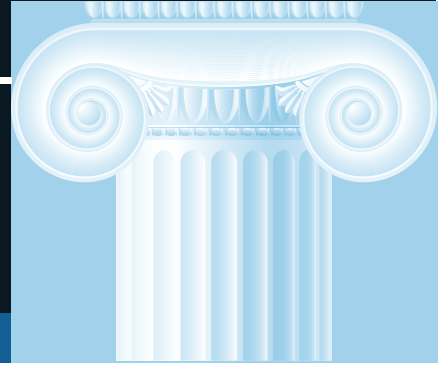


# Legal Notes



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

MARCELLO A. CIRIGLIANO  
MEGAN R. CONROY  
AUSTIN F. DUBOIS  
WILLIAM A. FRANK  
BRIAN NEWMAN  
DIANA PUGLISI  
RAYMOND P. RAICHE  
JEANINE GARRITANO WADESON

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

## IN THIS ISSUE:

- 2014: A YEAR OF GROWTH
- EMPLOYMENT NON-COMPETE CLAUSES
- THE MAGICAL MEDICAID ASSET PROTECTION TRUST
- BSR&B EXPANDS BY WELCOMING NEWEST ATTORNEY MEGAN R. CONROY
- EDUCATIONAL WORKSHOPS
- MEDICAID PLANNING SEMINAR

**GOSHEN**  
10 MATTHEWS STREET  
GOSHEN, NY 10924  
PHONE: 845.291.0011

**WARWICK**  
21 OAKLAND AVENUE  
WARWICK, NY 10990  
PHONE: 845.988.1515

[WWW.MID-HUDSONLAW.COM](http://WWW.MID-HUDSONLAW.COM)



## BLUSTEIN, SHAPIRO, RICH & BARONE, LLP

ATTORNEYS AT LAW

### 2014: A YEAR OF GROWTH

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



Last year was an extraordinary time for our law firm. We started 2014 strong with the addition of attorney William Frank, who was instrumental in our efforts to expand our Municipal Law Department. Will represents the Town of Wallkill, the Village of Unionville, and the Village of New Paltz. He also serves other municipalities on special counsel assignments. Will is a seasoned labor negotiator, and has greatly increased the scope of legal services we provide to the region's cities, towns, and villages. BSR&B Partner Jay Myrow also assisted in our municipal growth last year with his appointment as an attorney for the Town of Warwick.

The towns of Wallkill and Warwick are two of the largest in Orange County; the services we provide to these municipalities are quite diverse. To further enhance our municipal practice, in October we also hired Brian Newman, an associate attorney who is concentrating his practice on municipal and transactional matters.

Last year we also had the privilege of expanding our physical presence into the Village of Warwick. Our first satellite office, at 21 Oakland Avenue, is being managed by yet another new associate to our firm, long-time Warwick resident Jeanine Garritano Wadeson. Jeanine, a part-time Village of Warwick Justice, has been an incredible addition thus far. Our entire team of 16 attorneys and support staff is excited to offer our full range of legal services – real estate, estate planning and elder law, estate settlement, general litigation including personal injury, criminal, and matrimonial – to the entire Warwick Valley region.

On a sad note, in the spring of 2014 Charles A. Judelson, who had been Of Counsel to our firm, passed away unexpectedly. Charlie was highly regarded by his clients and peers as one of Middletown's finest estate planning and estate settlement attorneys. He leaves behind a legacy of serving some of the Hudson Valley's most prominent businesses and families for almost 50 years. Charlie was the last member of the venerable law firm Bull, Morreale & Judelson P.C. Since his passing, BSR&B has been actively assisting Charlie's clients in updating their estate plans to reflect recent changes in estate laws.

Charlie's clients have joined our already growing Estate Planning Department, led by BSR&B Partner Richard Shapiro. His team includes associate attorneys Austin DuBois and Megan Conroy. Megan, a graduate of Albany Law School, joined us last month.

The partners and management team at BSR&B expect 2015 to bring an ongoing uptick in economic activity in our region, and we shall continue to provide the resources necessary to ensure that our clients receive the superior quality legal services they have come to expect from this firm.

---

# EMPLOYMENT NON-COMPETE CLAUSES

By Brian M. Newman, J.D.  
bnewman@mid-hudsonlaw.com



## What is a Non-Compete Clause?

A non-compete clause is a provision in an employment contract under which the employee agrees to refrain from competing with the employer's business following the end of the employment relationship. The non-compete clause generally states what the nature of the restricted employment is, the geographic radius, and the length of the restriction.

The idea behind non-compete clauses is to prevent former employees from using their experience and expertise to immediately compete against their former employer in the same marketplace.

## Are Non-Compete Clauses Enforceable?

When an employee breaches a non-compete clause, employers generally have two options to protect them.

- They can ask a court for injunctive relief, meaning an order that bars the former employee from engaging in the prohibited employment.
- Or, they can ask a court for money damages, which would be measured by the amount of financial harm allegedly caused to the employer by the former employee's competition.

