died early in the year or otherwise had little income or high deductions. Without the election, such income would be considered income with respect to a decedent (IRD) and taxed to the beneficiary who may be in a much higher tax bracket. Interest accruing after the date of death is not IRD and the beneficiary is not bound by the estate's election.

Election out of installment sales treatment. In the case where there is a sale in the year of death where proceeds are being paid out over time, the executor can elect out the installment sale treatment on the decedent's final income tax return by merely reporting the entire gain in that year. This could save taxes in the case where the decedent is otherwise in a low tax bracket or has other losses to offset the gain.

Administrative Elections

Creating or terminating the fiduciary relationship. Form 56 is used to notify the IRS of the creation or termination of a fiduciary relationship by the executor of trustee (IRC Sections 6903 and 6036). The fiduciary should also separately file Form 2848 (Power of Attorney) with the IRS under separate cover. The filing of Form 56 provides the IRS with the fiduciary's address to avoid notices (especially 90-day notices) being sent to the wrong address. If there is more than one fiduciary, each should file a separate Form 56.

Requesting a prompt assessment of tax. The executor or fiduciary uses Form 4810 to request a prompt assessment of the decedent's income, fiduciary or gift tax liability by filing the form within the 3-year statute of limitations. The form is filed after filing the decedent's final income tax return, or Forms 1041 (Fiduciary Income Tax Return) and 709 (U.S. Gift and GST Tax Return). Once filed, the IRS has 18 months (rather than the usual 3 years) to make an assessment of tax or start court proceedings. Filing Form 4810 is useful where there may be questionable issues on the tax returns and the executor wants to limit the exposure to an audit.

Request to discharge the executor from personal liability. The executor or trustee can limit their exposure to personal liability with regard to the tax on the decedent's final income tax return or with regard to Forms 706 and 709 by filing Form 5495 after filing each respective return. The executor or trustee is discharged from personal liability (but not fiduciary liability) upon the subsequent payment of taxes as notified by the IRS, or, if no such notice is received within 9 months after Form 5495 is filed.

Election to Split Pre-Death Gifts

Regulation Section 25.2513-2(c) allows the executor or administrator of a deceased spouse to consent to gift-splitting with the surviving spouse, but only with respect to pre-death gifts. Furthermore, the spouse may not elect to split gifts with a deceased spouse if he/she remarries before the end of the calendar year.

Fiduciary Tax Elections

Taxable Year of Estate. Generally, an estate's tax year begins on the day following the date of death. For tax reporting purposes, the executor may select either a calendar year or a fiscal year ending on the last day of any month, but not beyond the first anniversary of the date of death. The election to select a fiscal year can be made on a late-filed return and is not bound by the date selected on Form SS-4, the payment of estimated taxes or the filing of an application for extension. The advantages of choosing a fiscal year include (1) the possible deferral of the estate's income tax, (2) allowing a yearend that best matches income and deductions to minimize the estate's liability and (3) possible deferral of the beneficiary's income tax liability since the beneficiary includes K-1 income in the calendar year which includes the last day of the estate's taxable year.

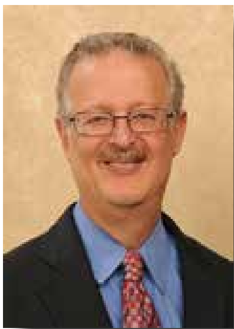
Treating a Revocable Trust as Part of the Estate. Section 645 allows the trustee to treat a qualified revocable trust (basically, a revocable trust owned by the decedent at the time of death) as part of the estate for income tax purposes. Both the executor and the trustee of all qualifying trusts that want to be a part of the estate's income tax filing must sign and file Form 8855 by the due date, including extension, of the estate's first income tax return. If there is otherwise no estate, the trustee can sign in place of the executor. All qualifying revocable trusts must obtain a new EIN after the decedent's

death, even if had a prior EIN assigned. The election is effective as of the date of death and ends on the earlier of the date when all asserts of the electing trust and estate have been distributed and (1) the second anniversary of the decedent's death if no estate return is required and (2) if an estate return is required, the later of 2-years or all taxable years of the estate until 6 months after the final determination of the estate's tax liability. Upon termination, the final distribution to a new trust carries out distributable net income (DNI) and capital gain of the trust as if the estate was in its termination year.

Advantages of making the 645 election include:

- The trust can use the fiscal year of the estate to defer income
- The trust can utilize the estate's charitable income tax deduction or set-aside
- The trust, as part of the estate, can own S corporation stock
- Only one tax return is required to be filed
- The trust can benefit from the estate's $25,000 rental loss allowance for the first 2 years after death (Section 469(h)(4))
- Payment of the decedent's medical expenses made by the trust within 1 year after death can be claimed on the decedent's final income tax return.
- Business related elections
- Elections specific to larger estates

Part II of this series will be published in the Fall issue and will cover business related elections and elections specific to larger estates.



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Make Sure You Bring a Note

The Delaware Supreme Court Creates New Requirements for Foreclosing Mortgage Lenders

by
By Sara T. Toner
and Stephen V. Torok
Richards, Layton Finger, P.A.

The Delaware Supreme Court surprised the mortgage lending community in April with its opinion in *J.M. Shrewsbury v. Bank of New York Mellon*.[1] In Shrewsbury, the Court held that to foreclose on a mortgage the holder of the mortgage must also be the party entitled to enforce the underlying obligation secured by that mortgage. Stated differently, for a mortgage holder to have standing to bring a *scire facias sur* mortgage proceeding in Superior Court, that mortgage holder must show that it has the right to enforce the corresponding promissory note or other secured obligation.

The holding in *Shrewsbury* has given rise to many questions related to the specific requirements for a mortgage lender to bring a statutory foreclosure in Delaware. Yet one takeaway is abundantly clear. Without further clarification, the holding in *Shrewsbury* will impose more transactional and litigation costs on mortgage lenders.

The Foreclosure Proceedings and the Shrewsburys' Challenge

In 2007, the Shrewsburys signed a promissory note in favor of Countrywide Home Loans, Inc. The loan was secured by a mortgage on the borrower's home. The mortgagee was a nominee of Countrywide. In 2010, the Shrewsburys stopped making payments on the mortgage loan.

