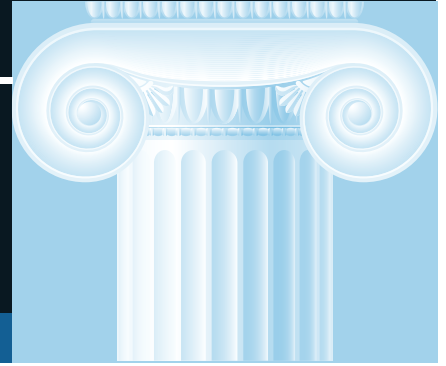


# Legal Notes



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- **CLOSEST TO THE PIN FOR INSPIRE**

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## BLUSTEIN, SHAPIRO, RICH & BARONE, LLP

ATTORNEYS AT LAW

### NEW OFFICE. FAMILIAR FACE.

We are extremely pleased to announce that we have opened a second office in the heart of Warwick, at 21 Oakland Avenue. Helping to support our expansion is our newest team member, Jeanine Garritano Wadeson!

To foster the expansion with Ms. Wadeson will be BSR&B Partner Jay Myrow. Ms. Wadeson, the sitting Village of Warwick justice, and Mr. Myrow, an attorney for the Town of Warwick and a former Village of Warwick justice, are long-time Warwick residents.

“This expansion will offer residents and businesses in the Warwick Valley region access to a full-service law firm to handle all their legal needs,” said BSR&B Managing Partner Michael Blustein. “We’re thrilled to be able to open this office and make available to the Warwick market all of our attorneys’ expertise.”

Ms. Wadeson, a graduate from Nazareth College of Rochester and Fordham University’s School of Law, has practiced law in Orange County for 18 years. She has served as Deputy Corporation Counsel for the City of Port Jervis and as the Zoning Board of Appeals attorney for the Town of Chester. Ms. Wadeson has extensive experience in the administration of trusts and estates and both residential and commercial real estate acquisitions and financing.

“With the addition of Jeanine’s legal expertise and our local ties, the timing couldn’t have been better to answer the demand that we know exists in the region,” said Mr. Myrow.



Ms. Wadeson is the current and past president of the Park Avenue Elementary School PTA, a past member of the Museum Village Board of Trustees, and a member of the New York State and Orange County Bar Associations.

“I’ve been interested in expanding more deeply into estate planning, so I couldn’t pass up the opportunity to work with one of Hudson Valley’s best estate planning teams, led by Partner Richard Shapiro,” Ms. Wadeson said. “To know that I’ve got the support of 13 other attorneys, all of whom are at the top of their respective practice areas, only makes this journey more exciting.”

## SAVE THE DATE!

JOIN US FOR THE OFFICIAL RIBBON  
CUTTING & OPEN HOUSE

TUESDAY, JULY 8, 2014

Blustein, Shapiro, Rich & Barone’s  
New Warwick Location

21 Oakland Avenue

4:30 p.m. - 6:30 p.m.

Refreshments will be served.

Please RSVP to [receptionist@mid-hudsonlaw.com](mailto:receptionist@mid-hudsonlaw.com)  
or call Kim at 845.291.0011.



# MEDICAL DEVICE RECALLS: WHAT YOU NEED TO KNOW

By Lauren E. Nelson, J.D.  
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After tracking annual medical device recalls from 2003 to 2012, the U.S. Food and Drug Administration (FDA) published a report at the end of March 2014 stating that the number of medical device recalls has nearly doubled over the past decade. Within these numbers, 57 of the recalls in 2012 were classified as Class I recalls, up from seven in 2003.

## What is a medical device recall?

A recall is generally a **voluntary action taken by a company to remove or correct a problem in a currently marketed medical device when it violates FDA law.** Recalls occur when a medical device is defective, when it could be a risk to health of the public, or some combination of the two. In most cases, the recalling party is the manufacturer, distributor, or some other responsible party, although in some instances, the FDA can require a company to recall a medical device. A recall can either be to correct a product that is currently used in the medical device market or it can remove the device from the market.

## What is a Class I recall?

The FDA assigns a classification to every medical device recall that indicates the relative degree of risk to public health. The three levels of classification are Class I, Class II, or Class III. **A Class I recall is considered the most serious and describes a “situation in which there is a reasonable probability that the use of, or exposure to, a violative product will cause serious adverse health consequences or death.”**

## Two Examples of Class I Recalls:

- **DePuy Hip Replacement:** In August 2010, the DePuy ASR XL Acetabular System and ASR Hip Resurfacing System were both recalled by their manufacturer DePuySynthes, a subsidiary company of Johnson & Johnson. Both systems incorporate two components which replicate the natural ball-and-socket design: a metal ball with a stem is affixed to the thigh bone (femur) and the socket, which sits adjacent to the pelvic bone. The socket is formed with a titanium shell lined with polyethylene, as titanium is often used to fuse implants to bone due to its porous nature, through a process called osseointegration. It was discovered that some mineral-based oils used as lubricants during the manufacturing process leaked into the porous titanium and therefore prevented the shell from bonding to the bone. The failure of the titanium shell to bond to the bone has caused the shells to loosen and shift, causing scar tissue, pain, and permanent bone loss for some patients. This failure to adhere occurs even in devices that were properly implanted. This defect in the design and manufacturing of the product led to its recall.

