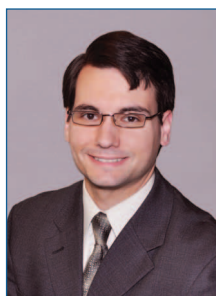


U.S. SUPREME COURT REJECTS RIGHT OF PRIVATE LAWSUITS AGAINST GREENHOUSE GAS EMITTERS

By Michael R. Frascarelli, J.D.
mfrascarelli@mid-hudsonlaw.com



On Oct. 29, 2012, Hurricane Sandy made landfall in our region. The total human and economic cost is still being tallied up, but it is already expected that Sandy was at least the second-costliest natural disaster to hit the United States, after Hurricane Katrina in 2005.

Hurricane Sandy is the latest of several weather disasters experienced by our region in the past several years. Nationally, devastating weather is beginning to seem like the norm. According to data kept by the National Oceanic and Atmospheric Administration (NOAA), there have been over 60 extreme weather events in the past 10 years, causing over \$1 billion in damage each.

This trend is consistent with what should be expected from a gradually warming climate. And if all of the available evidence for and against climate change was presented before a court of law, and that court applied the typical standard of review in a civil case, the court would have to decide that the evidence overwhelmingly points to human activities as the cause of this warming.

All this leads to an interesting proposition:

- if (i) frequent and severe weather is causing significant human and economic losses,
- (ii) that weather is caused by climate change, and
- (iii) climate change is caused by certain people or industries (such as power companies and auto manufacturers),

Can you sue those people or industries in a civil action to recover your severe weather-related losses?

The answer is almost certainly No, according to the U.S. Supreme Court in the case of *American Electric Power v. Connecticut*, decided last summer.

In that case, 11 states (including New York) and two private land trusts brought common law tort claims against several of the country's largest power companies, entities that are also the country's biggest greenhouse gas emitters. Basically, the claims alleged that these companies know their emissions cause climate change, that they unreasonably refuse to switch to lower-emission sources of power, and that as a result, they are unjustifiably creating a hazard to property owners and the public at large.

The plaintiffs sought present and future damages from the power companies for the effects of climate change. Hurricane Sandy provides a good illustration of the types of costs sought to be reimbursed: actual damages inflicted on people, property, and business activity, as well as compensation for measures needed to mitigate future damages, such as building a massive sea wall to protect New York City from future storm surges.

The Supreme Court held that **dealing with the causes of climate change was a job for the U.S. Environmental Protection Agency, not federal courts.** This result makes sense in light of the fact that we all contribute to climate change by using electricity, using natural gas for heat and cooking, driving our cars, breathing, etc.

While this decision doesn't necessarily cut off all judicial remedies for climate change-related damages, it strongly suggests that no civil action will succeed in this area. The jurisprudence may change as the effects of climate change become better-recognized and private and public entities become expected to deal with those effects.

For the time being, there simply is no one to sue over the damage inflicted by terrible weather.

FREE EDUCATIONAL WORKSHOPS: Estate Plans That Work™

Thursday, January 17th
3:00 p.m. to 6:00 p.m.

Thursday, February 21st
3:00 p.m. to 6:00 p.m.

BSRB Education Center (1st floor)
10 Matthews Street
Goshen, New York

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

To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Event Calendar" link.

The information in this newsletter is for general information purposes only and is not, nor is it intended to be, legal advice, including legal advice for Internal Revenue Code purposes as described in IRS Circular 230.

Legal Notes

BURT J. BLUSTEIN
MICHAEL S. BLUSTEIN
RICHARD J. SHAPIRO
GARDINER S. BARONE
RITA G. RICH
JAY R. MYROW

ARTHUR SHAPIRO,
of Counsel
DAVID S. RITTER,
of Counsel
CHARLES JUDELSON,
of Counsel

CAROL C. PIERCE
AUSTIN F. DUBOIS
RAYMOND P. RAICHE
MICHAEL R. FRASCARELLI

IN THIS ISSUE:

- HOW TO AVOID 'PIERCING CORPORATE VEIL' LAWSUITS
- "STUCK" WITH AN IRREVOCABLE TRUST? MAYBE NOT!
- PLAY "HOOKY ON THE HILL" FOR A GOOD CAUSE
- U.S. SUPREME COURT REJECTS RIGHT OF PRIVATE LAWSUITS AGAINST GREENHOUSE GAS EMITTERS
- EDUCATIONAL WORKSHOPS

10 MATTHEWS STREET
GOSHEN, NEW YORK 10924

PHONE: (845) 291-0011
TOLL FREE (866) 692-0011
WWW.MID-HUDSONLAW.COM

BLUSTEIN, SHAPIRO, RICH & BARONE, LLP ATTORNEYS AT LAW

HOW TO AVOID 'PIERCING CORPORATE VEIL' LAWSUITS

By Gardiner S. Barone, J.D.
gbarone@mid-hudsonlaw.com



While it's true that incorporating a business provides limited liability to its owners, the protection of the "corporate shield" - the legal division between the company and the individuals that own it - is only available to those who actually follow the "corporate formalities" for the life of the corporation.

