GDB LEGAL UPDATE

PROVIDING CURRENT INFORMATION ABOUT LEGAL DEVELOPMENTS FOR OUR CLIENTS AND FRIENDS WINTER 2012

If My Estate is Less than $5 Million, Then I No Longer Need to Concern Myself About Estate Planning, Right...?

By: David N. Milner, Esq.

Ever since President Obama signed "The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010" into law on December 17, 2010,[1] effectively exempting from Federal Estate Tax taxpayers having taxable estates of less than $5 million [2] ($10 million[3] for married individuals), we are often asked this question.

The answer, of course, is no, you must still concern yourself with estate planning, even if your estate is less then $5 million. It is important to have a properly structured estate plan, to ensure your assets pass in the manner you choose and to take advantage of available tax advantages — even if your estate is less than $5 million.

First and foremost, there are non-tax reasons. A properly planned estate will enable you to make sure that your assets pass as you want them to and will not leave this to chance. Planning your estate properly may also permit you to protect your assets from the reach of your children's (or more remote issue's) creditors, spouse, etc.

Significant tax reasons also remain. First and foremost, the so-called $5 million "exemption" is scheduled to expire on December 31, 2012. If allowed to expire the "exemption" will be reduced to $1 million. Married couples will not have a $2 million "exemption" since the provision that permits a spouse's unused exemption to be used by their surviving spouse is also scheduled to expire. It is important to remember that there really is no "exemption." Rather, the law permits a credit against the tax which would otherwise be payable equal (assuming that no taxable gifts have been made during one's life) to what the estate tax liability is on $5 million. For there to be a taxable estate, the assets must pass to someone other than a surviving spouse since there is an unlimited deduction for transfers made to one's spouse, whether made at death or during your life. Assets that are transferred to a decedent's spouse will be subject to estate tax upon the spouse's death at their then value. Those clients having assets that may appreciate significantly over time would benefit significantly from including a provision in their will which establishes a properly

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In Memorium
Aaron N. Wise (1940-2012)

The firm mourns the loss of Aaron N. Wise, a partner at Gallet Dreyer & Berkey LLP since 2002, who died unexpectedly from a heart attack while at his home, on January 22, 2012. Mr. Wise was the author of numerous publications,

including a treatise on international sports law, a treatise on trade secrets throughout the world, and several guides to doing business in the United States. He had received the highest "preeminent" rating (AV) by the Martindale peer review rating service. Mr. Wise was fluent in several languages, including German, French, Spanish, Italian, Russian, Portuguese, Polish, Czech, and Japanese.

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[1]Reprints of the Special Edition of our Newsletter discussing this Act are available upon request.
[2]$5,120,000 for those dying in 2012.
[3]$10,240,000 for dying 2012.

Gallet Dreyer & Berkey, LLP
ATTORNEYS AT LAW

Should You Include A Mandatory Arbitration Clause In Your Contracts?

By David S. Douglas, Esq.

It is a question that experienced clients who have just negotiated a business deal not infrequently pose as they turn to their lawyer to "paper" the deal and prepare the formal contract: "What if the deal goes sour? Should we include an arbitration clause in the contract? Isn't arbitration better, faster, and cheaper than a full-blown lawsuit?"

It is a good question. Unfortunately, as with many good questions, the answer is "it depends."

More and more 21st century contracts include arbitration clauses. In part, this is a consequence of widespread dissatisfaction with the expense, delay, and out-of-control discovery process all too often associated with litigation. In part, it stems from conscious decisions to avoid the wild card that juries pose. In part, it is the result of successful marketing by alternative dispute resolution organizations.

Arbitration, however, is itself far from cost, or risk, free. As to cost, an arbitration often necessitates the expenditure of significant fees that are absent from the traditional litigation process. For example, the filing fee for a court case commenced in New York, either in state or federal court, is a few hundred dollars. Arbitration filing fees in matters involving significant disputes run in the thousands, and often tens of thousands, of dollars.

Similarly, clients are often surprised, and sometimes angered, to learn that during an arbitration, the client is not only paying for his or her own lawyer, but must also foot a share of the bill for the arbitrator. While the responsibility for payment of judges lies with the taxpaying public, it is the individual parties who must pay for the arbitrator, who, like the party's lawyer, charges for his or her time on an hourly basis.

