INSIDE THE LAW

Summer 2018

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STATE AND LOCAL TAX AND HOMEOWNERSHIP PROVISIONS—HIGHER STANDARD DEDUCTION MAY OFFSET SALT LIMIT

Third in a series of five articles provided by the attorneys at Fletcher Tilton PC

The Tax Policy Center estimates that, of the approximately 46 million households that itemized deductions under the old law, about 19 million households will do so in 2018—meaning 27 million fewer households are likely to itemize deductions in 2018. This anticipated change is attributed to the nearly doubled new standard deduction covered in the previous article.

The Tax Cuts and Jobs Act ("The Act") dramatically affects the tax deductions attributable to homeownership as well as other restrictions on state and local tax ("SALT") deductions. This article will focus on these provisions as well as other rules affecting individuals.

SALT PROVISIONS

Under prior law, taxpayers who itemized their deductions could deduct state and local income taxes (or sales tax in low- or no-income-tax states), real estate taxes (both foreign and local), and personal property taxes such as automobile excise taxes, without limitation. Of course, large deductions for SALT expenses were not deductible for alternative minimum taxes, so higher-bracket taxpayers often realized only a limited benefit from these deductions.

Under The Act, the total deduction for SALT cannot exceed $10,000. In addition, no deduction is permitted for foreign income and foreign real estate taxes unless incurred in a trade or business or incurred in an income-producing activity.

The effect of these new rules is as follows.

	2017	2018
Adjusted Gross Income	$200,000	$200,000
Itemized Deductions:		
State Income Tax	$10,000	
Real Estate Tax	$5,000	
Excise Tax	$1,000	
SALT Deductions Limit		$10,000
Home Mortgage Interest	$10,000	$10,000
Charitable Donations	$5,000	$5,000
Total Itemized Deductions:	($31,000)	($25,000)
Personal Exemptions	($8,100)	$0
Taxable Income	$160,900	$175,000
Tax	**$31,397**	**$30,579**

The preceding chart refers to a married taxpayer couple with total income of $200,000, upon which they pay $10,000 in state income tax. In addition, they pay $5,000 in local real estate tax and $1,000 in excise tax on their cars. They also have non-SALT deductions of $5,000 in charitable contributions and $10,000 in home mortgage interest.

Despite the fact that taxable income has increased by $14,100, the total tax liability has decreased as a result of the decrease in tax rates.

RENTAL PROPERTY AND PROPERTY IN TRUSTS

Property tax on a rental or income property (such as a second home that is rented out for all or part of the year) would not be subject to the new $10,000 limitation on SALT. Taxpayers whose SALT deductions would exceed the $10,000 limit, due to property tax on a second or vacation home, may want to consider converting that property to a rental/income property during 2018. This way, the taxpayers would be able to benefit from the new law.

In addition, moving property into certain types of trusts can also provide tax benefits. If this is a possibility, taxpayers should consult with their advisors, as there are many variables to consider.

HOME MORTGAGE INTEREST DEDUCTIONS

In view of the importance of homeownership to the economy, there is always concern when Congress tinkers with the home mortgage interest deduction. While this year was no exception, The Act did make changes to the home mortgage interest deduction. But these changes will affect only homeowners with very large "jumbo" mortgages. A jumbo loan is defined as a mortgage of more than $424,100 in most counties, and more than $636,150 in others.

Taxpayers itemizing their deductions are permitted to deduct qualified residence interest ("QRI"). For these purposes, QRI is interest incurred in purchasing a qualified residence in which the mortgage must be secured by the residence.

While the mortgage interest on a principal residence is still deductible, the amount of the acquisition indebtedness cannot exceed $750,000, reduced from $1,000,000 prior to The Act. In other words, the interest on only the first $750,000 of the indebtedness is tax-deductible. This new limitation does not apply to debt incurred before December 15, 2017; interest on those larger loans will still be deductible up to $1,000,000.

Under prior law, interest on home equity loans of up to $100,000—to wit, loans secured by a residence—was deductible notwithstanding the fact that the loan proceeds were used for other purposes, such as tuition, consumer purchases, and the like. This tax policy gave homeowners added incentive to use the equity in their homes as a cheap way of avoiding credit card or student loan debt with

higher interest rates. Beginning in 2018 and through 2025, interest on home equity loans will not be deductible.

