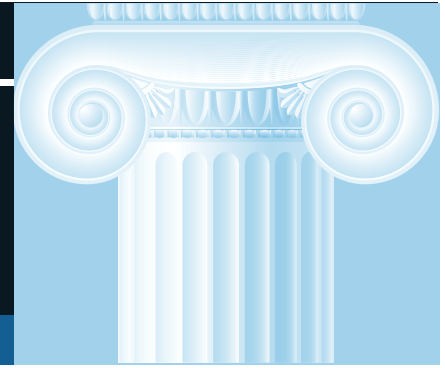


# Legal Notes



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### { *Managing Partner's Message:* }

## CLIENT SERVICE OFFERINGS CONTINUE TO EXPAND IN 2014

This year is shaping up to be another exciting time for Blustein, Shapiro, Rich & Barone, LLP.

But before I share our most recent news, I would like to begin by saying Thank You to all of our clients for our continued success and growth in 2013. All of the major practice groups – transactional law, estate planning, and commercial litigation – enjoyed positive outcomes and accomplishments on behalf of our clients.

Now, as we enter a new year, the demand for our services continues to increase. In response, we have made several targeted hires to expand our ability to serve the needs of our existing and future clients in the Hudson Valley.

Last February, **Marcello Cirigliano** joined BSR&B in our commercial litigation department after serving in the Orange County District Attorney's Office. Marcello's experience as a former prosecutor and a trial attorney will assist Litigation Partner Tad Barone in the continued growth of our personal injury practice.

In August **Diana Puglisi** joined BSR&B in our transactional practice. Diana worked for several years in private practice in Queens before moving to Orange County. She has been a great help with our builder clients as we close new construction deals. Diana has also been handling the majority of our residential sale or purchase transactions, as well as commercial refinances on behalf of the many lenders we represent.

And most recently, we were excited to welcome **William A. Frank** to BSR&B as another lateral hire. Will handles commercial transactions for a local bank and currently represents the municipalities of the Town of Walkill and Village of Unionville. With his knowledge and particular experience in municipal law, we will be expanding our core practice areas to include the representation of local municipalities. In addition to general advice to town and village boards, Will also assists with their employment matters including collective bargaining and disciplinary hearings. Additionally, Jay Myrow has been appointed by the Town of Warwick as Special Counsel. I expect that with our increased capabilities and our reputation within the community, this practice area will continue to grow as municipalities face ever more complex legal issues.

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All signs point to an improving economy in Hudson Valley area, with several major projects starting or on the immediate horizon in Orange County and neighboring counties. Many of these projects will create well-paying jobs for our region. As we start the year, we are experiencing a definite uptick in optimism and activity in the purchasing and selling of commercial real estate (both existing buildings and vacant land); a similar uptick is being noted in leasing by landlords and tenants. Our residential development clients are more optimistic heading into this year than they have for several years.

Again, thank you for allowing BSR&B to serve your legal needs. We look forward to the continued opportunity to be of service to you in 2014 and the years to come.

Michael S. Blustein, J.D.  
Managing Partner  
[mblustein@mid-hudsonlaw.com](mailto:mblustein@mid-hudsonlaw.com)

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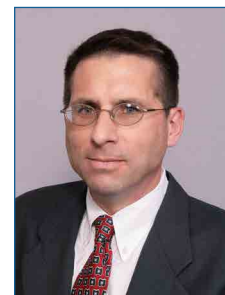
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## FRANCHISES: WHAT YOU NEED TO KNOW BEFORE TAKING THE PLUNGE

By Gardiner S. Barone, J.D.  
[gbarone@mid-hudsonlaw.com](mailto:gbarone@mid-hudsonlaw.com)



In good times and bad, franchises have historically offered a proven business model for people eager to own and run their own business. Still, while many people turn to owning a franchise as an alternative to the uncertainty of working for a corporation that may lay off employees or move its operations offshore, the grass isn't always greener on the other side.

The trick is to find a franchise that is right for you and to understand the pitfalls and restrictions imposed by a franchise system.

At the heart of the franchise system is the **Franchise Licensing Agreement ("FLA")**. This is the legal document that spells out your rights and obligations as a franchisee of a franchise system. Typically, the FLA is non-negotiable and imposes substantial limitations on how you run "your business." Before buying a franchise and entering into a FLA with the franchisor, it is important to understand the most common pitfalls to FLAs.