Additionally, burdensome discovery is hardly unknown in the realm of arbitration. All too often, the private lawyers who serve as arbitrators readily grant one side or the other's request that substantial paper discovery and the depositions of parties, or even non-parties, be conducted prior to any actual hearing, thus exponentially increasing the arbitration's cost and significantly lengthening the process.

Arbitration also poses its own set of risks. For instance, while the quality of judges varies greatly, with litigation one is at least guaranteed that the person overseeing one's case handles such matters as a standard part of his or her job. Many arbitrators handle arbitrations simply as a sideline to their own private practices and are largely novices at the task. Compounding that risk is that it is extraordinarily difficult successfully to appeal an adverse arbitration decision.

The question of whether to include an arbitration provision in a particular contract thus entails a weighing of relative potential advantages and disadvantages, an assessment that the client and lawyer should analyze carefully together in light of the specifics of the situation presented. ■

> With litigation one is at least guaranteed that the person overseeing one's case handles such matters as a standard part of his or her job.

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- Tax Law
- Trademarks and Copyright
- Trusts & Estates
- White Collar Criminal Defense

__About the author:__ David S. Douglas is a partner at Gallet Dreyer & Berkey LLP. His practice focuses on complex commercial litigation. In addition, he is the chair of the Town of Cortlandt's Zoning Board of Appeals, chair of the Town's Open Space Committee, and a member of the Hudson Highlands Gateway Task Force. Mr. Douglas can be reached at dsd@gdblaw.com.

Franchise Law Update — New Regulations and Recent Court Decisions Affecting Franchising

By: David T. Azrin, Esq.

FTC BROADENS SCOPE OF FEDERAL BUSINESS OPPORTUNITY REGULATIONS

In December 2011, after years of consideration, the Federal Trade Commission announced changes effective March 1, 2012 to the federal regulations which govern the sale of business opportunities, by broadening the types of businesses which are governed by the regulations to include more at-home business ventures, while at the same time lessening the nature of the disclosure requirements for businesses that fall under the new rule.

The FTC's regulations which govern the sale of business opportunities require that companies selling business opportunities must give the buyer a written disclosure document describing the offering before the buyer signs any agreement or pays any money.

Under the new federal rules, the definition of a business opportunity was broadened to include any arrangement under which the business opportunity seller offers the buyer the opportunity to enter into a new business, requires a payment of any amount (not limited to $500 or more) and promises the buyer it will i) provide locations for the use or operation of equipment, displays or vending machines, ii) provide accounts or customers for the buyer; or iii) buy back the goods or services the buyer makes or provides.

Accordingly, the new regulations reach two main categories of business ventures that were not previously covered under the prior regulations: 1) cheap at-home business opportunities which required a payment of less than $500, and 2) business opportunities in which the seller promised to buy back the goods or services or to provide wholesale customers for the buyer.

At the same time, the new regulations narrow the scope of the disclosure document that is required for the sale of business opportunities to only five categories of information, rather than requiring business opportunity sellers to provide the more extensive franchise disclosure document which requires the disclosure of 21 categories of information and financial statements.

The impact of the new federal regulations will be felt mainly in the states without business opportunity laws. Twenty six states have their own business opportunity laws which already require pre-sale disclosure.

The impact of the new federal regulations will be felt mainly in the states without business opportunity laws. Twenty six states have their own business opportunity laws which already require pre-sale disclosure. New York's franchise laws contain a unique broad definition of a franchise which already covers most arrangements normally considered to be business opportunities.

COURT DECISIONS ADDRESSING CLAIMS THAT FRANCHISEES ARE EMPLOYEES

Franchisors have been concerned since late last year after a Massachusetts state appeals court ruled in *Awuah v. Coverall* that, under Massachusetts' employee misclassification statute, the individual franchisees of the Coverall commercial cleaning franchise system should have been classified as employees, rather than franchisees, subject to all of the payroll, unemployment insurance and workers compensation rules. In that case, the franchisor provided all the accounts to its individual commercial cleaning franchisees and collected all the customer revenue, while the individual franchisees provided the cleaning services to the customers.