Some common symptoms experienced by patients with this defective shell included:

- Pain when rising from a seated position
- Pain in the groin and inner thigh
- Weight-bearing pain, particularly in the buttocks

Patients who have undergone hip replacement surgery are encouraged to schedule an appointment with their physician to determine if their orthopedic implant is one of the models recalled. While physicians may skillfully assess the situation, and suggest if any damage has occurred due to a faulty medical device, only a lawyer can help you determine if compensation may be available.

- **Kugel Mesh Patch:** The Composix Kugel Mesh Patch was recalled in December 2005. Pursuant to the recall notice issued by the FDA, **“Patients who have been implanted with a Composix Kugel Mesh Patch during hernia surgery should seek medical attention immediately if they experience symptoms that could be associated with ring breakage[,]”** such as unexplained or persistent abdominal pain, fever, tenderness at the implant site, or other unusual symptoms. The Mesh Patch was designed to aid in the repair of ventral hernias caused by the thinning or stretching of scar tissue that forms after hernia surgery, but has proven to be defective. During a hernia surgery, the folded patch is placed behind the hernia through a small incision. The patch is then held open by a “memory recoil ring” that allows the patch to unfold once inside the body and lay flat. However, **the “memory recoil ring” was discovered to break under the stress of placement of the large sized products in the belly area, leading to bowel ruptures and/or chronic intestinal fistulae.**

**If you or someone close to you has suffered a serious injury due to a defective medical device, you may be able to pursue compensation from the manufacturer of the device. Defective medical device cases are complex and should be trusted to an experienced attorney.**

## Congratulations!

**BSR&B Attorney Austin DuBois was recently appointed to the City of Newburgh Industrial Development Agency.**



The Newburgh IDA is a state-regulated local public authority whose mission is to assist in the development and financing of economic development and community revitalization projects in the City of Newburgh. Those efforts are designed to promote job creation, industrial development, and commercial development that improve the quality of life of its citizens.

Austin, the only attorney on the IDA, was recommended by current sitting members of the Board due to his enthusiasm for the revitalization of the City of Newburgh and the development of the business community.

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## TITLE INSURANCE SHOULDN'T BE OPTIONAL WHEN BUYING A HOME

By Diana Puglisi, J.D.  
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Buying a home can be a very trying experience, both financially and emotionally. A purchaser expects to pay the agreed upon purchase price, but the costs that arise at closing often take a home buyer by surprise.

A purchaser seeking financing will receive from the lender a “Good Faith Estimate” of their closing expenses, but it is just that - an estimate. Even though the estimate is presented before closing, the numbers do not always seem real until the purchaser is asked by their attorney to bring numerous checks to the closing table. And that’s when the questions begin. The most frequent questions relate to title insurance and the issuance of a title policy.

What is it for? Do I have to buy it? Why is it so expensive?

New York Insurance Law defines a Title Insurance Policy as any policy or contract insuring or guaranteeing the owners of real property against loss by reason of encumbrances and defective titles. In essence, the title policy provides assurances that the title company will stand behind you if a problem that is covered by the policy arises after you buy your new home. **It is an assertion, backed by insurance coverage, that no one but you has a claim to your new home, and that there are no outstanding liens, misfiled deeds, or mysterious former owners.** Coverage under the policy lasts for as long as you own your home, and it is issued in the amount of the purchase price of the home, unless you elect to purchase additional coverage to account for inflation.

Unfortunately, mistakes happen. If during the title company’s search, for example, they don’t find an existing mortgage on your new home, the title company will be responsible for paying off the mortgage and removing the lien, thereby protecting your ownership from foreclosure by a bank you knew nothing about. Fraud and forgery are other potential pitfalls, and many title problems are not discovered until you refinance or try to sell your home.

A buyer’s title insurance policy is optional, but a loan policy is not. While title insurance protects you, **a loan policy protects your lender if you chose to finance your purchase. The Loan Policy serves to protect the lender, and the priority of their lien on your home.**

The premium for title insurance is a one-time fee, which is paid at closing, and New York State regulates the rates charged. Therefore, the insurance rate is the same for each title company, but the cost of the searches performed by those companies which are incorporated into the title report, and are charged separately, may vary from company to company. There is a push in New York State to require the licensing of title agents, and to increase the regulation of closing costs, so in the future these closing costs may seem less daunting.

