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INSIDE THE LAW

SUMMER 2020

IN THIS ISSUE

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Regulators Loosen Appraisal Standards to Assist Homeowners and Businesses During the COVID-19 Crisis

by Christopher P. Yates, Esq. | 508-532-3524 | cyates@fletchertilton.com

Federal regulators have thrown another lifeline to a slowing housing market by further loosening the rules around appraisals. On April 14, 2020, the Federal Reserve Board (FRB), the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the National Credit Union Administration (NCUA), and the Consumer Financial Protection Bureau (CFPB) issued an interagency statement to defer temporarily the requirement for real estate-related appraisals and evaluations associated with financing existing real estate ("existing" real estate excludes new construction). This move allows regulated institutions to extend funds to creditworthy households and businesses that have a heightened need for additional liquidity due to U.S. economic strains from the declared COVID-19 national emergency.

Link to Press Release:
https://www.fdic.gov/news/news/press/2020/pr20051.html

The joint statement highlights temporary changes to appraisal regulations for certain qualifying loans (including residential properties underwritten by Fannie Mae and Freddie Mac) to address social distancing protocols in various states and cities. The agencies have moved to allow exterior-only appraisals (known as drive-by appraisals) or, in some cases, desktop appraisals, where the appraiser doesn't inspect the property or comparable sales. Instead, the appraiser relies on public records, multiple listing service (MLS) information, and other third-party data sources to identify the property characteristics. There are at least fourteen types of transactions that may qualify for exterior only or desktop appraisals; here are three of the most common:

- Residential real estate transactions of $400,000 or less;
- Commercial real estate transactions of $500,000 or less; and
- Business loans of $1,000,000 or less where the loan is not dependent on other factors for repayment, such as rental income.

The agencies have also issued an interim final rule (IFR), that temporarily allows regulated institutions to close qualified commercial or residential real estate loans without the required appraisal or evaluation, provided that such evaluation or appraisal is completed within a grace period of 120 calendar days following closing. These qualified real estate loans do not include financing in connection with the acquisition, development, or construction of real estate, as these loans present heightened risks not associated with the financing of existing real estate. Refinance transactions, for example, may qualify for exterior only or desktop appraisals if the owner's equity position in the property is great enough to reduce the lender's risk sufficiently.

Institutions are instructed to make best efforts to obtain a credible valuation of real property collateral prior to loan closing, consistent with the underwriting principles in the agencies' Standards for Safety and Soundness and Real Estate Lending Standards. The agencies also expect institutions to develop an appropriate risk mitigation strategy if the appraisal or evaluation ultimately reveals a market value significantly lower than the expected market value.

These temporary provisions will expire on December 31, 2020 (meaning a transaction closed on or before this date is eligible for deferral), unless the deadline is extended by the agencies. The agencies believe that this limited time frame for the deferral will, in some respects, help manage potential risk by balancing the need for immediate relief due to the national emergency, against the safety and soundness concerns for risk to lenders. The regulators conclude the interim final rule by stating that they believe the change will help ensure credit goes to deserving borrowers and protects all involved.

For more details on the specific guidelines and qualifications, please see the Interagency Statement on Appraisals (https://www.fdic.gov/news/news/press/2020/pr20051b.pdf) **FT**

Catching Up On Your Taxes

by Michael P. Duffy, Esq. | 508-459-8043 | mduffy@fletchertilton.com

The reality is once the COVID-19 pandemic finally ends, many individuals and businesses will not have enough capital to pay all their bills. This is especially the case with respect to folks that have fallen behind on their taxes.

Not filing your income tax returns can result in the imposition of costly penalties. Even more penalties may be assessed if an unpaid balance is not paid on time. Coupled with these financial costs is the fact that the IRS and the Massachusetts Department of Revenue (DOR) have expansive collection powers. Owing back taxes can result in liens being filed, bank accounts being levied, wages being garnished, driver's licenses and other professional credentials being cancelled. If you don't come to the table and deal with the government, they can and will take your livelihood from you.