CHARITABLE CONTRIBUTIONS

Taxpayers itemizing their deductions are permitted to deduct their charitable gifts, with attention to the rules applicable to the type of property given, the identity of the donor, etc. The Act's increase in the standard deduction may have a significant impact on the tax benefit of charitable giving.

In the following example, a married couple filing a joint return has other itemized deductions of $13,000 and donates $10,000 annually to charity.

	Tax Year 2018	Tax Year 2019
Adjusted Gross Income	$150,000	$150,000
Less: Charitable Donations	($10,000)	($10,000)
Less: Other Itemized	($13,000)	($13,000)
Standard Deduction	$24,000	$24,000
Taxable Income	$126,000	$126,000

In the above example for both years, the new standard deduction of $24,000 exceeds total itemized deductions of $23,000 so that no tax benefit results from the charitable gifts.

By accelerating the 2019 gift into 2018, the following tax consequences result:

	Tax Year 2018	Tax Year 2019
Adjusted Gross Income	$150,000	$150,000
Less: Other Itemized	($13,000)	($13,000)
Less: Charitable Donations	($20,000)	($0)
Standard Deduction	$24,000	$24,000
Taxable Income	$117,000	$126,000

Now, the $33,000 of itemized deductions in 2018 exceeds the standard deduction of $24,000. So, the 2018 taxable income is reduced by $9,000, which, in this case, would have been taxed at the 22% rate. This simple tax planning technique saves the taxpayers $1,980 in 2018, without any tax increase in 2019.

The Tax Policy Center estimates that, compared to the 37 million households that claimed itemized deductions for gifts to nonprofits in 2017, fewer than 16 million households will do so in 2018—a drop of 21 million households. **FT**

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SELLER'S REMORSE—THE FIXED PRICE OPTION TO PURCHASE REAL ESTATE

By Jess D. Oyer, Esq.

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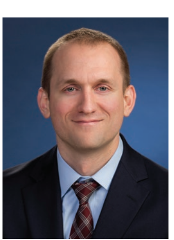

It is fairly common for lessors and lessees of real property to include in long-term lease agreements an option to purchase the property. Often, such options to purchase establish a fixed price. Establishing a fixed price option gives rise to substantial risk of which owners/lessors in particular should be wary. Whether you are a commercial or residential owner/lessor, you should think twice before fixing a price for the future sale of your property.

Despite periodic short-term recessions, over an extended time frame, real estate values usually appreciate. Consequently, fixing a purchase price for real property that provides good or even great value today could leave you with only a fraction of the future market value when the option to purchase is exercised. As a lessor and property owner, before agreeing to a fixed price option to purchase in your lease agreement, you should be aware of the following:

- Market fluctuations could significantly affect the value of the option.
- The option will likely be enforceable despite such fluctuations.

If an exercised option price fails to provide you with acceptable returns in relation to market value, your first instinct may be to assert one of the following common defenses against an action for specific performance. For the reasons stated, these defenses are unlikely to provide you with relief.

Common but Unreliable Defenses to an Option Holder's Action to Enforce the Exercise of a Fixed Price Option:

1. **Unconscionability:** You may try to convince a court that because of the gross disparity between the fixed price and the current market value, the option contract should be declared unconscionable. However, black letter law regarding unconscionability requires both procedural and substantive unconscionability to undo a contract. Therefore, unless you can claim that you were unduly influenced or forced into executing the lease/option agreement, unconscionability will not provide a valid defense to enforcement.

2. **Rule Against Perpetuities ("RAP"):** If the contract was executed more than 21 years ago, some property owners may try to claim it is invalidated by the RAP. As part of Massachusetts common law, the RAP prevents certain contingent future interests from being valid in perpetuity. See *J.C. Gray, Rule Against Perpetuities* § 201, at 191 (4th ed. 1942). In Massachusetts, there has been no definitive ruling as to whether the RAP applies to options appurtenant

to lease agreements. Therefore, even if the option to purchase is written so as to be valid and exercisable decades beyond the 21-year limitation associated with the RAP, the RAP provides no assurance that the exercise of that option can be avoided or undone. Furthermore, many jurisdictions explicitly forbid the RAP's application to such lease-appurtenant options, lending some support to the option holder's position in an enforcement action.