In New York, there is no statute or regulation that addresses non-compete clauses, though specific professions, such as the legal profession, have rules governing if and when they can be used. Instead, the law pertaining to non-compete clauses has been developed by the courts. While non-compete clauses can be valid and enforceable, New York courts have generally frowned upon non-compete clauses as "unreasonable restraints on trade," meaning that they deny a person the right to earn a living in their chosen field. This philosophy has led to a series of rules developed by New York courts regarding enforceability.

## When can a Non-Compete Clause Be Voided?

There are specific instances in New York law when non-compete clauses can be rendered void, or held to be enforceable, without much room for analysis. One rule that is fairly consis-

tently applied in New York courts concerns employees fired without cause, with courts typically holding that the non-compete clause is unenforceable because it lacks "mutuality of agreement." However, this general rule has been questioned by the Appellate Division, Fourth Department in *Brown & Brown, Inc., et al v. Johnson*, 2014 WL 486750 (4th Dept. 2014), which recently held that there is no blanket rule protecting employees fired without cause from enforcement of their non-compete clauses. The court in *Brown & Brown, Inc.* said that the Court of Appeals case that has been relied upon by lower courts as precedent (*Post v. Merrill Lynch*, 42 N.Y.2d 84 (1979)) dealt only with the rights of an employee fired without cause to severance benefits. *Brown & Brown, Inc.* is currently under appeal in the Court of Appeals, which will issue the final word on whether the Fourth Department's interpretation of the Court of Appeals precedent is correct.

Another scenario in which many New York courts have found non-compete clauses to be per se unenforceable is when the employer has breached the employment contract. The legal theory here is that it would be unjust to allow an employer to prevent a former employee from working in the same profession and geographic area when the employer itself had failed to comply with the terms of its own agreement.

## When is a Non-Compete Clause Enforceable?

New York follows a legal rule called the "Employee Choice Doctrine." This rule governs a type of non-compete clause that is structured so that the employee leaving the business has a choice: he or she can agree to refrain from competing and receive full severance benefits, or he or she can choose to compete under the clause's terms, but in return would not receive any benefits. New York courts have held that clauses structured along these lines are enforceable, regardless of whether or not they are reasonable. The reasoning here is that these clauses are not true non-competes, because they provide employees with a trade-off if they choose to compete against their former employer. The one exception to this rule is when an employee is terminated without cause. In that scenario, the Employee Choice Doctrine will not apply.

If a non-compete clause falls outside one of these examples, then courts in New York will typically evaluate the clause as to its reasonableness. Whether or not a non-compete clause is reasonable is subject to a factual inquiry by the court based on several guiding factors.

No matter how attractive the job offer, employees asked to execute an employment contract containing a non-compete clause should consult an attorney prior to signing the contract. Similarly, employers should craft their employment contracts in consultation with legal counsel to ensure reasonableness and enforceability.

# THE MAGICAL MEDICAID ASSET PROTECTION TRUST

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



Given the escalating costs of long-term care (Orange County nursing homes currently cost an average of almost **\$12,000 per month**), it is no wonder that people are searching for ways to shelter their hard-earned assets from the potentially devastating financial effects of a lengthy stay in a nursing home. If long-term care insurance is not an option, a “Medicaid Asset Protection Trust,” or “MAPT,” is an extraordinary asset protection tool.

Long-term care is paid for from three primary sources:

- the person’s own assets;
- long-term care insurance; or
- the Medicaid program.

In 2015, a person does not qualify for nursing home Medicaid coverage until they have assets of not more than \$14,850. While a person may choose to “spend down” their assets to qualify for Medicaid, most people prefer to preserve as much of their assets as possible for themselves and their heirs.

The problem with waiting too long to protect your assets is that virtually all asset transfers (other than a transfer to a spouse or a disabled child) made within five years of applying for nursing home Medicaid coverage results in a period of Medicaid ineligibility. In 2015 in the Hudson Valley, a non-exempt transfer of \$200,000 of assets made during the 5-year “look-back period” will disqualify an “otherwise eligible” person – meaning a person with \$14,850 of assets or less at the time of application – from receiving nursing home Medicaid coverage for 17½ months. Understandably, a nursing home will not be keen on letting a person reside in the facility for any period of time without paying for their care. Since Medicaid will not initially pick up the tab, the facility will almost certainly seek payment from the resident – and the family members to whom the assets were transferred during the look-back period – and often will sue if payment is not made to cover the cost of care.

**Proactive planning, that is, engaging in asset preservation techniques at least five years before long-term care is likely needed – is the best way to preserve as many of one’s assets as possible.**

The most effective way to maximize the amount of assets that can be protected from a Medicaid “spend down” is to make a “gift with strings attached” by creating and funding assets into a MAPT.