Although the court decision contained broad language, so far it appears that the ramifications of this court decision are limited to the unique provisions of the Massachusetts state law and the structure of that franchise system. No courts have adopted this reasoning in other states. In a ruling by a Georgia appeals court last year in another case, *Jan-Pro Franchising v. Depianti,* which addressed the same state statute, the court concluded that the Jan-Pro commercial cleaning franchisees should not be considered employees under the Massachusetts employee misclassification statute. And in a ruling late last year by a Kentucky appeals court, the court ruled in *Doctor's Associates v. Uninsured Employer's*

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Firm News and Honors

- **Partners David L. Berkey, Roger L. Stavis and Randy J. Heller** have once again been selected this year by their peers as Super Lawyers in their respective areas of specialization; an honor bestowed on fewer than 5% of attorneys in the New York metropolitan area.

- **Randy J. Heller** has again been selected by *New York Magazine* as among the Best Lawyers in New York in the field of Construction Litigation for 2012.

- **Partner Marc J. Luxemburg** presented two seminars at the Annual Conference of the Council of New York Cooperatives and Condominiums on November 13, 2011. The first was on Current Significant Legal Decisions of the Year 2011, and the second, which Mr. Luxemburg co-presented, was on Why It Is Important to Have Your Attorney Review All Contracts.

- **Marc J. Luxemburg** was a featured speaker at the Annual Meeting of the Committee on Cooperatives and Condominiums of the New York State Bar Association on January 26, 2012. He spoke on the *Jennifer Realty* decision and how it impacts on the obligation of Sponsors to make sales of unsold apartments.

- On January 20, 2012, the *New York Law Journal* published a letter to the editor by **Marc. J. Luxemburg,** concerning the issue of whether cooperatives should have to pay legal fees to pet owners who violate a no-pet rule, but cannot be evicted by reason of the New York City Pet Law.

- **Partner David T. Azrin** has again been selected by *Franchise Times* magazine for 2012 as a "Legal Eagle," a designation given to the top 125 franchise attorneys in the country.

- **The firm of Gallet Dreyer & Berkey LLP** has again been selected by *US News and World Report* as a "First Tier" law firm (the highest honor bestowed) for its construction law and litigation practice.

Franchise Law (continued from page 1)

Fund that Subway franchisees were not statutory employees of the franchisor for purposes of a workers compensation statute.

COURT DECISION UPHOLDING STATE'S RIGHT TO TAX OUT-OF-STATE FRANCHISORS

In a closely watched case late last year, *KFC v. Iowa Department of Revenue,* the U.S. Supreme Court refused to grant review of an Iowa state appeals court decision which upheld the Iowa Department of Revenue's right to impose an income tax on Kentucky-based KFC for royalties that KFC received from its Iowa franchisees. The Iowa state appeals court held that it had the authority to impose Iowa's state income tax on the revenues which KFC received from its Iowa franchisees because KFC had an "economic nexus" to the state.

The decision was significant because, in the past, franchisors generally believed that they could not be subject to such taxes because they were not physically present in the state. State taxing authorities may attempt to rely on this court decision in taking more aggressive action to tax the revenues received by out of state franchisors from franchisees located within the state.

According to the results of a recent 2011 survey of state tax departments by the publisher BNA, states are currently about evenly divided as to whether an out-of-state franchisor's licensing of a trademark to an in-state franchisee would be sufficient to trigger "nexus" that would justify imposition of taxes upon the franchisor for income received from such franchisee. Twenty-one states including New York said it was generally not sufficient to trigger "nexus." But, 15 states including neighboring Connecticut and New Jersey responded that the franchisor's use of intangible property within their state would be sufficient to trigger the "nexus" required for taxing revenue received by out-of-state franchisors from franchisees located within their state. ■

The FTC's regulations require that companies selling business opportunities must give the buyer a written disclosure document describing the offering before the buyer signs any agreement or pays any money.

__About the author:__ David T. Azrin is a partner at Gallet Dreyer & Berkey LLP. Mr. Azrin represents a range of business clients and individuals on employment, trademark, and franchise law matters. He is the sponsor of the IFA's franchise business network program in the New York City area, and he was named last year one of the top 125 franchise attorneys in the country by Franchise Times *magazine. Mr. Azrin teaches an employment law course for small businesses for the City of New York Business Solutions program. Mr. Azrin can be reached at dta@gdblaw.com.*

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Estate Planning (continued from page 1)

Assets that are transferred to a decedent's spouse will be subject to estate tax upon the spouse's death at their then value.

structured trust that will benefit the taxpayer's spouse while she is alive, but not subject the assets remaining in the trust to estate tax upon the surviving spouse's death.

