

# Lum, Drasco & Positan LLC

## Attorneys At Law Since 1870

### FEATURED ARTICLES

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- **Estate Planning in 2020**
- **Corporate Transparency**
- **Supreme Court Expands Takings Suits in Federal Court**

### FIRM NEWS

#### FIRM CELEBRATES SESQUICENTENNIAL

The Lum Firm celebrated the 150<sup>th</sup> anniversary of its founding on February 24, 1870. On that date, William B. Guild, Jr., an established trial attorney formed a partnership with Frederick H. Lum, who was sworn in to the bar that day. Since its founding, the Firm has been home to many outstanding attorneys including members of bench, justices of New Jersey Supreme Court, elected officials, and leaders of the Bar. The Lum Firm has been an integral part of the communities it serves and is proud of its role in the major changes in the law over the past century and a half.

**Wayne J. Positan** was appointed by the New Jersey State Bar Foundation to a two year term on the NJSBF Medal of Honor Selection Committee. Positan was the recipient of the NJSBF Medal of Honor in 2016.

**Paul A Sandars, III** presented a program at the 2019 Construction Superconference entitled “Know Your Audience: Customizing Jury Trial Skills for a Mediation” on Tuesday December 17.

**Scott Reiser** has been appointed co-chair of the Special Events Committee for the Seton Hall University School of Law Alumni Council for 2019-2010.

**Wayne J. Positan** was honored by the Boston University Alumni Council for his years of service as a member and President of the Council, and President of the BU Alumni Association at a dinner at the Dahod Family Alumni Center at The Castle during BU Commencement Weekend in May.

The Firm is pleased to announce that 16 lawyers are included in the 2020 edition of *The Best Lawyers in America* and 2 lawyers are “Lawyer of the Year” recipients.

#### **Lum, Drasco & Positan LLC – 2020 “Lawyer of the Year” Recipients**

- **Dennis J. Drasco** - Litigation – Insurance in Newark
- **Christina Silva** - Labor Law – Management

**Lum, Drasco & Positan LLC – *The Best Lawyers in America*® 2020 Edition**

**Dennis J. Drasco** - Appellate Practice, Commercial Litigation, Construction Law, Litigation – Construction, Litigation – Insurance, Litigation - Land Use and Zoning, Litigation - Real Estate, Litigation - Trusts and Estates

**Wayne J. Positan** - Appellate Practice, Commercial Litigation, Employment Law – Management, Labor Law – Management, Litigation - Labor and Employment

**Paul A. Sandars III** - Commercial Litigation, Construction Law, Litigation - Construction

**Gina M. Sorge** - Family Law

**Kevin J. O'Connor** - Commercial Litigation

**Christina Silva** - Employment Law – Management, Labor Law – Management, Litigation - Labor and Employment

**Bernadette Hamilton Condon** - Construction Law, Litigation - Construction

**Daniel M. Santarsiero** - Employment Law – Management, Labor Law - Management

**Arthur M. Owens** - Legal Malpractice Law - Defendants

**Scott E. Reiser** - Commercial Litigation

**Elizabeth Moon** - Employment Law - Management

**Richard Camp** - Family Law Arbitration, Family Law Mediation

**Donald J. Volkert, Jr.** - Arbitration

**Cynthia A. Matheke** - Personal Injury Litigation – Defendants, Personal Injury Litigation - Plaintiffs

**Edward M. Callahan, Jr.** - Construction Law, Litigation - Construction

**About *Best Lawyers*®**

Since it was first published in 1983, *Best Lawyers*® has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* lists are compiled based on an exhaustive peer review evaluation. Over 83,000 leading attorneys globally are eligible to vote, and they have received more than 13 million votes to date on the legal abilities of other lawyers based on their specific practice areas around the world. Lawyers are not required or allowed to pay a fee to be listed; therefore inclusion in *Best Lawyers* is considered a singular honor.

## **Estate Planning in 2020**

*By Kevin Murphy, Esq.*

We anticipate that much of estate planning in 2020 will be similar to recent years with individuals seeking to minimize taxes (both estate and income taxes). Now may be a good time to review your estate plan.

Outlined below is a summary of recent estate and gift tax law developments.



