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P R E S E N T S

The COUNSELOR

FOREIGN OWNERSHIP OF REAL PROPERTY IN THE UNITED STATES



Robert B. Moy, Esq.

There has been tremendous growth in foreign investment in real property, both residential and commercial, located in the United States in the past five to ten years. Some states, such as New York and California, have seen a large number of investors from Asia, especially from China, purchasing real property and investing in real estate development projects. Florida and other southern states have seen a large influx of investment dollars from South America pouring into real estate.

Although there are many reasons for this growth, perhaps the key factor is that real estate in the United States is perceived to be a safe and stable investment by foreign investors. Foreign investment flowing into the United States from China has been fueled by the incredible wealth created by the Chinese economy and stock market, and the easing of restrictions on currency controls, which has allowed the free flow of money out of China. The increased popularity and use of the EB-5 Immigrant Investor Program to allow foreign investors to obtain permanent residency status in the United States has also helped to increase the flow of foreign investment into United States real estate.

There are many tax and liability implications applicable to foreigners buying real property in the United States, which should be addressed

with some advanced planning prior to the signing of a contract and/or the closing of the purchase. One of the key considerations for foreign buyers is structuring the ownership of the real property to minimize taxation and to maximize protection from personal liability arising out of ownership.

OWNERSHIP STRUCTURE

The simplest form of real property ownership in the United States is ownership in a foreign buyer's individual name. There are, however, significant disadvantages to individual ownership, such as the potentially onerous estate tax in the event that the individual dies while the owner of real property located in the United States. In addition, an individual owner is exposed to personal liability for any obligations arising out of the ownership of the real property.

One form of ownership available to foreign buyers to shield themselves from personal liability is a limited liability company ("LLC"). Ownership of real property in an LLC provides liability protection for the LLC's owners or "members," and an LLC is a pass through entity that is taxed only to each of its members. Thus, LLC's avoid the double taxation of other entities such as C corporations, which are taxed once at the corporate level and again at the shareholder level. An LLC does not necessarily provide estate tax savings to individual foreign owners of the entity, but it has become a popular entity to use for owning real estate.

Another option available to foreign buyers is to own real property through a foreign corporation. In addition to the limited liability offered by foreign corporations, individual owners of foreign corporations are not subject to United States estate taxation upon the death of the individual shareholders. There are some disadvantages, as foreign corporations may be subject to more income tax since they are not entitled to any reduced capital gains tax rates upon sale of the real property, a benefit that is available to individuals. In addition, there might be an additional income

tax imposed upon foreign corporations known as a "branch profits tax."

Perhaps the most advantageous structure for foreign buyers to own real property in the United States is a hybrid structure whereby a foreign citizen owns a foreign corporation, which in turn, owns an LLC set up in the United States. A foreign citizen in this dual structure will have liability protection, and avoids the possibility of United States estate taxes upon death. The tradeoff is the potential for higher income taxes and capital gains tax rates upon sale of the real property.

It is also worth noting that upon the disposition of any real property, all foreign individuals and foreign corporations are subject to withholding under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). Under FIRPTA, the buyer of real property from a foreign owner is required to withhold ten percent (10%) of the gross purchase price at the closing. The foreign investor may apply for any refund at the end of the tax reporting year once any applicable taxes have been paid from the withholding.



L-R: Harold L. Deiters, III, Event Co-Chair & Jeffrey D. Forchelli, Esq.

Jeffrey D. Forchelli and Steven E. Pegalis were honored at the Nassau County Bar Association's annual WE CARE Fund's Stephen W. Schlissel Golf and Tennis Classic. More than 400 lawyers, judges and business and civic leaders participated at this event, which each year raises more than \$250,000 for local charities. The funds are distributed through grants to improve the quality of life for children, the elderly and others in need throughout Nassau County. In the 26 years since the founding of the We Care Fund, Nassau County attorneys have raised more than \$3 million for more than 100 local charitable causes.

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ESTATE AND GIFT TAX CONSIDERATIONS

As noted above, there is generally an estate tax imposed on the estate of a foreign citizen who owns real property situated in the United States at the time of death. A foreign citizen receives only a \$60,000 exemption on estate taxes for any property owned in the United States at the time of death (compared to the \$5,430,000 exemption from federal estate taxes that United States citizens currently receive), and an estate tax return must be filed for the estate if the gross estate exceeds \$60,000 in assets located in the United States. These assets would include direct ownership of real property in the foreign individual's name or the foreign citizen's ownership interest in an LLC set up in the United States.