3. **Failure of the Option Holder to Turn the Corners Squarely:** The advantage of option contracts rests with the option holders because they can access future market information before deciding whether to exercise their option to buy. So, the courts require that the option holder adhere strictly to the terms of the option provision. This strict adherence is referred to as "turning the corners squarely." A more familiar expression might be "dot the i's and cross the t's." See, e.g., *Westinghouse Broadcasting, Co. v. New England Patriots Football Club, Inc.*, 10 Mass. App. Ct. 70 (1980). The *Westinghouse* court recognized that this unequal access to information is particularly salient where the intervening period has resulted in "an increase in the value of the optioned rights." *Id.* at 73. Because of this increased burden imposed upon option holders, there are indeed instances in which regretful owners have successfully thwarted claims for specific performance. Such a defense requires the owner to identify where the option holder has failed to exercise the option strictly in accordance with its terms.

Fixing a purchase price for real property that provides good or even great value today could leave you with only a fraction of the future market value when the option to purchase is exercised.

Generally, the terms to which the option holder might fail to adhere include those relating to the method and timing of the requisite notice of the intent to exercise the option; the specification of the closing date, time, and place within the notice of intent to exercise the option; whether the option holder is ready, willing, and able to tender performance (e.g., tender the requisite funds) on the date, time,

The best advice for lessors/property owners with respect to lease-appurtenant, fixed price options to purchase is simply to avoid them.

and place specified in the notice of intent to exercise the option; and/or the option holder's failure to satisfy obligations under any other contract provision upon which the option rights have been made contingent.

While the turn-your-corners-squarely rule can provide some measure of relief for the regretful owner, it cannot be relied upon. Significantly, the majority of cases to which it has applied are those in which the option holder's attempt to cure a failure to strictly adhere to the option terms has occurred after expiration of the option. Thus, the relief provided by the rule arises from the happy accident of the option holder's insufficient attention to detail and poor timing. An owner cannot plan with any degree of comfort to rely upon accidents when negotiating an option to purchase.

CONCLUSION

The best advice for lessors/property owners with respect to lease-appurtenant, fixed price options to purchase is simply to avoid them. The option holder's exclusive access to intervening information, between the execution of the contract and a future decision to exercise the option, means that the option holder alone will benefit from market fluctuation. If the option increases in value, then the option holder is more likely to exercise it; if it decreases, the option holder is less likely to exercise it. The owner, on the other hand, is subject to the whim of the market and the advantage of the option holder. While the larger context of the lease agreement may justify this risk to the owner, owners should nonetheless be aware of the risks associated with fixed price options and the rules relating to their enforceability. **FT**

WHAT'S NEXT FOR REMOTE SELLERS AFTER *WAYFAIR*?

By Michael P. Duffy, Esq.
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Last month's Supreme Court decision in *South Dakota v. Wayfair, Inc. repealed the sales tax "physical presence" standard required by Quill Corp. v. North Dakota. In doing so, the Supreme Court opened the door for states to impose a sales tax collection obligation on large and medium-size out-of-state retailers operating over the internet.*

In what is probably the biggest state and local tax case of the past decade, the Supreme Court last month released its long-awaited opinion in *South Dakota v. Wayfair, Inc*. As was generally expected by state tax practitioners, the *Wayfair* opinion overturned the Supreme Court's widely criticized 1992 holding in *Quill Corp. v. North Dakota*. Broadly speaking, the repeal of *Quill* means that states are now permitted to impose a sales tax collection obligation on an out-of-state retailer, even if such retailer does not have any sort of physical presence in the state of the customer.

OVERVIEW

Quill itself has long been considered an anachronism. For instance, the departure from physical presence as the exclusive means of asserting state power over a party began with the Supreme Court's 1945 decision in *International Shoe Co. v. Washington.* In that case, the Supreme Court established that the Due Process Clause supported a state's assertion of personal jurisdiction over an out-of-state corporation based on the corporation's "minimum contacts" in the forum state. A series of cases following *International Shoe* provided that these minimum contacts are established when a party intentionally engages in transactions with customers in a forum state or purposefully avails itself of that state's market.

Unlike the concept of personal jurisdiction, a state's authority to tax the activities of remote parties is regulated jointly by both the Due Process Clause and the Dormant Commerce Clause. The two clauses together have been read to limit a state's power to tax an out-of-state party to instances where the taxpayer has a constitutionally sufficient connection with the state seeking to impose a tax obligation. The Supreme Court refers to this constitutionally required minimum level of connection to impose a tax obligation as "nexus."

The degree to which "minimum contacts" and "nexus" are different has been the subject of significant debate over the past 40 years. Obviously, the Due Process Clause's minimum contacts standard does not require a taxpayer's physical presence. The Supreme Court expressly stated this conclusion in *Quill*. But the degree to which the Dormant Commerce Clause imposes additional restrictions has been less clear.