In 2015, the Bank of New York Mellon, the assignee of the original mortgagee, filed a statutory *scire facias* mortgage foreclosure action against the Shrewsburys in the Superior Court in New Castle County.[2] In the foreclosure proceeding, the Shrewsburys asserted a statutory defense called a "plea in avoidance." Delaware courts have held that a plea in avoidance essentially "admits the allegations of the complaint but asserts [a] matter which destroys the effect of the allegations and defeats the Plaintiffs' rights."[3] Prior to the *Shrewsbury* decision, Delaware law seemed to be clear that enforceable pleas in avoidance were limited to the subject matter of the transaction—the mortgage itself. Here, the Shrewsburys alleged that BNY Mellon's complaint was defective because the bank was not the proper assignee of the promissory note secured by the mortgage being foreclosed; rather, the bank was only the assignee of the mortgage. The Superior Court disagreed with the Shrewsburys' defense and granted summary judgment to BNY Mellon.[4] On appeal, the Supreme Court reversed the decision of the Superior Court and remanded the case to the Superior Court for further proceedings.

Citing cases from a variety of different jurisdictions, the Supreme Court held that a mortgage can only be enforced by the person who is entitled to enforce the underlying obligation (generally, a promissory note secured by the mortgage).[5] In so holding, the Court found that Delaware laws supported such an interpretation, as, in the Court's view, there is a history of Delaware courts requiring proof of "mortgage money" (e.g., the promissory note) in addition to the mortgage in a foreclosure action. As such, the plea in avoidance defense was properly raised by the defendant. BNY Mellon could not foreclose on the mortgage without proof that it was the assignee of the original promissory note.

The Major Shrewsbury Question: How Do You Prove Assignment Under *Shrewsbury*?

The Court in *Shrewsbury* made very clear that the rights under a promissory note must be assigned along with the mortgage in order for the lender to have standing to enforce the mortgage in a statutory foreclosure proceeding. *Shrewsbury* is thus a cautionary tale. Mortgage lenders should ensure that foreclosure complaints properly state that the underlying obligation is also held to the mortgage holder, whether as original holder or by assignment. Yet the Court gave little guidance on how such an assignment should be shown in the complaint. Mortgage lenders are therefore left with questions. Are mortgage lenders now required to state the specifics of the assignment in the complaint? Are they required to attach a copy of the note and assignment to the complaint?

The Court did not seem to share these concerns. Rather, it stated that the holding was not intended to "impose new pleading requirements which must be contained in the mortgage complaint."[6] Instead, the Court proposed alternative language in the Superior Court statutory foreclosure form. The form now reads that a foreclosing lender should include the sentence: "Defendant owes plaintiff the principal amount of the mortgage with interest from _______." The Court suggested that the Superior Court change the form to state that "the defendant owes the principle [sic] amount of the *mortgage money* with interest.…"[7] In other words, the complaint should make reference to the underlying obligation and make clear that such an obligation is owed to the foreclosing lender. Unfortunately, such a change to the form requires action by the Supreme Court, which has not yet occurred. Nor is the simple additional statement dispositive of the issue because the term "mortgage money" has no settled meaning, notwithstanding the statements in the Court's opinion.

Chief Justice Leo Strine, in his dissenting opinion, disagreed with the majority's assertion that *Shrewsbury* does not pose additional pleading requirements. In Delaware, he argued, a party bringing an action must show in the action that the party has standing to sue. The Delaware statute governing the *scire facias* foreclosure process seems clear: the holder of the mortgage has standing to bring the action. This clarity and simplicity have been among the benefits of Delaware's *scire facias* process. According to the majority's opinion, however, a mortgage holder only has standing if it is the holder, whether originally or by assignment, of the underlying obligation. Thus, in order for a mortgage lender to pass the new standing test imposed by the *Shrewsbury* decision, the mortgage lender *must* plead that it is the original holder or the assignee of the note. A prudent mortgage lender would therefore want to ensure that its attorneys are expanding any foreclosure complaint beyond the simple suggestion by the majority opinion in Shrewsbury, which, in any event, is not yet part of the Superior Court's form.

The heightened pleading standards described above are not the only questions arising from the *Shrewsbury* case. There are a number of other problems with its analysis. For example, Chief Justice Strine emphasized in his dissent that the majority decision ignored the interrelationship between the enforcement rights of the mortgagee under the mortgage and the obligation of a foreclosing mortgagee to satisfy the underlying debt.[8]

Practical Issues Resulting from *Shrewsbury*

Delaware practitioners will continue to analyze the implications of the *Shrewsbury* opinion. In the immediate short term, however, banks should be working with their attorneys to ensure that they are preserving their rights to the best of their ability. Issues can arise in both the litigation and transactional context.

Shrewsbury Litigation Issues

As noted above, *Shrewsbury* is, at best, murky in providing guidance as to how to properly plead the assignment of the promissory note in a statutory foreclosure proceeding. The majority held that new pleading standards have not been imposed, but, as noted by Chief Justice Strine in his dissent, to establish

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standing, the foreclosing bank would need to plead that it holds both the mortgage and the note because failure to do so would be met with a motion for dismissal on the basis of *Shrewsbury* and the absence of proof of its interest in the note.

Perhaps these concerns, as the majority suggested, can be remediated by a simple sentence in a pleading. Yet relying on one sentence could be a risky gamble. The facts in *Shrewsbury* make clear why the proper pleading is critical to the mortgage lender in foreclosure and how it avoids unnecessary delay and expense. Recall that in *Shrewsbury*, the borrowers stopped making loan payments on the mortgage in 2010. The foreclosure action was not filed until 2015, the Superior Court did not give its ruling until 2016, and the Supreme Court reversed in 2017. The matter is still ongoing. As such (and as emphasized by Chief Justice Strine in the dissent),[9] the Shrewsburys went a full seven years living in their home without making a single mortgage payment and without being foreclosed upon. BNY Mellon's failure to prove that it was assigned the original promissory note delayed the proceedings for two years. Any mortgage holder that does not adequately plead that it is the holder of the note runs the same risk of delay.