Think of title insurance like any other insurance policy you own – **you pay the premiums just in case something was to happen, and you hope it never does.** The premium might seem high, but since you only pay this premium once, why take an unnecessary risk? **When it comes to the question of whether you should purchase title insurance, the old adage “better safe than sorry” couldn’t be more applicable.**

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## VESTED RIGHTS AND LAND USE APPROVALS: RECENT COURT DECISIONS

By Jay R. Myrow, J.D.  
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In New York, the general rule is that landowners and proposed developers do not acquire **vested rights** in land use approvals (subdivision, site plan, building permit, etc.) simply by the granting of an approval or the issuance of a permit. The exception to this rule occurs when a landowner/developer has demonstrated a commitment to the approved or permitted project by incurring substantial expenses by investing in the project. However, the ability to gain vested rights in a project is narrow in scope; neither the granting of an approval nor substantial expenditures alone is enough to establish vested rights. **The investment in the project must be so substantial that the withdrawal of the approval or permit will result in a serious loss to the developer that renders the improvements essentially valueless.**

In November, 2013, the New York Court of Appeals ruled in *Rocky Point Dr.-In, L.P. v Town of Brookhaven*, 21 NY3d 729 [2013] that a proposed developer who obtained conditional site plan approval from the Town of Brookhaven Planning Board to build a Lowe’s Home Center had not acquired vested rights in the project. The developer challenged the withdrawal of the site plan approval, alleging that it had acquired vested rights in the approval. The relevant facts are as follows: during the site plan approval process, the Town Board of Brookhaven rezoned the developer’s parcel to a new zoning district that did not permit the proposed Lowe’s development. The prior zoning district also would not have permitted the Lowe’s development because it did not allow commercial development on parcels greater than five acres (the Lowe’s parcel was 17 acres). The developer argued to the Court against the general rule that an approval is not protected against subsequent zoning changes, by alleging that the “special facts” exception applied, which recognizes the zoning classification in effect at the time of the application to be controlling.

To qualify for the “special facts” exception, the developer had to establish that (a) it was in full compliance with the zoning in effect at the time of the application, and (b) that there were substantial delays in processing the application through unjustifiable actions by the Planning Board. In the Brookhaven case, the developer was

*(continued on page 4)*

## It's All for the Kids!



For the first time ever, BSR&B's legal talent – along with Orange County District Attorney Dave Hoover – embraced its theatrical side at this year's Orange County Boys & Girls Clubs' Celebrity Dinner & Tip Challenge.

The team, decked out in Washington Senator uniforms in honor of the Broadway show *Damn Yankees*, helped raise a net of more than \$40,000 in support of Orange County's children.

BSR&B team members included Austin DuBois, Marcello Cirigliano, and Lauren Coyle.

## FREE EDUCATIONAL WORKSHOPS:

# Estate Plans That Work™

**Wednesday, June 18, 2014**

3:00 p.m. to 6:00 p.m.

**Tuesday, July 22, 2014**

3:00 p.m. to 6:00 p.m.

*We'll explain little-known pitfalls and the best methods to protect your loved ones' inheritance after you're gone.*

The above workshops will be held at the  
**BSR&B Education Center (1st floor)**  
**10 Matthews Street, Goshen, New York**

To register for a workshop, call Donna at 291-0011 x242, or register online at [www.mid-hudsonlaw.com](http://www.mid-hudsonlaw.com) by going to the "Upcoming Events" link.

(continued from page 3)

unsuccessful in both respects. **The Court noted that the developer was, in fact, never in compliance with the prior zoning law as the project always exceeded the 5-acre maximum.** The Court rejected the developer's argument that the planning board routinely ignored this requirement with other applicants, holding that the developer presented no credible evidence in support of that claim. The Court also concluded that the developer failed to prove any inordinate delays or bad faith conduct by the Planning Board in processing the site plan application.

In February, 2014, the Appellate Division, Second Department, ruled in *Exeter Bldg. Corp. v Town of Newburgh*, 114 AD3d 774 [2d Dept 2014], that a developer did not have vested rights in a site plan approval for 136 residential units. During the approval process, the Town of Newburgh rezoned the developer's property to a more restrictive residential zone that did not allow for the density approved in the site plan. The Planning Board had placed the developer on notice during the planning process that the property may be rezoned and that the developer would be proceeding with the application at its own risk. The Planning Board advised the developer after the zoning change that their approval no longer conformed to the new zoning, and the developer applied to the Town Zoning Board of Appeals (ZBA) for a determination that the developer had acquired vested rights in the approval. The ZBA ruled that no vested rights had been acquired, and the developer commenced a lawsuit challenging the Planning Board and ZBA actions.

Even though the applicant had originally applied for site plan approval in 2002, and the zoning change occurred in 2006, the Court concluded that the developer had not acquired any vested rights in the approval. **The Court noted that there were many conditions to the approval that were never completely satisfied, and that the expenditures made by the developer in reliance on the approval were not substantial enough to acquire vested rights in the project and could be utilized in developing the project under the new zoning classification.**

As is evident in these Court decisions, the law in New York provides little protection to those investing through the zoning and planning process. **We very much remain a "proceed at your own risk" state.**

## Closest to the Pin for



BSR&B was a proud supporter of the Orange County Cerebral Palsy Association and the Inspire Foundation at this year's annual golf tournament.

Managing Partner Michael Blustein and BSR&B attorney Austin DuBois enjoyed a beautiful afternoon at the Otterkill Golf & Country Club, where Michael won the closest to the pin contest!