On the other hand, the United States does not send people to jail for not being able to pay their bills. This principle applies even to tax bills. Consequently, the IRS and DOR collection playbooks are grounded by the reality that you can't get blood from a stone. The government will even settle a tax debt for less than the amount owed if the conditions are right.

Below is an outline of key elements of the tax collection process and some guidelines on how to approach resolving back taxes. These guidelines apply whether this is the first year you don't think you'll be able to pay, or the debt is old and you are looking for the resolve to get back on track.

FILING AND PAYMENT DEADLINES EXTENDED

If you are calculating that you have tax liability for a given year and you don't think you'll be able to pay, it is usually advisable to file your tax returns by the due date anyway. The IRS penalty for filing a late income tax return is usually 5% of the amount due per month for each month the return is late. So, if you file four months late and owe $20,000, this results in an automatic $4,000 additional tax penalty. However, if you file on time, but pay late, the penalty is only 0.5% per month of the amount due. In this case, filing on time and paying four months late results in a penalty of only $400. Simply put, there is usually no good reason to increase the amount of penalties assessed by filing late.

For individuals and businesses concerned that they won't be able to pay their 2019 taxes, you have surely already heard there is some good news. The IRS and Department of Treasury have extended the filing deadlines for 2019 individual, trust and estate, and corporate income tax returns from April 15 to July 15. The deadline to pay taxes reported on these types of returns has also been extended to July 15, as has the deadline for reporting and paying quarterly estimated tax payments due in the 2020 tax year. The extension of these deadlines gives folks more time to figure out their actual tax liability and get the necessary funds together.

For taxpayers already behind on their taxes, the IRS announced in late March that it is pausing most collection activities until after July 15, 2020. Accordingly, the IRS will not be imposing any automated liens or levies at this time, nor will the IRS be taking any action concerning liens or levies already in place. For folks currently paying the IRS under an installment plan, all payments due under the agreement from April 1 through July 15, 2020 are suspended.

MAKE A DEAL TO AVOID COLLECTIONS

Both the IRS and DOR have broad powers to collect taxes. Usually the first action taken against a taxpayer who owes back taxes is that liens will be filed. The liens let other creditors know the taxpayer owes back taxes and potentially gives the IRS the right to foreclose on property. It is rare for the IRS to initiate foreclosure proceedings, however. Typically, getting hit with tax liens causes a 120-point drop in the taxpayer's credit score. The IRS and DOR will then consider more serious collection actions if the taxpayer does not come forward and attempt to work out a resolution. These actions can include co-opting employers to garnish the taxpayer's wages or directing third parties, who owe funds to the taxpayer, to pay these funds to the government instead.

Probably the most invasive action that the IRS and the DOR can take is a general levy of the taxpayer's bank accounts. The government does this by sending a request to the taxpayer's bank and forcibly withdrawing funds from the account to apply towards the tax debt. This is almost certainly one of the most traumatic things that can happen to a taxpayer who now may be facing the prospect of bounced rent checks or other cascading defaults as a result of the withdrawals.

Even though the government has extremely powerful collection tools, it will agree to not use its most coercive methods against taxpayers who voluntarily come forward and negotiate an installment plan or settlement offer. Furthermore, if a taxpayer comes forward and demonstrates a current inability to pay anything toward their back taxes, the government has the power to put the taxpayer into a "currently not collectible" status that will buy them time to get liquid. The caveat to these types of arrangements is that the government doesn't put itself last in terms of what expenses come before the tax debt. For taxpayers with out-of-control spending, their definition of a reasonable offer may differ dramatically from the government's.

COLLECTIONS CAN'T LAST FOREVER

One of the main sources of leverage taxpayers have in collections is the fact that the government's power to collect taxes *usually* does not last forever. We frequently meet with clients who are shocked to learn that the IRS typically has only ten years to collect back taxes. After this ten-year period is over, the debt is unenforceable and uncollectible. If the IRS has taken the step of putting liens on the taxpayer's property – which is usually standard operating procedure when $10,000 or more is owed – the liens become unenforceable once the ten-year collection period ends. The fact that the IRS can't collect taxes forever means the government is incentivized in certain circumstances to bargain down the total amount of tax due and settle with the taxpayer for less than what is owed.