Thus, until there are further clarifications as to what is required for pleading under *Shrewsbury*, it would be wise for attorneys to clearly and unequivocally establish in their complaints that the foreclosing party has a right to the underlying obligation. It would be advisable to attach the note and any assignments as exhibits and to track any assignments clearly and specifically in the pleadings.

Such a requirement could add expense to the litigation process. Mortgage lenders and their attorneys will need to spend more time crafting complaints and ensuring they contain all the necessary information. Without clear guidance from the Court in *Shrewsbury*, the tendency of foreclosing lenders will be towards over-inclusive complaints. Thus, preparation of a foreclosure complaint in Delaware will be a more involved and expensive process for mortgage lenders. Additionally, as noted above, any insufficiency in the complaint could be exceedingly costly and time consuming, as mortgage lenders will be forced to litigate their starting to bring the foreclosure.

Shrewsbury Transactional Issues

Lenders should consider *Shrewsbury* prior to foreclosure as well. Recall that the opinion found that the mortgage holder had no right to bring the foreclosure action if it was not the assignee of the promissory note. As such, a mortgage lender should ensure that any time it is acquiring a mortgage loan by assignment, all of the underlying obligations are clearly included in the assignment. Any inadvertent break in the chain of assignments could prevent the statutory foreclosure of the loan. This can easily be accomplished, but it does require attention. And as the world of commercial finance has moved to electronic records or MERS assignments for mortgages, assignments can be accomplished rapidly and with little preparation, often without the note actually being assigned.

Still, guided by *Shrewsbury*, some additional precautionary measures should be taken. Lenders should ensure that when mortgage assignments are effectuated, the note has been indorsed by an allonge to the subsequent owner of the mortgage (unless prior owners of the obligation indorsed it in blank). The last endorsement should be that of the mortgage seller. For example, the endorsement could say:

> PAY TO THE ORDER OF
> WITHOUT RECOURSE
>
> [LENDER'S NAME]
>
> (Authorized Signature)
>
> [NAME OF AUTHORIZED SIGNER]
> [TITLE OF AUTHORIZED SIGNER]

When used correctly, an endorsement to an allonge would be helpful in the context of *Shrewsbury*, as a properly executed allonge results in an enforceable and properly transferred note. Remember, an allonge must be permanently affixed to the note and clearly identify the note by referencing, at least, the name of the maker, the date of the note, the amount of the note, and the address of the security property.

As illustrated above, the uncertainty of *Shrewsbury* makes the stakes a little higher for routine assignments and could raise transaction costs. If both the mortgage *and* the promissory note are not assigned, a lender could have trouble years later in foreclosure proceedings. Banks with Delaware mortgage loans might consider using outside counsel for even simple assignments to ensure that there are no procedural hold-ups during a later foreclosure. But retaining outside counsel adds costs to these relatively routine processes, which are often borne by the borrower.[10] The more expensive assignments get, the more lenders risk alienating repeat customers that may be trying to save on transaction costs.

Conclusion

In *Shrewsbury*, the Delaware Supreme Court stated that a mortgage lender cannot foreclose on a mortgage in Superior Court unless the lender is also the holder of the underlying obligation. Until Delaware courts give more guidance on this holding, a mortgage lender should proceed cautiously. In both litigation and transactions, a mortgage lender should work with its attorneys to ensure that the mortgage lender is the holder of both the mortgage and the note. Otherwise, the uncertainty of the path forward from the *Shrewsbury* decision could cause difficulty, expense and delay.

Perhaps as courts re-examine the questions raised by *Shrewsbury*, they should heed Chief Justice Strine's words from the dissent. "We should be careful," the Chief Justice wrote, "about mandating as judges, not legislators, an increase in the costs to lenders of enforcing their rights, when that is not necessary to protect the legitimate rights of borrowers." Until there is greater clarity, this warning resonates.

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The views expressed in this article are those of the authors and not necessarily those of Richards, Layton & Finger or its clients.

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Notes

1- 2017 WL 137476 (April 17, 2017)
2- As a reminder, Delaware allows both statutory foreclosures (by a writ of *scire facias*) in the Superior Court and equitable foreclosures in the Chancery Court.
3- *Shrewsbury*, 2017 WL 137476 at *3.
4- *Bank of New York Mellon v. J.M. Shrewsbury*, 2016 WL 639372 (February 17, 2016).
5- *J.M. Shrewsbury v. Bank of New York Mellon*, 2017 WL 137476, at * 3-4 (April 17, 2017).
6- *Id*. at *5.
7- *Id.*
8- *Shrewsbury*, 2017 WL 1374746 at *8 (C.J. Strine, Dissenting).
9- *Shrewsbury*, 2017 WL 1374746 at *6 (C.J. Strine, Dissenting).
10- In his dissent, Chief Justice Strine also addressed the costs that could be imposed on borrowers. He warned, "Costs that are above what is truly necessary to protect borrowers from inequitable conduct by lenders will be ultimately borne by all borrowers and especially the vast bulk of those who prudently borrow and make their loan payments." *Shrewsbury*, 2017 WL 1374746 at *6 (C.J. Strine, Dissenting).