In deciding *Quill* in 1992, the Supreme Court held that the Dormant Commerce Clause required a remote seller to have a physical presence in the jurisdiction of the state of the customer in order for that state to impose a sales tax collection obligation on the seller. The seller in *Quill* solicited sales from North Dakota customers through mail-order catalogs, and used common carriers for shipping. Following *Quill*, it was an open question whether the physical presence standard should be applied to all manner of state tax obligations, or the holding was limited to only sales tax obligations.

The Supreme Court appeared to limit the applicability of *Quill's* physical presence standard in more recent years to sales tax obligations only. For example, in the late 2000s, the Supreme Court declined to consider appeals of two high-profile state income tax cases that relied on the use of "economic nexus" theories to establish the requisite connection between the state and the seller. The connection in *Tax Comm'r of State of W. Va. v. MBNA America Bank N.A.* involved a taxpayer generating receipts from offering credit cards to in-state residents, and the basis in *Lanco, Inc. v. Division of Taxation* involved an out-of-state taxpayer receiving licensing fees earned from in-state usage. The state supreme courts in West Virginia and New Jersey, respectively, found both of those connections to be sufficient to justify the imposition of an income tax obligation on the out-of-state parties.

The Supreme Court's refusal since then to hear either *MBNA* or *Lanco* on appeal has been interpreted as its acceptance of economic nexus theory in principle, at least with respect to the imposition of a state income tax liability. Still, the *Quill* physical presence standard persisted for sales tax obligations up until last month.

Broadly speaking, the repeal of Quill *means that states are now permitted to impose a sales tax collection obligation on an out-of-state retailer.*

WHAT IS ACTUALLY IN THE *WAYFAIR* DECISION?

Wayfair decided exactly one issue: It repealed *Quill's* physical presence standard as applied to sales tax. The Supreme Court made its determination in the context of a challenge to S.B. No. 106, a South Dakota bill that, among other things, created an economic nexus standard for out-of-state retailers.

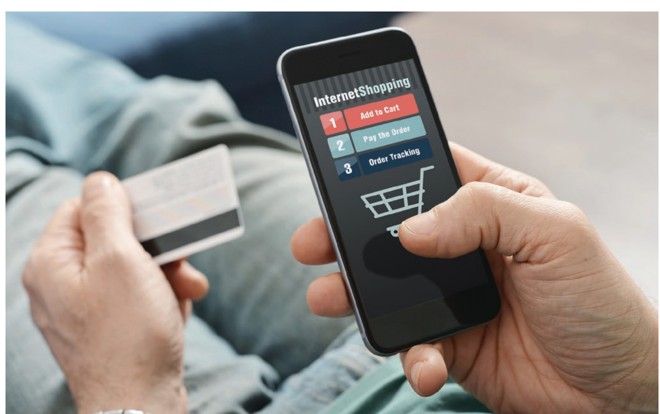
Technically, all other remaining Dormant Commerce Clause challenges to S.B. No. 106 were remanded to courts in South Dakota. As a result, it is theoretically possible, although unlikely, that S.B. No. 106 may ultimately be found unconstitutional on some other ground. I say this outcome is unlikely because the Supreme Court's discussion of S.B. No. 106 appeared to approve of certain features in the statute, especially when considered in the context of South Dakota's overall sales and use tax compliance regime.

S.B. No. 106 imposes a collection and remittance obligation on out-of-state sellers that cross a bright-line sales threshold. The threshold was set at either $100,000 or more in sales or 200 or more separate transactions with South Dakota customers in any given year. The structure of S.B. No. 106 was clearly inspired by various model sales tax nexus proposals that have been floating around in recent years, including the widely discussed federal Marketplace Fairness Act and the Multistate Tax Commission's Sales and Use Tax Nexus Model Statute. It should be noted, however, that the Marketplace Fairness Act set the dollar threshold at a much higher $1,000,000 in sales per year.

The Supreme Court focused on several features of S.B. No. 106 in its review. In particular, four aspects of S.B. No. 106 were identified as supporting its constitutionality: the fact that South Dakota was a member of the Streamlined Sales and Use Tax Agreement, the fact that South Dakota offered free software to out-of-state vendors to assist in meeting their compliance burdens, the fact that the bill prohibited retroactive enforcement, and the fact that enforcement of the bill was stayed until its constitutionality was validated. Whether or not the presence or absence of any one of these features would have impacted the Supreme Court's ultimate finding has yet to be determined, but states at least have fairly strong guidance on best practices for revising their sales tax nexus statutes for remote sellers going forward. In this sense, the case is also a major shot in the arm for the Streamlined Sales and Use Tax Agreement.