The collections rules in Massachusetts are less taxpayer-favorable. As is the case with federal tax debt, tax debt in the Commonwealth may only be collected against a person during a ten-year, post-assessment collection period. If, however, during the ten-year period the Massachusetts DOR also files a lien on the taxpayer's property, the lien can be enforced past the expiration of the normal collections period. For this reason, the Massachusetts DOR has less incentive to compromise taxes owed by taxpayers who also have significant property holdings. The Massachusetts DOR will also normally ask that taxpayers agree to extend the ten-year collections period when they enter into an installment agreement. In contrast, the IRS rarely asks taxpayers to extend the ten-year collections period.

YOU CAN SETTLE OLD TAX DEBT FOR LESS THAN THE FULL AMOUNT

If you've ever been up at 3:00 am watching TV, you may have stumbled upon an infomercial starring somebody claiming to be a "tax guru" who can help you settle with the IRS for "ten cents on the dollar (or even less!)." Although it is important to point out a number of these self-proclaimed gurus have ended up in jail over the years, the underlying pitch is actually true: the IRS can settle with taxpayers for an amount that is less than legally owed.

> **The IRS can settle with taxpayers for an amount that is less than legally owed.**

First, if a taxpayer is on an installment plan, the plan payment amount is already based on the taxpayer's ability to pay rather than the amount of outstanding debt. The IRS can and will take partial payment installment plan offers from taxpayers in cases where the ten-year collections period will expire before all the tax is paid. When a taxpayer makes an offer for a partial payment installment plan, the offer will usually be evaluated with greater scrutiny than an installment offer that will fully pay the total outstanding taxes. But, all else being equal, the IRS would prefer to get something from a voluntarily complying taxpayer rather than play hardball.

The IRS also has the authority to fully settle a tax debt before the expiration of the ten-year period for either a lump sum or a shortened payment plan. This settlement process is called an "Offer in Compromise," and can be an extremely good deal for taxpayers under the right circumstances. Making an Offer in Compromise requires the taxpayer to disclose his or her available equity and future earnings power and propose a settlement amount. If a lump sum offer is made, a nonrefundable down payment must also be submitted with the initial offer proposal. The IRS then reviews the numbers and uses a complex formula to determine whether the offer meets its internal guidelines relative to the taxpayer's ability to pay. If the taxpayer's offer meets these guidelines, the IRS is inclined to settle the full amount due for the amount offered.

The Offer in Compromise "gurus" tend to get into trouble when they make promises to taxpayers before really diving into the particularities of each case. For example, many folks owing back taxes aren't even eligible for an Offer in Compromise because they have unsustainable spending habits, have unrealistic expectations as to what is considered "fair," or are still out of compliance. On the other hand, a qualified professional will not prepare and submit an Offer in Compromise unless he or she knows it meets the IRS guidelines and has a high probability of being accepted.

Lastly, for some taxpayers that owe back taxes to the IRS or Massachusetts DOR, bankruptcy may be a viable option. Some back taxes can be discharged in bankruptcy, although the process for determining if this is possible is very complicated. We always recommend a full bankruptcy analysis be done by a bankruptcy attorney, although we can advise clients as to whether their tax debts are eligible.

WHERE DO WE COME IN?

Our Tax Practice has experience with all available workout options. We advise clients on the best approach they should take to minimize penalties and interest in the event they will not be able to pay in full when their tax returns are prepared. We can then assist clients with cleaning up old liabilities by getting favorable installment arrangements in place, evaluating bankruptcy potential and, if appropriate, making an Offer in Compromise. Where we excel is right-sizing the work we propose by evaluating a client's facts before we commit to a particular course of action.