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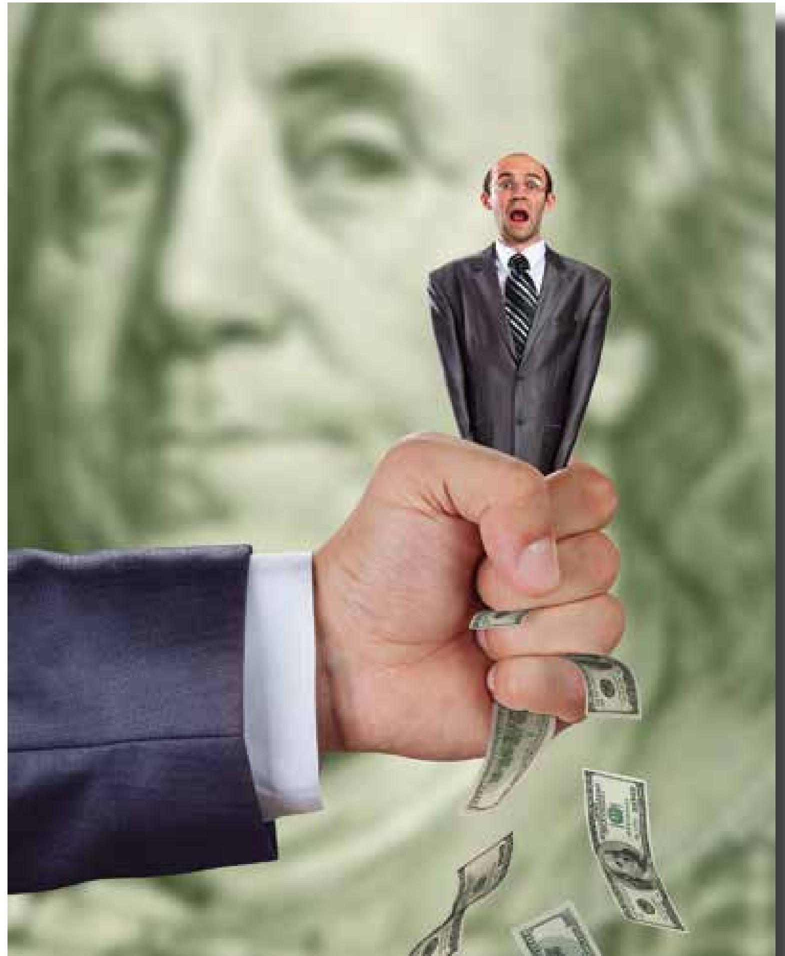
"So Counselor, What Are the Chances of Getting My Litigation Fees and Costs Reimbursed from the Trust or Estate Corpus?"

by
William M. Kelleher
and Phillip A. Giordano
Gordon, Fournaris & Mammarella, P.A.



Trust and estate litigants often ask their attorneys whether they will be able to obtain reimbursement of their litigation fees and costs. The short answer is that it depends on the facts, nature, and result of the case. While that is quite true, it is also fair to say that trust and estate litigants generally have a better chance of reimbursement than do litigants in other areas of American litigation.[1]

The Three General Bases for Reimbursement of Counsel Fees and Costs Out of a Trust

The three alternate bases under which litigation fees and costs can be reimbursed from a trust corpus are: (1) Delaware common law, (2) 12 Del. C. § 3584, and (3) the bad faith exception to the American Rule. From the get-go, it is important to know that winning is not a necessary precondition to recovering attorneys' fees in trust litigation.[2]

The catch-all Delaware common law basis to award fees in trust litigation

If relying on the Delaware common law, the awarding of "fees out of the trust corpus has generally been proper in two circumstances: (i) where the attorney's services are necessary for the proper administration of the trust, or (ii) where the services otherwise result in a benefit to the trust."[3]

Section 3584 of Title 12 of the Delaware Code

Turning to the code, 12 *Del. C.* § 3584 provides that "[i]n a judicial proceeding involving a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorneys' fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."

The exception to the American Rule

Delaware follows the American Rule and therefore Delaware litigants must generally pay their own attorneys' fees and costs. But an equitable exception to the American Rule permits Delaware courts to award attorneys' fees if they find that a party brought litigation in bad faith or acted in bad faith during the course of the litigation.[4] Delaware courts do not lightly award attorneys' fees under this exception, and have limited its application to situations in which a party acted vexatiously, wantonly, or for oppressive reasons.[5] A deciding court could look to both Section 3584 and the American Rule exception in order to perform a dual analysis. That is what happened in the *Gore* case. There, the court explained that while Section 3584 grants the court greater flexibility in exercising its discretion to shift attorneys' fees, the support which the parties seeking reimbursement cited for their application was partly based on the bad faith exception to the American Rule.[6] Thus, in performing its analysis, the *Gore* court looked at both Section 3584 and the criteria needed to justify exception to the American Rule.

The reimbursement standard for validity challenges offers another opportunity for fees

It is well-established that when a beneficiary successfully challenges the validity of a will or trust, Delaware courts generally award that prevailing contestant her attorney fees.[7] But even when the challenge is unsuccessful the court can still award fees and costs from the corpus to the losing party. In validity challenges in which the contestant is unsuccessful, Delaware courts apply a two-part test: (1) did the unsuccessful contestant demonstrate that she had probable cause for bringing the challenge and (2) did she demonstrate that there were exceptional circumstances.[8]

A party presents probable cause when she produces evidence sufficient to establish a prima facie case and has also overcome the presumption that always exists in favor of a will or trust's validity.[9] In other words, if the court evaluates only the contestant's evidence, and not the evidence presented by the estate or trust, did the contestant present a prima facie case that the challenged will or trust was invalid?[10]

The second part of the test—exceptional circumstances—is a bit more complicated. It is somewhat unclear what constitutes exceptional circumstances. And in many cases, the "exceptional circumstances" could overlap with what would otherwise be evidence of probable cause. Two examples of exceptional circumstances are (i) where the court deems that there was a benefit to the estate and (ii) where the challenging party loses on appeal after winning her initial challenge.[11]

But the existence of exceptional circumstances isn't always so clear.[12] For example, as the court in *Kittila* explained:"[o]ther circumstances that may qualify as exceptional, depending on the facts of the case, include occasions when a testatrix disinherits a blood relative in favor of a stranger, materially alters a prior testamentary scheme, or relies on legal advice from an interested party."[13]

The *Kittila* court further explained that "clarifying the proper beneficiaries of the estate" is not necessarily a benefit to the estate because that "could be said of every challenge to a will."[14] According to that court, the estate is however benefitted when an action clarifies an "ambiguous testamentary scheme."[15] Also, the *Kittila* court found that there were a number of unusual circumstances, unique to that case, that made the court's decision "neither easy nor readily apparent at the outset of [the] case . . . ."[16] Those factors were the combination of: (1) the decedent's unexplained and abrupt termination of a decades-long loving relationship with the only "family" with whom she maintained any ties; (2) her material alteration to her previous testamentary scheme shortly after a guardianship was imposed over her person and property; (3) her bequests to her guardians, a charity suggested by her guardians, and another couple with whom the guardians were close; (4) the guardians' failure to alert the Kittila family to the decedent's failing health and ultimate death; and (5) the guardian's false statements to the family regarding her estate and his knowledge of her will.[17]

In sum, the authors of this article believe that exceptional circumstances exist where there is a true benefit to the estate or trust or where the case was an extremely close call.