If a foreign citizen owns real property in the United States through a foreign corporation, or through the hybrid structure discussed above, there is no estate tax upon the death of the individual because shares in a foreign corporation are not considered assets located

in the United States, even if the real property owned by that entity is located in the United States. Similarly, a gift by a foreign citizen of stock in a foreign corporation is not subject to gift tax in the United States. If, however, a foreign citizen wishes to gift real property located in the United States directly, the donor of the gift would be subject to a gift tax on the value of the gift and the recipient would be subject to reporting requirements to the United States government if any such gifts exceed \$100,000 in the aggregate in any given year.

OTHER CONSIDERATIONS

There are many other issues for foreign buyers that arise in connection with purchasing or investing in real property in the United States. Title insurance is a concept that is new to many foreigners, but it ensures that the purchaser is receiving a clear title. At closing, it is imperative that the foreign buyer secure title insurance and have adequate homeowners and/or liability insurance.

Land use and zoning issues frequently arise with real estate and it is important to determine whether the property is properly zoned for the intended use of the foreign buyer, preferably before a contract is signed. Local zoning laws and regulations may permit only certain uses for the real property or place restrictions on expansion or development of the property. If a purchaser wishes to change the use of the property for another purpose or to expand or develop the property, great care must be taken to determine whether that new use or expansion is permissible.

Due diligence, financing options, property management issues, USA Patriot Act considerations and even whether the foreign buyer needs to be physically present at the closing are all issues that arise and need to be addressed by a foreign buyer. Thus, it is vital that foreign buyers assemble a team of trusted advisors, including real estate brokers, engineers, appraisers, bankers, attorneys, accountants, contractors and property managers to guide them through the process.

Media Mentions

Long Island Business News:

- **Managing Partner Jeffrey D. Forchelli** was interviewed about law firm hiring in the article, "Legal Notice: Help Wanted".

- **Joseph P. Asselta** was interviewed about the growth of the construction law practice on L.I. in the article, "Lawyers Build onto their Practice as Building Picks Up."

- **Brian R. Sahn** was interviewed about leases and landlord/tenant issues in the article, "The Language of Leases."

- **Andrew E. Curto** was profiled in the Law: Ones to Watch section.

- **Michael A. Ciaffa** was interviewed for the article, "Coming Off the Bench."

- **Keith J. Frank** was profiled for the Who's Who in Labor Law special section and **Judy Simoncic** for Who's Who in Professional Women.

Newsday:

- **Gregory S. Lisi** was interviewed for the article "Offering the Perk of Paid Sick Leave," which focused on Paid Time Off.

New York Real Estate Journal:

The following attorney articles were published:

- "Recent Change in Law Clarifies Accrual Date of Contractor's Claims for Payment Against the N.Y.C. S.C.A.," by **Joseph P. Asselta** and **Raymond Castronovo**;

- "Real Estate Tax Breaks for Green Buildings," by **John V. Terrana** and **Alexander Zugaro**;

- "Law: Owner and Lessee of Real Property Must Be Served With a Mechanic's Lien," by **Parshhueram Misir**.

- **Judy L. Simoncic**, **Mary E. Mongioi**, **Andrea Tsoukalas** and **Nicole S. Forchelli**

were spotlighted in the annual Women in Real Estate section.

- *The Suffolk Lawyer* published **Allison W. Tenebaum's** article, "First Annual Increase to New York State's Estate Tax Exclusion."

- *Korea Daily* published **Dana Y. Lee's** real estate article.



The Firm was recognized for Distinguished Pro Bono Service by the Nassau County Bar Association, The Safe Center of LI and Nassau/Suffolk Law Services with the Access to Justice Pro Bono Recognition award (large firm category).

Awards, Seminars & Events

Gregory S. Lisi was interviewed on radio station WHPC 90.3 FM for the program "Law You Should Know." His segment discussed labor law and was titled, "Romance In The Workplace."

The Firm is now the exclusive sponsor for the Long Island Region of the Association of Corporate Counsel (ACC) Greater New York Chapter, the largest community of in-house counsel in the world. The Firm's Long Island General Counsel Network group (LIGCN), headed by **Joseph V. Cuomo**, oversees the collaboration. The first joint event was a Continuing Legal Education (CLE) seminar titled, "Fundamentals of International Business Transactions - A Look at Europe and China." **Robert B. Moy** was among the speakers. The second (CLE) seminar was titled "Malpractice Insurance for the General Counsel," **Keith J. Frank** moderated the seminar.

Gregory S. Lisi and **John V. Terrana** presented at the Long Island Auto Body Repairman's Association (LIABRA). They discussed property tax reduction and labor issues.

James C. Ricca was the guest speaker at the Community Bankers Mortgage Forum. Mr. Ricca, with the assistance of **Dana Lee**, gave a presentation on the history of U.S. Banking and the current U.S. Banking Regulatory System.

Andrea Tsoukalas hosted a Long Island Gasoline Retailers Association, Inc. (LIGRA) seminar. **Douglas W. Atkins** presented on property tax reduction and **Gregory S. Lisi** presented on Labor Law: Hours & Wages to the members.