Although these are troubling times, a trusted advisor can still help clients make the right choices to minimize the damage and plan for success. **FT**

Civil Litigation Basics
Rolling Out the Big Guns: Expert Witnesses

by Michael E. Brangwynne, Esq. | 617-336-2281 | mbrangwynne@fletchertilton.com

This is the third installment in a series about the basics of the civil litigation process. If you are interested in reading the first two articles, they are available on Fletcher Tilton's website under the Knowledge Library.

FACT VS. OPINION TESTIMONY

At trial, witness testimony can essentially be broken down into two categories: fact testimony and opinion testimony. Our court system favors percipient witnesses that have firsthand knowledge of the facts about which they are to testify – i.e. things that they personally saw, heard or otherwise perceived - which falls under factual testimony.

For example, if we consider a construction defect lawsuit in which the plaintiff-owner has brought a claim against a defendant-contractor for allegedly defective construction work, a bystander witness at the job site would be permitted to testify that he observed a certain subcontractor pouring concrete foundation on a particular date and time at a particular location.

A different question is whether to allow witnesses at trial to express the opinions they have formed as a result of their own personal observations. Generally, the rule is that a witness may testify as to opinions that he has formed where the opinions are based on the witness's own perception of the facts at issue, will be helpful to the jury in understanding the witness's testimony, and are not based on scientific, technical or other specialized knowledge. This is called lay opinion testimony, because it involves topics upon which an average person walking down the street would be capable of giving an opinion.

In the same construction defect action described above, our bystander would likely be permitted to testify that, based on his personal observations that the subcontractor smelled of alcohol, had glassy eyes and was off-balance, it was the witness's opinion that the subcontractor was drunk while pouring the foundation. This would be permitted because an average person is capable of detecting whether another person is three sheets to the wind – the opinion does not require any specialized knowledge outside of everyday experience.

It would be a different story, however, if our bystander were to testify that, based on the color of the concrete, its viscosity and the way in which it settled after being poured by the subcontractor, it was his opinion that the concrete had been mixed incorrectly for the application. Such an opinion would require specialized knowledge in the fields of construction and masonry – and therefore would fall under the category of expert opinion.

In order to offer such evidence at trial, the party seeking to admit the expert opinion testimony must establish a foundation (sorry, I couldn't resist) that the witness is qualified, through his education, training or experience, to give an opinion on the topic at hand. Importantly, if the expert is shown to be properly qualified, he would not need to have perceived the concrete being poured himself to offer an opinion – he can form his opinion based on the facts presented by percipient witnesses and other evidence.

EXPERT WITNESSES

Because lawsuits can frequently involve complicated medical, technical or scientific issues, it often becomes necessary during the discovery stage – due to the evidentiary rules discussed above – for the parties to retain experts in a particular field who may serve as expert witnesses at trial. Under the rules of discovery, each party must disclose to the other parties the identity of any expert witnesses that may be called at trial, the subject matter on which the expert is expected to testify, all facts and opinions on which the expert is expected to testify, and a summary of the grounds for each opinion.

Expert retention and disclosure can be a critical step in proving one's claims. For example, if a defendant-contractor asserts as a defense that he precisely followed the instructions, plans and drawings provided by the owner's architect – and therefore any defects in the construction work are the fault of the architect – he will likely need to retain an expert witness with training and specialized knowledge in the field of architecture that will be permitted to testify as to his opinions on how the drawings were flawed and resulted in the defects to the project.

Expert disclosures are generally one of the final pieces of discovery exchanged between the parties. Once the asserted facts and opinions of each party have been disclosed to the other parties, all that remains is resolution of the dispute. This is most often accomplished through mediation, arbitration or trial. **FT**

Civil Litigation Basics - Negotiating an Armistice

by Michael E. Brangwynne, Esq. | 617-336-2281 | mbrangwynne@fletchertilton.com

This is the fourth installment in a series about the basics of the civil litigation process. If you are interested in reading the first three installments, they are available on Fletcher Tilton's website under the Knowledge Library.