Even when awarded, fees and costs will still likely undergo an analysis for reasonableness

In *IMO the Hawk Mountain Trust*, Vice Chancellor Parsons awarded about 94% of the amounts sought in the co-trustees' fee applications.[18] The co-trustee sought approximately $1.1 million in total fees and the court awarded $1,033,800.[19] The reductions came for various reasons. The court agreed with some of the respondents' objections, finding that certain work done did not benefit the trust and, thus, was not properly reimbursable.[20] That work included the filing of a dismissed Pennsylvania case (for which the court awarded reimbursement for only some of the related fees) as well as the unnecessary cancellation of an LLC.[21] The court also made a small deduction for work done that benefitted a trust other than the trust that was the subject of the case.[22] And the court ordered a partial deduction for fees incurred to obtain, and

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then prepare for, a deposition that was never taken due to the co-trustees' own strategic choice not to take that deposition.[23]

The *Hawk Mountain* court also took a small deduction off of one fee application on the basis that the full fees were not adequately justified. In that regard, the court noted that the petitioners presented no detailed evidence on the following factors of DLRPC Rule 1.5: "the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;" "the fee customarily charged in the locality for similar legal services;" and "the experience, reputation, and ability of the lawyer or lawyers performing the services."[24] The court explained that in this case only one of the firms billed more than $500 per hour for their services.[25] Approximately 11.7% of the hours billed by that firm was by lawyers charging more than $500 per hour, with the highest rate being $645.[26] The court then found that—"based on the limited record before me"—the reasonable hourly fee in the matter was no more than $500 per hour.[27] The court therefore capped the reimbursable billing rates at $500 per hour.[28] It does appear, however, that if all of the factors of DLRPC Rule 1.5 were covered in the application at issue to the court's satisfaction, the court would have allowed reimbursement for hourly rates in excess of $500.00.

Proportionality matters

In *Kittila*, then-Master LeGrow (now Superior Court Judge LeGrow) ultimately reduced the petitioners' fee reimbursement because the dollar value of the sought fees was disproportionate to the size of the estate in dispute.[29] In *Kittila*, the petitioners filed a fee petition, and an accompanying affidavit of fees, whereby they sought the reimbursement of $224,565.46 in attorneys' fees and costs that petitioners had incurred in unsuccessfully challenging the validity of two wills. The estate opposed the petitioners' request and argued the requested amount was disproportionate to the total value of the estate (which was then only $351,330.27 after deducting the estate's attorneys' fees and costs incurred defending the petitioners' challenges).[30]

The Master recognized that an award of the amount requested by the petitioners would reduce the estate to only about half of its original size and, as a result, somewhat foil the testator's intent. Consequently, the Master recommended that the court order the estate to pay only petitioners' attorneys' fees and costs in the reduced amount of $88,032.65 (which amount represents approximately twenty percent of the value of the estate at the time of testator's death).[31] Simply said, the Master recognized "the importance of ensuring that an award of attorneys' fees does not eviscerate the testator's intent."[32] Notably, the petitioners in *Kittila* were unsuccessful. Had they succeeded, the authors of this article believe that that success would have increased the odds of them receiving full reimbursement of their fees as the grantor's intent would have not have been at the same risk of being undermined.

But of course if the financial stakes are much higher it is logical to expect that much larger amounts of fees and costs will be reimbursed. And the *Gore* court confirmed as much. After awarding reimbursement for the full amount of the sought fees and costs (including to losing parties), the *Gore* court explained that "[t]he fees were, indisputably, large, but, then again, so was the [t]rust corpus about which the parties were arguing."[33]

Conclusion

While some uncertainty will remain in any prediction of whether a trust or estate litigant will ultimately be awarded their fees, the Delaware courts and the General Assembly have provided quite informative general parameters. As a result, it can confidently be said that the odds of a fee award from the corpus, even for losing parties, are rather higher in Delaware trust and estate litigation than in other areas of litigation.

The authors thank Dick Nenno of Wilmington Trust for his insight in forming the topic for this article.

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Notes

1- We do not endeavor to examine in this article the issues of advancement and indemnification of corporate trustees' litigation expenses, which is a bit of a different animal and is most often covered by the express terms of the trust instrument.
2- See, e.g., IMO Trust for Grandchildren of Wilbert L. and Genevieve W. Gore, C.A. No. 1165-VCN, 2013 WL 771900, at *4 (Del. Ch. Feb. 27, 2013).
3- Merrill Lynch Trust Co., FSB v. Campbell, 2009 WL 2913893, at *11 (Del. Ch. Sept. 2, 2009). *See also Gore,* 2013 WL 771900, at *1; *Chavin v. PNC Bank, Delaware,* 873 A.2d 287, 289 (Del. 2005)).
4- Postorivo v. AG Paintball Hldgs., Inc., 2008 WL 3876199, at *24 (Del Ch. Aug. 20, 2008).
5- Id.
6- Gore, 2013 WL 771900, at *1.
7- See In re Melson, 1999 WL 160136, at *8 (Del. Ch. March 10, 1999).
8- In re Last Will of Szewzcyk, 2001 WL 456448, at *9 (Del. Ch. April 6, 2001).
9- IMO Last Will & Testament of Kittila, 2015 WL 3899572, *2 (Del Ch. June 24, 2015) (citing *Ableman v. Katz,* 481 A.2d at 1114, 1120-21 (Del. 1984).
10- Kittila, 2015 WL 3899572, at *2.
11- Id.; Ableman, 481 A.2d at 1120.
12- See Kittila, 2015 WL 3899572, at *3; *see also Ableman,* 481 A.2d at 1120 ("Further muddling of the issue arose because in those situations where fees have been awarded, the Courts have failed to expressly clarify the rule . . . .").
13- Kittila*,* 2015 WL 3899572 at *3 (citing *Ableman*, 481 A.2d 1120-21).
14- Id.
*15- Id. (*citing *Scholl v. Murphy,* 2002 WL 31112203, at *3 (Del. Ch. Sept. 4, 2002)).
16- Kittila, 2015 WL 3899572, at *3.
17- See id. at *3.
18- IMO The Hawk Mountain Trust Dated Dec. 12, 2002, 2015 WL 5243328, at *7 (Del. Ch. Sept. 8, 2015.
19- Id.
20- Id. at *5.
21- Id.
22- Id.
23- Id. at *5-6.
24- 2015 WL 5243328, at *7.
25- Id.
26- Id.
27- Id.
28- Id.
29- IMO the Last Will & Testament of Kittila, No. CV 8024-ML, 2015 WL 5897877, at *1 (Del. Ch. Oct. 9, 2015).
30- Id.
31- Id. at *2.
32- Id.
33- Gore, 2013 WL 771900, at *3.