Residents of states such as New York, which impose their own estate tax, have an even greater reason to plan their estates properly. Take, for example, a couple with combined assets of $2 million, all of which are held jointly with a right of survivorship (for example, a home, their checking and savings accounts, etc.) Upon the first death, there would be no estate tax payable since all of the assets will pass to the survivor by virtue of the manner in which the assets are owned — often referred to as a "will substitute." For this purpose, New York State follows federal law. Upon the survivor's death, and assuming the value of the assets remained at $2 million, the estate would be subject to a $99,400 New York State Estate Tax. Had the couple in our example merely changed the manner in which they owned their assets from a joint tenancy with a right of survivorship to a tenancy-in-common (and assuming the assets did not pass to the surviving spouse at the first death), each would have had a taxable estate of $1 million. The combined New York State Estate Tax would have been zero, a savings of almost $100,000, for their family. Of course if the federal exemption is allowed to return to $1 million, or if the value of the asset increases, the savings would be even larger. If the couple wanted to make sure that the survivor had the benefit of all the assets during the survivor's lifetime, each of them would have created a trust within their will which would hold the assets for the benefit of the survivor and then ultimately either pass the assets to, or continue to hold the assets for the benefit of, the couple's children. ■

About the author: David N. Milner is a partner at Gallet Dreyer & Berkey LLP. Mr. Milner's practice focuses on tax law, estate planning, corporate law, and real estate. Mr. Milner, who is also a certified public accountant, helps clients to structure transactions and develop estate planning strategies to reduce adverse tax consequences. He regularly speaks before community groups and trade organizations on estate planning and tax issues. Mr. Milner can be reached at dnm@gdblaw.com.

Aaron N. Wise

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Mr. Wise, who was born in Hartford, Connecticut, earned his law degree at Boston College Law School and a Masters of Law in comparative and foreign law and taxation at New York University Law School. He also studied at the University of Paris Law School, where he earned a doctoral certificate. Mr. Wise was an avid tennis player, an accomplished pianist, and a lover of music, sports, politics, travel, and the law. He leaves behind his wife Jane, two sons Haywood and Paul, daughter Renee, and three grandchildren.

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Where In The USA Can Product Liability Suits Be Brought Against My Company? Anywhere My Product Causes Some Damage?

U.S. Supreme Court Decides Two Important Cases Addressing These Questions

By: Aaron N. Wise, Esq.

This past year the U.S. Supreme Court decided two cases that will make it more difficult to for plaintiffs to bring lawsuits in U.S. state or federal courts against a foreign company that manufactures products abroad which make their way to the U.S., if the foreign company does not have a store, sales office or employees here in the U.S.

BACKGROUND

These two cases addressed the situation where the foreign company has few direct contacts with a state, other than the fact that the company's products ended up there. In this situation, the question arises whether it is fair for the company to be forced to defend a lawsuit in that state given that it has few direct contacts. To answer this question, the courts have generally followed one of two approaches:

"STREAM OF COMMERCE." Under this pro-consumer approach, a court can exercise jurisdiction over a foreign company if the foreign company knew or reasonably should have known that it was placing its products in the "stream of commerce" so they might end up in a particular U.S. state.

"PURPOSEFUL AVAILMENT." Under this pro-business approach, a court cannot exercise jurisdiction over a foreign company unless (i) it had taken significant actions targeting business in that state and (ii) the claims related to the products that it had directed to that state.

In the two recent decisions, the U.S. Supreme Court, the nation's highest court, made it clearer that the more pro-business "purposeful availment" approach should be applied, particularly in product liability cases.

THE J. MCINTYRE MACHINERY, LTD. CASE

This first case was brought by Robert Nicastro, who alleged he was injured by a defective metal-shearing machine manufactured in the UK by J. McIntyre and sold in the USA. J. McIntyre sells the machines throughout the US through a distributor located outside of New Jersey (Ohio-based) in which J. McIntyre holds no ownership or management control.

The Supreme Court of New Jersey decided that J. McIntyre could be sued in New Jersey for Nicastro's injuries in New Jersey because J. McIntyre knew or should have known or expected that its products would be sold throughout the USA and could end up in New Jersey.