ADR: ALTERNATIVE DISPUTE RESOLUTION

As we discussed in the first article of this series, civil litigation at its core is a process for resolving legal disputes between two or more parties. United States citizens have a constitutionally protected right to access to the judicial system as a default method for resolving such disputes. That is not to say, however, that the parties cannot by agreement choose a different method – other than proceeding through the court system and a trial – by which to resolve their disputes. This is generally referred to as alternative dispute resolution, or ADR, and it typically takes one of three forms: informal settlement negotiations, mediation, or arbitration.

NEGOTIATION

The British poet George Herbert wrote that "a lean compromise is better than a fat lawsuit." Indeed, mounting legal fees, costs, disruption to business and the uncertainty of victory can lead even the most stalwart litigant to the bargaining table. There should be no indignity attached to what can often be a pragmatic decision.

The simplest form of ADR is picking up the phone and calling your adversary. Assuming a lawsuit has already been threatened or filed, this is best accomplished lawyer to lawyer. While direct settlement communications between the parties themselves are not prohibited, such communications are generally ill-advised, as it is possible that a party might inadvertently bind himself to a settlement agreement without a proper consideration or inclusion of all the necessary terms.

Settlement negotiations can take place at any time, and it is not uncommon for settlement agreements to be reached before a lawsuit is filed, at the close of discovery, on the courthouse steps during trial, or even after a jury has returned with a verdict in favor of one of the parties (typically to avoid an appeal). Once the terms of the settlement are agreed upon, the settlement is committed to a written settlement agreement and release of claims, which is an enforceable contract between the parties and a bar to future litigation based on the claims that gave rise to the lawsuit.

Settlement negotiations can take place at any time, and it is not uncommon for settlement agreements to be reached before a lawsuit is filed...

MEDIATION

Mediation is a more formalized settlement negotiation process at which the parties present their respective claims and defenses to a neutral third party, called a mediator, who is meant to assist the parties in reaching a reasonable settlement agreement. The involvement of a mediator – typically a lawyer, former judge or other professional with a background in the subject matter of the lawsuit – can prove helpful in quelling fevered emotions and providing an unbiased assessment to each party of the strengths and weaknesses of their claims, and of the settlement value of the case.

Importantly, the mediator does not have the authority to decide the outcome of the dispute. He can assist the parties in coming to an agreement, but at the end of the day, if the parties have reached an impasse, they will go their separate ways and the dispute will continue through the civil litigation process.

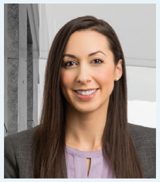
ARBITRATION

A third ADR is arbitration, wherein the parties submit their dispute to the authority of one or more arbitrators. The arbitrator is agreed upon and compensated by the parties and is often selected for his expertise in a particular field – for example the parties to a construction dispute could select an arbitrator with a background in the construction industry. The arbitrator assumes the role of both judge and jury and issues a decision that is binding on the parties. If one of the parties refuses to abide by the arbitrator's decision, the aggrieved party can file a simple action in court seeking enforcement of the arbitrator's decision.

Settlement, mediation and arbitration are always worth considering, and each has its advantages and disadvantages. If a dispute is not resolved through one of these alternative methods, then the parties are left with the default method – a trial on the merits. **FT**

The Importance of a Healthcare Proxy in Times of Crisis

by Lauren E. Miller, Esq. | 508-459-8044 | lmiller@fletchertilton.com



In times of crisis, it is of paramount importance to have proper documents in place in the event that you fall seriously ill. A health care proxy is a legal document in which you to designate an agent to make medical decisions on your behalf if you become incapacitated. Oftentimes a health care proxy will include a place for you to outline your wishes regarding medical treatment preferences and end of life decisions, which is helpful guidance to your agent who may be faced with difficult decisions. Another important document that works in conjunction with the health care proxy is a HIPAA release, which allows your health care agent to access your medical records.