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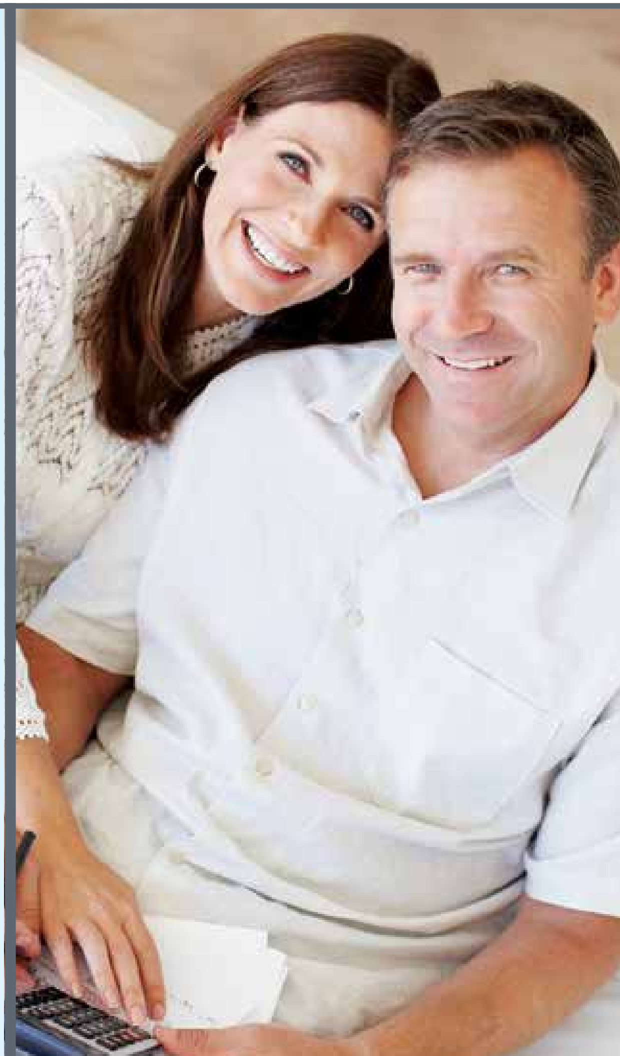

Compliance Focus

by
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Senior Regulatory & Policy Analyst
Center of Regulatory Intelligence
FIS Risk, Information Security
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"As these developments progress, debt collection continues to be a source of enforcement actions."

Recent Developments in Debt Collection

According to data from the New York Federal Reserve, almost 14 percent of American consumers have at least one account in third-party collection. Debt collection plays an important role in helping creditors minimize their losses and enhance consumer information reporting by furnishing data to the credit reporting agencies, but debt collection remains the top consumer complaint category the Consumer Financial Protection Bureau (CFPB) receives, at approximately 27 percent of total complaints. This has made regulators at state and federal levels, who are striving to understand the issues that make debt collection such a hot-button issue, work hard to strike a balance for consumers and collectors. The U.S. Supreme Court has also weighed in on the issue twice in 2017.

On June 18, the U.S. Supreme Court handed down its decision (viewed as an industry-friendly opinion on debt purchasing) in Henson v. Santander Consumer USA Inc. Judge Neil Gorsuch, in his first opinion and on behalf of a unanimous Supreme Court, upheld a Fourth Circuit Court of Appeals ruling that a "debt purchaser" is not considered someone who "regularly collects or attempts to collect … debts owed or due … another" under the Fair Debt Collection Practices Act. In the opinion, the term under question appears to focus on third-party collection agents working for a debt owner, and therefore not a debt owner seeking to collect debts for itself. The opinion then found that a "debt purchaser" purchases debts for its own account and therefore does not trigger the definition in dispute. Of particular importance, the opinion did not address the alternative "principal purpose" definition of a "debt collector."

During 2017 state legislative sessions, legislators also addressed the treatment of debt purchasers. Maine, for example, passed a law requiring debt buyers to be licensed as debt collectors in the state, while Colorado enacted provisions surrounding legal actions by collection agencies bringing action on a debt owned by a debt buyer.

At a Consumer Advisory Board meeting on June 8, a few days before the Supreme Court's decision, CFPB Director Richard Cordray gave a speech in which he addressed how the agency is formulating new rules to govern the debt collection market. After releasing a proposal on third-party debt collectors in 2016, Cordray stated, "Writing rules to make sure debt collectors have the right information about their debts is best handled by considering solutions from first-party creditors and third-party collectors at the same time." Cordray went on to detail how breaking the issue into pieces was proving to be "troublesome." The CFPB now plans to consolidate all issues of "right consumer, right amount" into a single rule that will cover first-party creditors, third-party collectors and debt purchasers.

As these developments progress, debt collection continues to be a source of enforcement actions. In April, the CFPB fined a debt collection law firm for falsely representing that attorneys were involved in the collections process. In November 2016, the CFPB, in coordination with the New York Attorney General, took action against a network of companies allegedly threatening, harassing and deceiving millions of consumers into paying inflated debts or amounts they might not owe. Additionally, a CFPB bulletin from 2013 on the prohibition of unfair, deceptive or abuse acts or practices (UDAAP) in the collection of consumer debts reinforces how the CFPB's powerful enforcement tool can target collection agencies. It is important to note, however, that these developments occur while the CFPB's rulemaking faces possible repeal through the Congressional Review Act and the CFPB's ability to regulate non-bank companies is challenged by the Financial CHOICE Act of 2017, which passed the U.S. House of Representatives in June 2017.

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For Your Benefit

A Tradition of Putting Clients First – A Heritage of Trust and Experience – Continuing into the Third Generation

by
Elizabeth Chen
Delaware State Chamber of Commerce

"Weiner Benefits Group has served Delaware and surrounding areas for almost eight decades and has grown into one of the most well-respected insurance agencies in the region."