THE RUN-UP TO *WAYFAIR* IS ALMOST AS IMPORTANT AS THE ACTUAL DECISION

The Supreme Court's decision to overturn *Quill* needs to be considered in the context of the past two years. As the case made its way up to and past the Supreme Court of South Dakota, approximately 20 states jumped on the bandwagon and passed similar nexus laws for remote sellers. Revenue considerations aside, much of this legislative action was aimed at creating a large



Wayfair decided exactly one issue: It repealed Quill's physical presence standard as applied to sales tax.

enough controversy that the Supreme Court would essentially have to resolve the issue. As a result, with so many states jumping the gun, some uncertainty exists as to exactly what will be tolerated going forward from a constitutional perspective.

For a local example, consider Massachusetts. In 2017, the Massachusetts Department of Revenue issued Directive 17-1, which required internet retailers with sales in excess of $500,000 or 100 or more transactions with delivery to Massachusetts customers during the six-month period ending December 31, 2017, to begin collecting sales. The directive took the position that *Quill* applies to mail-order vendors but does not apply to sales made over the internet because the installation of software on an in-state customer's computer creates a sufficient physical presence. From a constitutional standpoint, the directive was not especially persuasive, but the point was obviously to have some sort of written administrative policy in place in the event *Wayfair* created a surprise opportunity for Massachusetts to begin taxing out-of-state vendors. Less than three months after Directive 17-1 was issued, it was withdrawn in Directive 17-2. Ostensibly, the Massachusetts Department of Revenue repealed Directive 17-1 because the department was aware that it could not make such a significant change in the state's long-standing nexus policy without enacting new statutes or at least engaging in formal administrative rulemaking. However, after a formal notice-and-comment period, the substance of Directive 17-1 was later codified in 830 Code Mass. Regs. 64H.1.7. The Department of Revenue takes the position that the new nexus regulation is effective against internet retailers as of September 22, 2017. It is an open issue whether the roughly nine-month gap between the effective date of the regulation and the *Wayfair* decision will result in liability for internet vendors.

Rhode Island took an approach different from that of Massachusetts, and in 2017 included in its annual budget a series of statutes collectively known as the Non-

Collecting Retailers, Referrers and Retail Sale Facilitators Act which require out-of-state vendors who interact with customers through installed software to report their activities to the Division of Taxation. Borrowing from S.B. No. 106, the reporting standard is inapplicable to out-of-state vendors unless they have sales in excess of $100,000 or 200 or more separate transactions with in-state customers in a given calendar year. Vendors subject to the Act must either register for and begin collecting sales tax, or alternatively agree to provide to customers a series of notices and disclaimers reminding them that they may be liable for use tax on their purchases. Vendors opting for compliance by issuing notices to customers must also report in-state customer data to the Division of Taxation. The reporting framework permits the Division of Taxation to both identify customers that have unreported use tax liability and identify out-of-state vendors that may be taking aggressive nexus positions. The Sale Facilitators Act went into effect on August 17, 2017, and is almost certainly enforceable in light of *Wayfair*.

WHAT IS THE PRACTICAL IMPACT FOR MOST BUSINESSES?

The practical impact of *Wayfair* is that the numerous statutes passed by various states over the past two years now likely have teeth, and taxpayers should expect another round of nexus statutes copying S.B. No. 106 to be forthcoming. For remote sellers operating under the assumption that a state's economic nexus or reporting standard previously was unenforceable, *Wayfair* clearly blows up this assumption.

Harder questions persist concerning the degree to which retroactive liability will be permitted, and what effect membership in the Streamlined Sales and Use Tax Agreement has on an economic nexus standard's constitutionality. On this subject, it is worth pointing out that Rhode Island is currently a full member state of the Streamlined Sales and Use Tax Agreement, and Massachusetts is not.

The big question now is what impact collecting sales tax on out-of-state internet purchases will have on consumer behaviors.