### **2020 Current Exemption and Exclusion Amounts**

In 2020, the federal estate/gift tax exemption amount will increase by \$180,000 to \$11,580,000 per individual (in 2019 this amount was \$11,400,000), reduced by prior gift tax exemption used. Therefore, for married couples, the total amount that can be given away tax free in 2020 will be \$23,160,000 (assuming no prior exemption used). The generation-skipping transfer ("GST") tax exemption amount will also increase to \$11,580,000 per individual, reduced by prior GST tax exemption used. These exemption amounts are indexed for inflation annually going forward, and therefore will presumably increase in future years, although as mentioned below these higher exemption amounts are set to expire on December 31, 2025. The tax rate on taxable transfers in excess of the exemption amounts is currently 40%.

In addition, each individual has an "annual exclusion" amount that he or she can give away to each person per year without using any of his or her gift tax exemption (certain requirements must be met for the gift to qualify for the annual exclusion). The annual exclusion amount is indexed for inflation annually. The annual exclusion amount in 2020 continues at \$15,000 per person (or \$30,000 per person if the donor is married and the couple elects to "split" gifts), the same amount as it is in 2019. Note that the special annual exclusion for gifts to noncitizen spouses in 2020 will be \$157,000 (in 2019 this amount is \$155,000). Payments of tuition and medical expenses made directly to the education or health care provider do not require the use of your annual exclusion amount or your gift tax exemption.

### **Anti-Clawback Regulations**

There has been concern about a potential "clawback" effect if a donor makes lifetime gifts at a time when the gift tax exemption amount is large (now \$11,400,000 and \$11,580,000 in 2020) but then dies when the federal estate tax exemption amount is smaller (for example, in 2026 when the exemption amount would be \$5,000,000, inflation adjusted).

On November 22, 2019, the IRS issued Final Regulations alleviating these concerns. These rules will allow decedents' estates the benefit of higher exemption amounts for gifts made in years in which the exemption amounts were greater. Accordingly, donors will be able to be confident that when making significant gifts using the temporarily-increased exemption amounts the benefit of such gifts will not be "undone" if the exemption amounts are reduced in later years. Of course, if the exemption amounts are reduced in future years, and the donor has not made significant gifts in years in which the exemption amounts are higher, then the donor would not get the benefit of those increased exemption amounts (in its preamble to the Final Regulations, the IRS refers to the increased exemption as a use it or lose it benefit). Although 2026 is several years away, you may want to accelerate your gifting agendas to take advantage of the increased (and potentially expiring) exemption amounts.

In addition, the Final Regulations make clear that if a spouse dies and the surviving spouse makes a portability election to claim the deceased spouse's unused exemption, the amount of

the deceased spouse's unused exemption will not be reduced if the exemption amount decreases at a later date (just as the amount of the deceased spouse's unused exemption does not increase with inflation).

### **New Jersey Update**

The New Jersey estate tax was repealed effective January 1, 2018.

New Jersey has, however, retained its separate inheritance tax. The New Jersey inheritance tax imposed depends on the amount received and the relationship between the decedent and the beneficiary receiving the assets from the decedent. Generally, the inheritance tax does not apply to amounts received from a decedent to a spouse, civil union or domestic partner, child or grandchild.

It is important to note that for purposes of the inheritance tax, there is a three year lookback inclusion rule for gifts.

### **Credit Shelter Trusts**

Some estate plans continue to include provisions known as "formula clauses" which are typically defined by a formula expressed with reference to the federal or New Jersey estate tax exemption amount. With the increased federal estate tax exemption and the repeal of the New Jersey estate tax, a formula clause could result in unanticipated consequences.

Also, for funded testamentary trusts, we recommend a review to determine the amount of unrealized gains within the trust. If there has been significant appreciation, it may be advisable to terminate the trust so that the appreciated assets qualify for a tax-free step up in basis upon the death of the beneficiary of the trust.

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### **Corporate Transparency**

*By Steven J. Eisenstein, Esq.*

There have been various legislative attempts on both the state and federal levels in recent years to require greater transparency by people forming entities to do business. The latest attempt to impose this burden on business owners has come from the federal government. On October 22, 2019, the U.S. House of Representatives, in a 249 to 173 vote, passed H.R.2513, known as the Corporate Transparency Act of 2019.



If passed by the Senate and signed into law, this bill would require each person who creates a corporation or a limited liability company in the United States to report to the U.S. Department of the Treasury, Financial Crimes Enforcement Network (FINCEN), on an ongoing basis, the identifies of the beneficial owners of that company. The bill defines beneficial owners as natural persons who directly or indirectly exercise control over the company, own 25% or more of the equity interest of the company or receive substantial economic benefits from the assets of the company.