The U.S. Supreme Court disagreed. It ruled that J. McIntyre could not be sued in New Jersey because J. McIntyre had not sufficiently and purposefully directed its business and acts toward New Jersey. The Supreme Court noted: "The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed after discovery [collection of evidence] the trial court found that the defendant [J. McIntyre] does not have a single contact with New Jersey short of the machine in question ending up in this state. These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposely availed itself of the New Jersey market."

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THE GOODYEAR CASE

This case arose after two North Carolina teenagers were killed in a bus accident in France when a tire manufactured in Turkey by a Turkish Goodyear subsidiary malfunctioned. In addition to suing Goodyear USA, the plaintiff sued three indirect Goodyear USA subsidiaries: the Turkish one , and a French and a Luxembourg subsidiary.

The U.S. Supreme Court ruled, unanimously, that the foreign subsidiaries could

The Court held that, for a U.S. court to exercise "general jurisdiction" over a foreign entity so that it can be sued for essentially any claim, even if the claim did not arise out of conduct in that state, the foreign entity's ties to that State must be so continuous and systematic as to render it at home in that State.

not be sued in North Carolina. The Court determined that North Carolina courts lacked specific jurisdiction over the Goodyear non-U.S. subsidiaries because the claim did not arise out of or relate to any contacts between in the forum State, North Carolina. The Court also ruled that there was no general jurisdiction over the Goodyear non-US subsidiaries because none of them had any "continuous and systematic" contacts with North Carolina.

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Here, the Goodyear foreign subsidiaries were not registered to do business and had no place of business in North Carolina and had neither employees nor bank accounts in North Carolina. They did not design, manufacture or advertise their products in North Carolina. They did not solicit business in or sell or ship tires to North Carolina.

The type of tire manufactured by the Turkish subsidiary that allegedly caused the Paris accident was never distributed in North Carolina, but it conformed to U.S. Department of Transportation standards and bore markings required for sale in the USA.

In favor of a finding of jurisdiction, tens of thousands of tires from the foreign subsidiaries manufactured between 2004-2007 were distributed within North Carolina by a highly organized distribution network involving other Goodyear USA subsidiaries or affiliates. The foreign subsidiaries made no attempt to keep those tires from reaching North Carolina.

However, the foreign subsidiaries took no affirmative action to cause their tires to be shipped to North Carolina. The North Carolina Court of Appeals had stressed that tires manufactured abroad by the foreign subsidiaries reached North Carolina through "the stream of commerce". Disagreeing, the U.S. Supreme Court concluded that that the "stream of commerce" analysis is not relevant to "general personal jurisdiction". Rather, the flow of a manufacturer's products into the forum State may bolster an affiliation with the forum State germane to "specific jurisdiction". The foreign subsidiaries did not have materially "continuous and systematic" contacts with North Carolina sufficient for "general personal jurisdiction". Since the accident took place outside of North Carolina (in France) and the Goodyear tire allegedly responsible for it never entered North Carolina, there was no basis for "specific personal jurisdiction."

RAMIFICATIONS OF DECISIONS

These two, pro-business decisions will likely cause most U.S. state courts to apply the more narrow "purposeful availment" theory of specific personal jurisdiction in product liability cases involving foreign companies, rather than the broader "stream of commerce" theory, thereby limiting the ability of plaintiffs to bring such suits in the U.S. courts against foreign companies, particularly where the foreign company does not have any offices or employees here.

If a foreign company is sued in the United States, one of its first defenses will typically be that the court has no personal jurisdiction over it — it can't decide the case. The "purposeful availment" theory will in many cases provide the foreign company considerable wiggle room to make cogent arguments supporting the court's lack personal jurisdiction, to attempt to get the case dismissed, or to settle the case for a nominal sum. ■

__About the Author:__ Aaron N. Wise was a partner at Gallet Dreyer & Berkey, LLP, practicing in the areas of corporate, commercial and contract law, international law, taxation, sports law, and intellectual property. Mr. Wise had considerable experience in representing foreign companies and individuals doing business in the United States, and he was fluent in several languages. Mr. Wise unexpectedly passed away just prior to publication of this Newsletter. (See the Memorium on page one of this Newsletter). The firm continues to provide legal representation for foreign companies and individuals doing business in the United States. Inquiries concerning the firm's international practice can be directed to David N. Milner at dnm@gdblaw.com, David L. Berkey at dlb@gdblaw.com, Jay L. Hack at jlh@gdblaw.com, and David T. Azrin at dta@gdblaw.com.

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