### >> FLAs are full of "must-dos" and "can't-dos."

When you buy a franchise, you're not only buying the right to use the franchisor's name, you're buying its business model as well. Most franchisors impose price, appearance, and operation standards that limit how you can operate the franchise. While these standards can help promote uniformity across the franchise brand, such that all McDonald's® burgers are prepared and served the same, they also impose seemingly rigid requirements that you need to adhere to in the operation of "your business."

Just like McDonald's®, any good franchise company has developed a method of doing business that works well and produces successful results. This should be evident to you in your first reading of the FLA. You will not only see that the FLA contains a lot of rules, but it also will refer to "Franchise Standards" and "System Manuals" that contain even more detailed rules and procedures you must adhere to in the operation of "your business." **The virtue of these rules and standards is they have a proven track record of success for the franchise system you want to become part of.**

However, the failure to operate "your business" in accordance with these rules is often an "event of default" that entitles the franchisor to terminate your franchise. While that may seem like a harsh remedy, enforcement of the rules and standards promotes uniformity across the franchise brand, which is what

the consumer expects. The "can't-dos" are in place to protect you and other franchisees in the system from deterioration of the uniformity of the franchise brand by other rogue franchisees.

While consistency in the franchise brand is to every franchisee's benefit, there are also downsides to the rigid application of franchise standards. For a franchisee who sees the opportunity to own and run his/her own business, it's important to remember that this uniform standard through the "must dos" and "can't-dos" in a FLA will likely be substantial limitations on your ability to personalize "your business."

### >> **FLAs are typically non-negotiable.**

Because the foundation of a strong franchise company is uniformity across the brand and the goal of generating the same customer experience regardless of where they purchase their BigMac®, the **means and methods of operating a particular franchise are typically non-negotiable.**

Most franchisors also consider the legal terms and conditions of the FLA to be non-negotiable, even if these terms and conditions do not relate to the means and methods of the franchise system and will not affect the day-to-day running of "your business." **Liquidated damages clauses and covenants not to compete** are two of the elements of a FLA that are presented as "non-negotiable."

A liquidated damages clause is the provision in the FLA that spells out the monetary damages you have to pay the franchisor in the event you commit an event of default and the FLA is terminated by the franchisor.

A covenant not to compete is the provision in the FLA that prohibits you from engaging in the same or substantially the same enterprise as the franchise after the FLA is terminated. In many instances, the covenant not to compete obligates the franchisee to take a legal "holiday" for three to five years, yet the franchisee remains obligated by the liquidated damages clause to pay damages to equivalent to several years' worth of royalty payments under the FLA. In short, on the one hand, you can't compete; but on the other hand, you have to pay as if you were competing.

Because of the seemingly punitive operation of the covenant not to compete and the liquidated damages clause, it is important that you fully understand these provisions before you sign the FLA. **Often, an attorney experienced in franchise litigation can assist you in effectively negotiating more favorable terms before you sign the FLA. Therefore, before signing a FLA, you should seek advice from a qualified attorney.**

#### GLOSSARY

**Franchise Licensing Agreement ("FLA"):** a legal document that spells out your rights and obligations as a franchisee of a franchise system

**Liquidated Damages Clause:** a provision in an FLA that spells out the monetary damages a franchisee has to pay the franchisor in the event the franchisee commits an event of default, and the FLA is terminated by the franchisor

## SUPPLEMENTAL NEEDS TRUSTS FOR THE DISABLED

By *Richard J. Shapiro, J.D.*  
[rshapiro@mid-hudsonlaw.com](mailto:rshapiro@mid-hudsonlaw.com)



With over 43 million people suffering from some form of disability in the United States, many people face the difficult challenge of assisting a disabled child or grandchild. A dilemma often arises where the parent or grandparent would like to help enhance a loved one's quality of life, but not at the expense of disqualifying either themselves or the disabled person from eligibility for governmental programs such as Medicaid and Supplemental Security Income (SSI). Fortunately, we have at our disposal a planning tool called the Supplemental Needs Trust (SNT).

There are two basic types of SNT's:

1. A "third party" SNT established and funded by a person who does not have a legal duty to support a person with a disability (i.e., a disabled adult child or a grandchild); and
2. A "self-settled" SNT funded with the disabled person's own assets and/or income.

These trusts are specifically authorized in New York under Estates, Powers and Trust Law §7-1.12.

With a typical third party SNT, all distributions from the trust are made in the sole discretion of the Trustee (who is often the person who established and provided the assets for the trust), and are usually paid to third-party providers of services to the disabled beneficiary. If distributions are made directly to the beneficiary, such distributions may reduce or disqualify the beneficiary from SSI, Medicaid, and other "means-tested" government programs.