The information disclosed to FINCEN would include the full legal name of the owner, the date of birth, the current address and the identifying number from the person's passport, state driver's license or other official governmental ID. It requires an annual filing with FINCEN of the current list of beneficial owners and any changes that have occurred during the previous year. These requirements will be imposed on companies as they are formed after the bill becomes law and, two years after the bill becomes law, will be applicable to all existing companies. There are both civil and criminal penalties for willful failure to provide the information and for submitting false or fraudulent ownership information.

Because the stated purpose of the bill is to prevent fraud and money laundering, there are a number of exceptions to the filing requirements. Among the companies which would not have to comply with these disclosure requirements are entities which file reports under the Security Exchange Act, banks, brokers or dealers, investment companies, insurance companies, accounting firms, non-profit entities including churches and charities, public utility providers and, most importantly, entities that employ more than 20 employees on a full-time basis in the United States, file income tax returns in the United States showing more than \$5 million in gross receipts and have an operating presence at a physical office within the United States.

This last requirement is obviously intended to reduce the burden on companies which are legitimately operating companies with a tangible presence but, since the bill will be immediately applicable to newly formed companies, it is difficult to see how it will excuse anyone from complying with the transparency requirements when initially forming companies.

If the bill is enacted into law, it will place a new annual federal reporting burden on tens of thousands of existing and future businesses. Because of the particular exclusions, the likely effect will disproportionately impact entrepreneurs and small businesses.

New Jersey itself has separate bills pending in the legislature which will impose reporting requirements on other businesses. They will be covered in a later article.

Our Business Department is familiar with all of these matters and can assist you should you have any questions or concerns.

## **Supreme Court Expands Takings Suits in Federal Court**

*By Kevin J. O'Connor, Esq.*

In its decision in Knick v. Township of Scott,<sup>1</sup> the United States Supreme Court significantly expanded the scope of suits for violation of the Takings Clause that may be filed in federal court. The Knick Court held that property owners may pursue takings claims directly in federal court rather than first litigating in state court. The Knick opinion overruled the Court's prior opinion in Williamson County Regional Planning Commission v. Hamilton Bank,<sup>2</sup> which had required plaintiffs to first pursue relief in state court for a taking claim.



Under the Takings Clause of the United States Constitution, private property may not be taken by the government for public use without payment of just compensation. In certain circumstances, government action or regulation may have the effect of "taking" private property and property owners will institute suit seeking compensation in what is commonly referred to as "inverse condemnation." Prior to the Knick decision, such inverse condemnation claims against local governments were required to be brought in state court in the first instance rather than federal court.

In the Knick case, the plaintiff owned property which had a small family graveyard. The township had an ordinance requiring graveyards to be open to the public during daytime hours. When the township attempted to enforce this ordinance, plaintiff filed suit in the federal district court alleging an unconstitutional taking of her private property without payment of just compensation. The district court dismissed the complaint based upon the Williamson County decision, because plaintiff did not first seek compensation in state court before filing the claim in federal court. The dismissal was affirmed by the court of appeals.

The Supreme Court granted plaintiff's petition for certiorari and in a 5-4 decision the majority overruled Williamson County, holding that the requirement to first litigate in state court "imposes an unjustifiable burden on takings plaintiffs" that conflicts with the Court's takings jurisprudence. In reaching this decision, the majority in Knick rejected the proposition that a taking does not occur at the time of the deprivation of a property right if there exists an adequate post-taking procedure for providing compensation. Rather, the majority announced a rule that "a government violates the Takings Clause when it takes property without compensation, ... a property owner may bring a Fifth Amendment claim under §1983 at that time." The majority opinion further stated that although the taking of property without payment of compensation is unconstitutional, this would not lead courts to bar such actions as long as there exist remedies to provide compensation. Thus, if remedies for seeking just compensation are available "injunctive relief will be foreclosed."

In sum, the Knick decision represents a major change in the field of inverse condemnation. The Knick Court held that a constitutional violation of the Takings Clause is complete when the property is taken without payment of just compensation. Thus, a takings plaintiff is permitted to sue directly in federal court rather than having first pursue a claim in State Court.

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<sup>1</sup> 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019).

<sup>2</sup> 473 U.S. 172 (1985).

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Lum Law Notes is a publication intended for the clients of Lum, Drasco & Positan LLC and other interested persons. It is designed to keep its readers generally informed about developments in the firm and its areas of practice and should not be construed as legal advice concerning any specific factual situation

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