A MAPT is simply a particular type of irrevocable trust. Why irrevocable? The garden variety revocable trust is not an effective asset protection vehicle. Since the trustmaker has full access to the assets, under Medicaid rules, the assets in a revocable trust are deemed “available” to the trustmaker, and must be “spent down” before the trustmaker becomes eligible for Medicaid coverage.

Transfers of assets to a properly structured MAPT, however, will be deemed a “transfer” of assets for Medicaid purposes as of the date the assets are funded into the trust. This feature is important because for effective Medicaid planning we want to “start the clock” for the 5-year look back period sooner rather than later. The sooner the clock begins to run, the sooner we get through the 5-year look back period, thereby protecting all the trust assets (as well as any appreciation of those assets) should the trustmaker later need long-term care.

A significant advantage of the MAPT over outright gifts to children is that the parent retains access to all the income from the trust, with the income taxed to the parent rather than the child, often at a lower income tax rate. For clients who have no intention to use the principal but need the income, this feature holds great appeal. Also, the trust structure ensures that the trustmaker has effectively made a gift “with strings attached.” The parent can retain control over the trust operation by serving as Trustee, and can even retain the power to change the ultimate beneficiaries of the trust (i.e., the parent can disinherit a child and give their share to a grandchild, another child, etc.).

Another benefit of the MAPT is the ability to avoid capital gains taxes upon the beneficiary’s ultimate sale of the assets. So long as the MAPT is properly structured as a complete “grantor” trust, and as long as the assets are held in the trust until the parent’s death, those assets will receive a “step up” in cost basis. That is, the assets will be revalued for income tax purposes using the date of death value. For example, if a share of stock with an original cost basis of \$10 is given outright to a child and then sold for \$100, the child will have a taxable gain of \$90. If the same stock is placed in the MAPT and held until death with a date of death value of \$100, the same sale will produce no taxable gain.

Transferring a primary residence to a MAPT retains the “step up” in basis advantage, and provides the further benefit that the trustmaker retains (1) a lifetime right to remain in the residence and (2) all the property tax exemptions that they may already have (i.e., STAR, Veterans, etc.). In addition, should the house be sold during the trustmaker’s lifetime, the trustmaker will remain eligible for the capital gains tax exemption exclusively available to home sellers (\$250,000 exemption for an individual seller, \$500,000 for a married couple).

Finally, should a health care crisis arise within five years after a MAPT has been funded, New York law provides a mechanism for “undoing” the MAPT notwithstanding that it otherwise qualifies as an irrevocable trust for Medicaid purposes.

BSR&B IS PLEASED TO WELCOME  
THE ARRIVAL OF ASSOCIATE  
ATTORNEY MEGAN CONROY.



Conroy, a Hudson Valley native and a graduate of Albany Law School, will be concentrating her practice on estate planning and elder law under the direction of BSR&B Partner Richard J. Shapiro and associate attorney Austin F. DuBois.

While at Albany Law School, Conroy was a Dean's List Scholar and an active member of the Nelson A. Rockefeller Chapter of the Phi Alpha Delta Law Fraternity International. Conroy interned with both the New York State Town and Village Courts, Third Judicial District, in Albany, N.Y., and the New York State Supreme Court, Ninth Judicial District, in Goshen, N.Y. Conroy is admitted to practice law in New York State. In addition, Conroy has studied International law in Greece, Turkey, Italy, France, Monaco, and England.

Welcome to the team, Megan!

**FREE EDUCATIONAL WORKSHOPS:**

**Estate Plans That Work™**

- **March 24, 2015** 3:00 p.m. to 6:00 p.m.
- **April 15, 2015** 3:00 p.m. to 6:00 p.m.

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

**RESERVE YOUR PLACE TODAY! SEATING IS LIMITED.**

Call **845.291.0011 x242** or  
email **receptionist@mid-hudsonlaw.com**.

**WWW.MID-HUDSONLAW.COM**

**SAVE THE DATE**

**Medicaid Planning  
Seminar**

*Presented by the National Business Institute*

**Tuesday, May 5, 2015**

9 a.m.-4:30 p.m.

**Homewood Suites by Hilton  
Newburgh-Stewart Airport**

180 Breunig Road  
New Windsor, NY 12553

BSR&B Associate Austin F. DuBois will be presenting a segment entitled

**“QUALIFYING ASSET TRANSFERS:  
WHICH TECHNIQUES WORK.”**

Other topics include:

- IS MEDICAID RIGHT FOR YOUR CLIENT?
- EXCLUDED VS. COUNTABLE ASSETS
- LEGAL ETHICS
- APPLICATION PROCESS, APPEALS & POST-ELIGIBILITY ISSUES
- SAME-SEX COUPLES MEDICAID PLANNING AFTER DOMA REPEAL
- LIENS, ESTATE RECOVERY & HARDSHIP WAIVERS

*Continuing Education Credits available for lawyers, accountants, nursing home administrators, and financial planners.*

**Visit [www.nbi-sems.com](http://www.nbi-sems.com) for more information.**