On the plus side, Rhode Islanders may be in for some bonus rate relief. Under R.I. Gen. Laws 44-18-18, the sales tax rate is supposed to drop from 7.0% to 6.5% on all sales "upon passage of any federal law which authorizes states to require remote sellers to collect and remit sales and use taxes. . . ." Although it is unclear whether the rate relief is effective when federal laws change due to judicial action, the underlying rationale behind the lowering of the rate was that if out-of-state vendors were paying their fair share, the burden on local businesses and consumers could be reduced. The Division of Taxation has yet to issue any guidance on this topic, but hopefully it will have some official statement out shortly.

OBVIOUS WINNERS ARE RETAILERS OF BIG-TICKET ITEMS

The big question now is what impact collecting sales tax on out-of-state internet purchases will have on consumer behaviors. One of the historic reasons for keeping *Quill* since the early 2000s was based not on policy but on practicality; this fledgling thing called the internet needed to be free from excessive burdens and regulations so that companies in that space had time to grow and develop. In 2018, a mature internet is clearly upon us.

The Supreme Court discussed at length the reasons for repealing *Quill*, focusing on the unfair advantage remote sellers had in generating sales that were not subject to sales tax. But this remote seller advantage may have been somewhat illusory, as many internet sellers also have additional shipping and logistics costs that functionally operate as taxes, at least from the perspective of consumers. The combination of both shipping and sales tax on certain big-ticket or luxury purchases may consequently create sticker shock. On the other hand, for retailers with significant distribution networks or affiliates already in various states, sales tax was almost certainly already being collected. The *Wayfair* decision should not change this practice.

I suspect that for businesses that rely on customers seeking an absolute lowest price, *Wayfair* will have a measurable impact on whether customers will want to continue bargain hunting on the internet. One need only look at the full list of parties in the *Wayfair* decision, which included online furniture and high-end electronics sellers, to find out which businesses felt they had the most to lose from the abrogation of *Quill.* In any event, the cost difference between local retailers and internet sellers with minimal geographic footprints has been narrowed.

And finally, to the extent that Congress believes the prospect of businesses having to collect sales tax in states where their sales are as low as $100,000 is unpalatable, it retains the power to pass some version of the Marketplace Fairness Act. Whether there is any interest in this area following *Wayfair* has yet to be determined. **FT**

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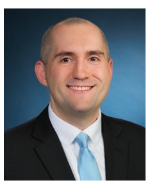
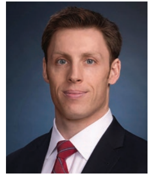


Anthony M. Serdynski, Jr., is an associate who concentrates his practice in residential and commercial real estate financing, land use law, leasing, permitting, and zoning. Anthony garnered his interest in real estate prior to attending law school, when he worked for over five years at a title company, assisting mortgage companies in real estate refinance and purchase transactions. In the summer of 2013, while in law school, he also interned at the Massachusetts Land Court for the Hon. Robert Foster and Recorder Deborah Patterson. Visit FletcherTilton.com/anthony-m-serdynski-jr to read more about Anthony.



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New England's Best Lawyers – 2018 edition was released, and we would like to congratulate the attorneys from Fletcher Tilton who made that prestigious list.

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UPCOMING SEMINARS

ESTATE PLANNING FOR MA-FL SNOWBIRDS

Tues., Aug. 21: 8:30–11:30 a.m.
Speaker: Frederick Misilo, Jr., Esq.
Location: Doubletree by Hilton, Hyannis, MA

ESTATE PLANNING SEMINARS

Speaker: Michael Lahti, Esq.

Tues., Aug. 14: 10 a.m. & 1 p.m.
Location: The Lobster Pot, Bristol, RI

Tues., Sept. 4: 10 a.m. & 1 p.m.
Location: Kirkbrae Country Club, Lincoln, RI

Thur., Sept. 6: 10 a.m. & 1 p.m.
Location: Kirkbrae Country Club, Lincoln, RI

Tues., Sept. 25: 10 a.m. & 1 p.m.
Location: The Connors Center, Dover, MA

SAVE THE DATE:

HOUSING: CREATIVE SOLUTIONS, OPTIONS & CHALLENGES

Sat. Sept. 29: 8:30 a.m.–12:30 p.m.
Speaker: Frederick Misilo, Jr., Esq.
Location: Courtyard Marriott, Marlborough, MA

HOW TO ADMINISTER A SPECIAL NEEDS TRUST

Sat. Oct. 27: 8:00 a.m.–1:30 p.m.
Speakers: Frederick Misilo, Jr., Esq. and Theresa Varnet, Esq.
Location: Courtyard Marriott Marlborough, MA

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