The multigenerational history of Weiner Benefits Group began with the late George J. Weiner, who first became a life insurance agent in September of 1938. As a New York Life agent, Mr. Weiner had frequently fielded questions from clients about employee benefits, and in fact he sold New York Life's first employee benefits plan in Delaware. Due to the growth of his business, in August of 1972, George J. Weiner Associates Inc. was formally incorporated.

In the following years, Terry Wolf, Xavier DeCaire, and Don Fulton would join Mr. Weiner as the next generation of partners. While specializing in individual life insurance, disability and retirement plans, the firm steadily increased their presence in the employee benefits market. Terry, Xavier, and Don purchased the business from Mr. Weiner in 1992, although he continued to be a fixture in the office until his passing in 2010. The current partners, Louis Memmolo and Michael Reckner joined in 1997, and Debra Shears in 2003 and were brought on board to continue to grow the employee benefits division. In January of 2017, they partnered to purchase the business, now known as Weiner Benefits Group. Louis, Michael and Debbie are now the third generation of partners to own the firm.

Combined, Weiner Benefits Group has served Delaware and surrounding areas for almost eight decades and has grown into one of the most well-respected insurance agencies in the region. The heritage of commitment and quality Mr. Weiner established in 1938 has transcended his own years of service, and earned Weiner Benefits Group a distinguished reputation. Terry Wolf says, "The success we have enjoyed is a direct reflection on the dedication and professionalism of the team that makes up Weiner Benefits Group, including the benefit consultants and supporting staff." Xavier DeCaire adds, "Hard work, integrity and, most importantly, honesty were the foundation of Weiner Associates starting in 1938. George mentored and taught all of us that the client must be treated fairly and at times with much compassion and patience. As we now enter our third generation those principles that he instilled in all of us have been upheld. I am excited for the future of Weiner Benefits Group…"

An important aspect of the firm's longevity is their belief in interacting with and helping the community whenever possible. Louis Memmolo, one of the current partners, says "We feel it is very important to support our clients' and our community's charitable efforts." Weiner Benefits Group, for example, serves through various associations, scholarships, and volunteer opportunities.

Times have changed drastically from when Mr. Weiner collected premiums weekly in person door-to-door, but even the smallest aspects of Mr. Weiner's tradition of dedication, like writing birthday cards for clients and personally answering incoming calls, continues today. Certainly in part due to its personalized, customized service, many of Weiner Benefits Group's clients are multi-generational as well. Descendants of Mr. Weiner's original clients remain with Weiner Benefits Group today.

Don Fulton says, "All of us are completely delighted as the firm moves into our third generation of serving individuals and businesses in the greater Wilmington area. George Weiner would be so proud to know that what he started almost 80 years ago has continued to fulfill his legacy of providing unparalleled financial support and service to five generations of client families."

Through serving business and individual insurance needs with commitment and quality, as well as giving back to the community, Weiner Benefits Group distinguishes itself as one of the most innovative and customer oriented firms in the area as it continues to carry on and build upon the legacy of George J. Weiner.

Choosing a Retirement Plan for Your Small Business

by
Maria T. Hurd, CPA
Belfint Lyons & Shuman, P.A.

"When retirement-eligible workers cannot afford to retire, it can lead to higher labor costs due to higher compensation and increased health and disability claims..."

As retirement plan auditors, we sometimes get questions from our tax colleagues regarding retirement plan options available to their small business clients. Offering a retirement plan benefits small businesses in the short run and the long run. By offering a retirement plan, small businesses can attract and retain qualified employees, while getting a tax deduction for the employer contribution. At the end of their careers, employees who have taken advantage of the savings opportunities are financially able to retire, which also benefits the employer. When retirement-eligible workers cannot afford to retire, it can lead to higher labor costs due to higher compensation and increased health and disability claims, while potentially causing promotion blockage for younger employees. Small businesses should consider the available options in conjunction with their accountant, third-party administrator, and/or their investment advisor. Some retirement plan options include:

IRA-Based Plans

• Payroll Deduction IRAs – Employers who set up payroll deduction IRAs must allow all employees to contribute an amount of their choice from each paycheck to a traditional or Roth IRA. There is generally no cost to the employer and there are no IRS forms to complete, making it the simplest and most inexpensive way to facilitate retirement savings without fiduciary liability, since the arrangement is not considered an employer-sponsored retirement plan. The program can be discontinued at any time without penalty.

• Simplified Employee Pensions (SEPs) – SEPs provide business owners a simplified method to make employer contributions to a SEP-IRA set up for each plan participant. A SEP-IRA account is a traditional IRA and follows the same investment, distribution, and rollover rules as traditional IRAs, but has a higher contribution limit. Employers must contribute a uniform percentage of pay for each eligible employee, limited to the lesser of 25% of pay or $54,000 for 2017. The discretionary contribution can be a different percentage each year.

• SIMPLE IRAs – To set up a Savings Incentive Match Plan, a small business must have 100 or fewer employees who earned $5,000 or more during the preceding calendar year. SIMPLE IRAs allow eligible employees to contribute up to $12,500 of their 2017 compensation through payroll deduction. Employers must either match employee contributions dollar-for-dollar up to 3% of compensation or make a fixed contribution of 2% of compensation for all eligible employees, even if the employees choose not to contribute. SIMPLE IRA plans are easy to set up and administrative costs are low.

Defined Contribution Plans

• Profit Sharing Plans and 401(k) Plans with an Employer Match – There are abundant contribution and eligibility options for employers who set up defined contribution plans. Small businesses work with several service providers, including recordkeepers, third-party administrators, investment advisors, accountants, and ERISA attorneys, to design the contribution formula that best fits their business. Generally, the maximum addition to a person's account (including the maximum employee deferral of $18,000 for 2017 plus the maximum deductible employer contribution of 25% of plan compensation) is the lesser of 100% of compensation or $54,000 for 2017 and $53,000 for 2016 subject to additional limits resulting from discrimination tests required by law. Discrimination tests can be avoided with a safe harbor plan formula or improved with automatic enrollment/ automatic escalation designs. Employers must work closely with experts to properly administer qualified plan arrangements while also achieving their financial goals. This plan requires annual filing of IRS Form 5500.