If you become incapacitated without these documents in place, your loved ones will be left with no option except to file a petition in the probate court to become your legal guardian. The guardianship process can be time intensive, expensive and stressful for families who are already dealing with a difficult situation. Depending on the nature of the emergency, getting the proper guardianship authority in place to make all necessary decisions may take several hearings. In addition, any court proceeding requires giving notice to interested parties, which leaves the door open for objections, conflict, and further delays. By executing a health care proxy and HIPAA release prior to any medical emergency, you have the opportunity to name an agent, alternates, and outline your wishes. **FT**

FIRM NEWS

FLETCHER TILTON VOTED THE WINNER in the category of **Special Needs Legal Assistance** by the readers of *Boston Parents Paper*.

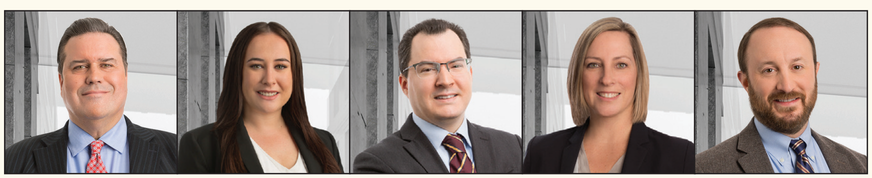
See the 2020 Family Favorites Reader's Choice awards in the August issue of *Boston Parents*.

ATTORNEY MICHAEL T. LAHTI, Chair of the Elder Law group, is recognized by *Rhode Island Monthly* for **Excellence in Law** in their May/June 2020 issue.

STEPPING UP IN A CRISIS

Fletcher Tilton attorneys inform clients about new COVID legislation. See their articles on FIRM NEWS at FletcherTilton.com:

- **Joseph T. Bartulis, Jr.**, Chair of the Labor & Employment Group: Families First, CARES Acts and more for employers
- **Elena J. Despotopulos**, Attorney in the Transactional Group: The CARES Act for business owners
- **Michael P. Duffy**, Tax Attorney: The Stimulus Bill tax relief for businesses
- **Meredith H. Greene**, Chair of the Special Needs Practice Group: alerts about Economic Impact Payments for recipients of government benefits
- **Brian J. Coughlin**, Immigration Attorney: U.S. Immigration Updates Related to COVID-19



Joseph Bartulis, Jr. | Elena Despotopulos | Michael Duffy | Meredith Greene | Brian Coughlin

SEMINARS/WEBINARS

For all events *not* listed as LIVE WEBINAR, formats will be determined at least 30 days prior, as regulations evolve. Please check website for updates and details.

Estate Planning with attorney Michael Lahti

Tues., July 28, 2020 | 10:00 a.m.-11:30 a.m. | LIVE WEBINAR
Tues., August 11, 2020 | 10:00 a.m.-11:30 p.m. | LIVE WEBINAR
Tues., September 1, 2020 | 10:00 a.m. & 1:00 p.m. | Bristol, RI
Tues., September 22, 2020 | 10:00 a.m. & 1:00 p.m. | Lincoln, RI
Tues., October 13, 2020 | 10:00 a.m. & 1:00 p.m. | Hyannis, MA
Wed., November 4, 2020 | 10:00 a.m. & 1:00 p.m. | Warwick, RI

Estate Planning for MA-FL Snowbirds with attorney Michael Lahti

Tues., August 25, 2020 | 10:00-11:30 a.m. | LIVE WEBINAR

Housing & Supported Decision-Making with attorneys Frederick Misilo, Jr., Meredith Greene and Theresa Varnet

Wed., September 30, 2020 | 6:00-8:00 p.m. | LIVE WEBINAR

Employment Law with attorney Joseph T. Bartulis, Jr.

Wed., October 7, 2020 | 8:30-10:30 a.m. | Framingham, MA
Thurs., October 15, 2020 | 8:30-10:30 a.m. | Boylston, MA

How to Administer a Special Needs Trust with Fletcher Tilton's Special Needs Practice Group

Sat., November 7, 2020 | 8:00 a.m.-1:30 p.m. | Marlborough, MA

For details and registration, visit FletcherTilton.com/seminars-events

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