In certain situations, if creditors can convince a court that the formalities of a corporation have not been followed, the court will declare the owners of the corporation personally liable for the debts of the corporation. This is known as "piercing the corporate veil."

Defending a "piercing the corporate veil" lawsuit is expensive and is likely to result in unwelcome financial exposure to those who were inattentive to the corporate formalities.

On the other hand, following the corporate formalities is far less expensive than defending a "piercing the corporate veil" lawsuit.

Some of the essential corporate formalities are outlined below:

- After the corporation is formed, the entity's principals should hold an initial meeting of directors (also known as an organizational meeting) to adopt bylaws, elect officers, and issue stock. The bylaws are particularly important, as they outline how the corporation will be operated. **Frequently, the failure to follow these initial organizational steps will result in a court disregarding the corporate veil and declaring the owners of the corporation personally liable for the corporation's debts.**

Firm Highlight



...for a Good Cause

Second Annual Hunter Mountain Ski Outing to Benefit Inspire

Blustein, Shapiro, Rich & Barone has partnered with The Ruby Group to support **Inspire** through the upcoming "Hooky on the Hill" skiing/fundraising event, scheduled for February 6, 2013.

All proceeds from the event, hosted at Hunter Mountain in Hunter, N.Y., will benefit **Inspire**, whose mission is to form partnerships with people who have special challenges to maximize their capabilities to lead fuller lives.

Read more on page 3...

- Annual maintenance of these formalities – in the form of annual meetings of directors and shareholders that are **documented in the corporate minutes** – is just as essential to maintaining the corporate shield as the initial formalities.
- **To maintain the corporate shield, officers should keep balance sheets and profit and loss statements for each year.** Corporations should also document any loans taken by the business, along with the repayment terms. Likewise, the corporate checking book should not be used as the principal shareholder's personal piggy bank. In short, a court will examine whether the corporate finances existed separately from its owners. **Failure to separate the corporate finances from your personal finances weakens the corporate shield.**

It is key to observe the legal formality that separates a corporation's debts from its owners' personal assets in order to maintain the corporate shield. Therefore, where shareholders of a corporation fail to attend annual elections of directors and officers – thereby effectively eliminating those positions or rendering them meaningless – and/or fail to separate the corporate finances from their own, the courts will be more inclined to allow a creditor to pierce the corporate veil due to the corporation's lack of compliance with formalities.

While no one of these deficiencies on its own may be enough to pierce the corporate veil, failing to follow multiple corporate formalities could lead to personal liability for debts of the corporation. Because there are no bright line rules applied to "piercing corporate veil" lawsuits, shareholders of closely-held corporations and members of limited liability companies should consult with their attorneys to adopt a preventative maintenance plan to keep their limited liability protections in full effect.

BSR&B is at the forefront of corporate preventative maintenance!

In 2013 we are adding BusinessDocx™ to our portfolio of practice management tools. BusinessDocx™ is a robust business document creation system that will allow us to take our business counseling practice to a whole new level.

Through BusinessDocx™ we will be able to help business clients better maintain their Corporate and LLC books, including the preparation of minutes for annual and special meetings. We plan to roll out a maintenance program for business entities, analogous to our estate planning maintenance program. We'll share more details about our implementation of BusinessDocx™ in future issues of *Legal Notes*.

Glossary:

Corporate Shield: the legal division between the company and the individuals that own it

Piercing the Corporate Veil: when a court declares the owners of the corporation personally liable for the debts of the corporation

Organizational Meeting: initial meeting of directors to adopt bylaws, elect officers, and issue stock

'STUCK' WITH AN IRREVOCABLE TRUST? MAYBE NOT!

By Richard J. Shapiro, J.D.
rshapiro@mid-hudsonlaw.com



The most common client request in my elder law practice is the desire to protect a residence and other assets from the high cost of long-term care, which in the Hudson Valley will range between \$10,000 to \$14,000 per month.

Proactive planning requires that the client make current gifts of selected assets, with such asset transfers being deemed "exempt" from Medicaid consideration five years after the transfer. While such gifts may be made outright, immediate gifts will result in a complete loss of control over the assets, a loss of income derived from the gifted assets, as well as possible adverse income tax consequences to the children or other recipients.

A far better option than outright gifts in almost every situation is the use of an Irrevocable "Medicaid Asset Protection Trust."