With a large population of Baby Boomers reaching retirement age in what some call a "silver tsunami," it is important for employers to promote retirement readiness to achieve an ideal balance of experienced workers and new talent.

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September 12th - DBA Trust Committee Meeting

Morris, Nichols, Arsht & Tunnell LLP, Wilmington. Email Corinne Stayton - corinne.stayton@debankers.com - to attend.

September 20th - BSA/AML for Trust Companies

University & Whist Club, Wilmington. The Delaware Bankers Association and FIS RISC present a BSA/AML seminar designed specifically for Trust Companies. Topics will include: BSA Overview; Detection and Reporting Techniques; SAR Filing; Customer ID Programs; Money Laundering Methods; High-Risk Accounts; Penalties; and, More! In addition to the live presentation a CD will be available for staff training.

September 29th - FDIC Directors' College

Atlantic Sands Hotel & Conference Center, Rehoboth Beach. The FDIC Directors' College is an interactive program that provides ongoing education on current topics of bank supervision to bank directors, senior officers, corporate secretaries, and board advisors. The course is designed to help directors and trustees, both new and experienced, stay abreast of the everchanging regulatory environment.

October 12th - CRA Policy/Community Roundtable

University & Whist Club, Wilmington. 8:15 to 11:30 a.m. Join regulators for a discussion of policies and community strategies.

October 24th & 25th - 2017 Delaware Trust Conference: *Winning the Wealth Management Game*

Chase Center on the Riverfront, Wilmington. Wealth Management Professionals, Get Your Game On for the 12th annual edition of this premiere trust event highlighting the advantages of the Delaware trust product. Sponsorships and Exhibitor space still available.

November 14th, 15th & 16th - 2017 Regulatory Compliance School

2017 Regulatory Compliance School

University & Whist Club, Wilmington. The Delaware Bankers Association and FIS RISC present the 2017 Regulatory Compliance School offering a comprehensive review of federal laws and regulations affecting the financial services industry. Keep current on the important changes in the Regs you deal with every day on the job, and earn CPE, CRCM, DE and PA CLE continuing education credit!

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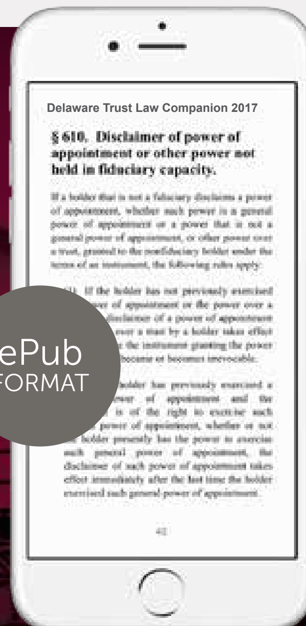

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Tax Law Update

by
Justin P. Duda, Esq.
Young Conaway Stargatt & Taylor, LLP

"Failure to abide by the Amended Regulations can result in significant monetary and other penalties..."

Recent Amendment to Treasury Regulations Creates New Reporting and Record-Keeping for Foreign-Owned Single-Member Limited Liability Companies

On December 13, 2016, certain Treasury Regulations (the "Amended Regulations") were amended to require a domestic LLC that is wholly owned by a foreign person (a "New Reporting Entity") to abide by the reporting and record-keeping obligations of Section 6038A of the Internal Revenue Code and its related Treasury Regulations. See Reg. § 1.6038A-1.

Prior to the amendments, these obligations applied to domestic business entities taxed as corporations and at least 25% foreign-owned (collectively, the "Prior Reporters"). Now, these obligations will also be applicable to domestic LLCs that are wholly owned directly or indirectly by a foreign person. Importantly, such domestic LLCs will be subject to these obligations even if owned through one or more foreign or domestic grantor trusts or other disregarded entities. See Reg. § 301.7701-2(c)(2)(vi).

A New Reporting Entity must file a separate Form 5472 for each "related party" with which the entity has had a "reportable transaction" during the applicable year. Among other things, a "related party" is any direct or indirect 25% foreign interest-holder in the New Reporting Entity or any person related to the New Reporting Entity or the owner of such New Reporting Entity. See Reg. §§ 1.6038A-1(d). "Reportable transactions" include, among others, (i) sales and purchases of inventory; (ii) sales and purchases of other tangible property; (iii) payments of rent and royalties to or by the New Reporting Entity; (iv) sales and purchases or amounts paid to or by New Reporting Entity for use of intangible property (i.e., patents, trademarks, and copyrights); (v) payment to or by the New Reporting Entity for management and other services; (vi) commission payments to or by the New Reporting Entity; (vii) loans provided and interest payments in each case to or by the New Reporting Entity; (viii) premium payments to or by the New Reporting Entity for insurance, (ix) other amounts taken into account in determining the taxable income of the New Reporting Entity, and (x) other payments made to or by the New Reporting Entity in connection with the formation, dissolution, acquisition, and disposition of the New Reporting Entity, including capital contributions to and distributions from the New Reporting Entity. See Reg. § 1.6038A-2(b)(3).

As a complement to the Form 5472 reporting requirements, the Amended Regulations also require New Reporting Entities to abide by the record-maintenance requirements of Treasury Regulation § 1.6038A-3, which provides, among other things, a specific list of records regarding reportable transactions that can be maintained to come within a "safe-harbor" under the regulation. The New Reporting Entity must have access to such relevant documents if the documents are in the possession of the foreign related party.

Failure to abide by the Amended Regulations can result in significant monetary and other penalties, and the New Reporting Entities do not get the benefits of the exceptions available to the Prior Reporters. To avoid such penalties, it may be advisable to discuss these obligations with foreign trust clients utilizing domestic LLCs. The Amended Regulations apply to a New Reporting Entity's taxable year beginning on or after January 1, 2017. If a New Reporting Entity has a foreign owner with a U.S. filing obligation, such entity has the same taxable year as its foreign owner. However, since many foreign owners will not have such a filing requirement, a New Reporting Entity, to the extent that it does not have one, must obtain an employer identification number and file its relevant Form 5472s on the calendar taxable year.

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