Third-party SNT's may be created either during the parent or grandparent's lifetime (called an inter vivos SNT), or as part of their will or revocable trust, where the SNT "springs" into effect after the parent or grandparent's death (called a testamentary SNT). Be aware that lifetime transfers into a **third-party SNT will not qualify for the annual \$14,000 gift exclusion** and will utilize a portion of the trustmaker's \$5,340,000 gift tax exemption. However, gifts made to a third party SNT for the benefit of a disabled child or grandchild will not result in the imposition of a Medicaid "penalty period" for the parent or grandparent making such a gift, even if made within the five-year Medicaid "look back" period.

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An additional benefit of a third-party SNT is that the state has no right to recover any of the assets in the trust remaining after the death of the beneficiary. All such assets may be left to other children, grandchildren, or any other beneficiaries selected by the trustmaker.

A self-settled SNT operates much like a third-party SNT (i.e., the Trustee retains complete discretion to make distributions of principal or income to or for the benefit of the beneficiary), but the assets funded into the trust come from the disabled beneficiary him or herself. Such trusts are often funded with settlement proceeds from a personal injury or similar lawsuit. Or, a disabled beneficiary who is able to work may divert income above the Medicaid allowable level into a self-settled SNT to retain eligibility for Medicaid and SSI. Be aware, however, that use of a self-settled SNT is only viable in New York if funded before the beneficiary turns 65; if used for a beneficiary over 65, the trust assets would be considered countable resources in determining the beneficiary's eligibility for Medicaid.

**A fundamental difference between the third-party SNT and a self-settled SNT is that the latter must include a "Medicaid payback" provision.** That is, upon the death of the beneficiary, the local Medicaid agency must first be repaid from the trust proceeds in an amount up to the amount of the benefits provided to the beneficiary during his or her lifetime. Assets that remain in the trust after the Medicaid payback, if any, may be left to other beneficiaries.

Also, under present law, a self-settled SNT can only be created by a beneficiary's parent, grandparent, guardian, or a court, even if the beneficiary is an adult and otherwise competent to execute a trust agreement. **There is pending proposed legislation in Congress that would amend the law to allow competent disabled adults to create and execute their own self-settled SNT's.**

SNT's can be extremely beneficial to families facing the already difficult prospect of assisting a loved-one with beneficiaries. **Because of the specific legal requirements for establishing and maintaining SNT's, an experienced elder law and special needs attorney should be consulted to assist with this important planning tool.**

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## Firm Highlights



### BSR&B EXPANDS MUNICIPAL LAW PRACTICE BY WELCOMING ATTORNEY WILLIAM A. FRANK

BSR&B is pleased to welcome William A. Frank to its team of accomplished lawyers. Frank, a graduate of Albany State University and St. John's University School of Law, will spearhead the firm's formal expansion of its Municipal Law department. His legal expertise also includes banking, commercial transactions, real estate, and litigation.

Frank joins the firm after working in another regional firm for nearly a decade, the past six years as a partner. Prior to practicing law in the Hudson Valley, Frank worked as an attorney in New York City for 12 years and in Great Neck for three years. Frank has also been the primary attorney representing the Town of Walkill for the last several years.

Frank has been a mediator for the U.S. District Court, Southern District of New York, for the past decade, and an arbitrator for Legal Fee Disputes in the New York State Supreme Court, Ninth Judicial District, for five years. This year, he has spoken at both the Association of Towns and Cities regarding Municipal Budget Preparation, and the National Business Institute: Recent Developments in Municipal Law. He is scheduled to speak at an upcoming municipal law seminar for the National Business Institute in early 2014.

BSR&B Attorney **Austin DuBois** represented a client who, despite his New Jersey residency, was being charged with over \$60,000 in property taxes from the state of New York. The client had moved to New Jersey and filed for residency in 2009. Thanks to DuBois, the assessment was cancelled.



BSR&B Partner **Richard Shapiro** is now a proud member of the Orange Regional Medical Center Planned Giving Committee. The committee is responsible for promoting planned giving through lifetime gifts and testamentary bequests, and educating the public about how to make planned gifts to the hospital.



Mr. Shapiro, who specializes in elder law and estate planning, is also a member of the Community Foundation of Orange and Sullivan Counties' Board of Directors, as well as a member of its Professional Advisors Council.