Assets transferred to a properly structured Medicaid Asset Protection Trust will be off the table for nursing home Medicaid eligibility purposes as long as the person creating the trust (the Trustmaker) does not apply for nursing home Medicaid for at least five years after funding the trust.

The trust must provide that the Trustmaker relinquishes access and control over the trust principal, but can retain rights to the trust income. While the Trustmaker is prohibited from receiving distributions of trust principal, other beneficiaries – typically children and grandchildren – are permitted beneficiaries of trust principal.

Medicaid Asset Protection Trusts have become especially popular with clients at or near retirement who have a reliable income from Social Security, pensions, IRAs, and other retirement accounts. Clients concerned about exposing their assets to the increasing costs of long-term care are happy to gain the protection afforded by the Medicaid Asset Protection Trust for selected assets, often including their primary residence.

However, clients are often understandably hesitant to do something "irrevocably." No matter how much income they have, they often ask, "but what if I *really* need to get at the principal in the trust?" Or, there always remains the concern regarding a possible need for nursing home care within five years of funding the assets to the trust, which results in the trust assets being deemed "countable resources" for Medicaid purposes.

Fortunately, New York law provides a simple method of revoking even an irrevocable trust. Revoking a trust created pursuant to New York law, Section 7-1.9(a) of the Estates, Powers & Trusts Law ("EPTL") requires the written consent of the Trustmaker and all the trust beneficiaries. Once the trust is revoked, the trust assets can be returned to the Trustmaker, thereby effectively "undoing" the property transfers. Although there may be gift tax consequences for a revocation, this is rarely an issue, as very few estates in which a Medicaid Asset Protection Trust is used are large enough to require the payment of gift taxes.

A practical problem arises, however, when the trust includes minor beneficiaries (typically grandchildren). Revocation under EPTL §7-1.9 cannot be utilized with minor beneficiaries, since they are legally incapable of consenting to a revocation. Fortunately, there is an easy fix for this problem. The Trustmaker may retain a lifetime "power of appointment" to remove or add additional principal beneficiaries during the Trustmaker's lifetime. Should the need arise to terminate a trust, the Trustmaker can simply exercise the power of appointment to eliminate the minor beneficiaries from the trust, after which the trust can be revoked by the Trustmaker and the adult beneficiaries.

Another possible hurdle is the circumstance where a trust revocation is necessary because the Trustmaker has a sudden health crisis (such as a stroke), but the Trustmaker is incapable of consenting to the revocation. This problem is easily solved by including in both the trust and in the Trustmaker's Durable Power of Attorney a provision authorizing the agent under the Power of Attorney to terminate any trusts created by the Trustmaker.

This technique was recently approved by the Appellate Division for the Second Department in *Matter of Perosi v. Legreci*. In that 2012 case, the court held that a Trustmaker may authorize an attorney-in-fact designated under the Trustmaker's power of attorney to act under EPTL §7-1.9 to amend or revoke the Trustmaker's irrevocable trust under, as long as the power of attorney grants the attorney-in-fact the power broad general authority to act.

By virtue of New York's powerful revocation powers, **the use of a Medicaid Asset Protection Trust provides seniors with a wonderful vehicle of protecting selected assets, while retaining the right to income from the assets, as well as significant control over the disposition of the trust principal.** The ability to retain such benefits, however, requires coordinated planning that is best provided by an elder law attorney well versed in this planning technique.

Firm Highlight

PLAY HOOKY ON THE HILL

(continued from page 1)

"Inspire's mission includes community engagement, and I couldn't think of a better way to engage the community and raise awareness than by breaking up a long winter season with a day on the slopes," said Austin DuBois of Blustein, Shapiro, Rich & Barone, who was recently named chair of the Inspire Foundation Board of Directors.

The day-long outing will include transportation to and from Hunter Mountain in a Coach bus and a lift ticket. Skiing lessons, meals, and ski and snowboard rentals will be available for additional fees. Hunter Mountain welcomes both skiers and snowboarders, and offers a Progression Park for Beginners, the Empire Terrain Park, and several trails rated for those expert skiers who enjoy the more challenging slopes.

"This event is a great example of how two businesses can partner up to not only support a local non-profit organization, but also foster positive networking opportunities that benefit the entire business community," said Peter Berman, president of The Ruby Group.

Tickets for the outing are \$75 per person, and include transportation and lift ticket; rentals are available for an additional \$42.

The chartered Coach bus will leave from 40 Matthews Street in Goshen at 7:30 a.m. and return by 6 p.m. Seating is limited; tickets can be reserved by contacting Krista Babcock at kbabcock@rubyccs.com or (845) 651-3800 x206. Seats are limited so **RESERVE YOUR SPACE TODAY!**