Robert B. Moy presented a CLE titled, "Purchasing Real Estate - More than Just a Contract of Sale" to over 100 attendees of the Asian American

Bar Association of New York and the Asian Real Estate Association of America (AABANY/AREAA).

Joseph P. Asselta presented, "Current Trends in Utilization of Minority and Women Owned Businesses (MWBes) on Publicly-Funded Construction Projects," to the Nassau County Bar Association's Construction Law Committee.

Kathleen Deegan Dickson presented on land use & zoning to the Energeia Partnership and the National Business Institute's Attorneys' Guide to Local Government Law seminar.

Robert L. Renda presented on property tax reductions to the BNI Networking group.

Mary E. Mongioi presented on real estate at "Legal Tuesday's" at the Freeport Library.

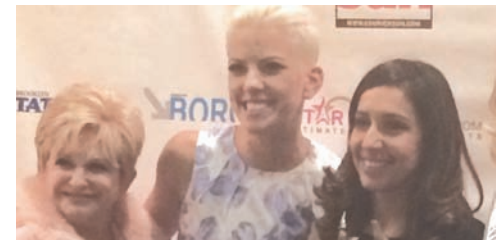
Lauren Lipnick volunteered at St. John's School of Law's Fall 2015 Mock Interview Program.



Kathleen Deegan Dickson was selected as one of the Top Ten Legal Eagles (Real Estate) for 2015 on Long Island by LI Pulse Magazine.



Managing Partner Jeffrey D. Forchelli was honored by the Long Island Business News with the 2015 Outstanding CEO award.



Andrea Tsoukalas was honored by the Queens Courier publication with the Top Woman in Business award.

SUCCESSFUL LAWYERS SUCCESSFUL CLIENTS

BANKING AND FINANCE

James C. Ricca representing New York Community Bank negotiated and closed a \$37,250,000 first mortgage acquisition loan and \$15,000,000 second mortgage construction loan for commercial/industrial property located in Suffolk County.

James C. Ricca negotiated and closed a \$12,000,000 mortgage loan secured by multi-family garden apartments in Rockland County.

John P. Bues negotiated and closed a \$22,690,000 mortgage loan secured by a multifamily apartment building located in Harlem.

James C. Ricca and **Daniel Dornfeld** representing New York Community Bank negotiated and closed a first mortgage acquisition loan and second mortgage construction loan for a residential subdivision located in Burlington County, New Jersey.

James C. Ricca negotiated and closed a \$45,000,000 mortgage loan secured by a multitenant commercial building located in Manhattan's garment district.

Representing a large institutional bank client, **John P. Bues** obtained a judgment of foreclosure and sale in a complicated and highly contested commercial foreclosure action, involving 2 mortgage loans, totaling \$3,364,836.59. The Court's decision granting the judgment noted the "multiple complex legal issues" in the matter and awarded our client \$75,000 in attorneys' fees.

After hearing and trial, **John P. Bues**, obtained a judgment in favor of Valley National Bank in the amount of \$1,287,059.69 due on a commercial loan. The Court ruled the Bank met the required burden of proof and awarded judgment as Mr. Bues successfully established the defendant's liability and the amount owed.

CORPORATE AND COMMERCIAL

20th Century Fox recently released the trailer for the movie "Joy," which is scheduled for release on December 25, 2015. *Joy* is an upcoming biographical picture based on the life of long time Firm client and serial entrepreneur Joy Mangano, the inventor of the "Miracle Mop" and the top home shopping network personality of all time. The film, directed by David O. Russell, features Academy Award winner Jennifer Lawrence as Joy and also stars Robert De Niro, Isabella Rossellini and Bradley Cooper. **Anthony V. Curto** and **Joseph V. Cuomo** handled *Joy's* life rights agreement with Fox.

LITIGATION

Danielle B. Gatto successfully represented a client in an appeal before the Appellate Division, Second Department, which sustained the dismissal of a lawsuit brought against our client by a person claiming to own 50% of our client's corporation. The lower court held that the person claiming to own 50% of our client's corporation was estopped from claiming same and was barred by the statute of limitations from claiming that he was entitled to monetary damages arising from an alleged oral contract, which proceeding was also handled by Ms. Gatto.

REAL ESTATE/LAND USE/ ZONING

Judy L. Simoncic, **Richard A. Blumberg**, and **Danielle Tricolla** obtained two favorable decisions in Nassau County Supreme Court in two separate Article 78 proceedings filed against the Village of Muttontown Zoning Board of Appeals and the Village of Muttontown Site and Architectural Review Board ("SARB"). In the first decision, Justice John Galasso overturned the Zoning Board's improper imposition of a condition on our client's building permit in connection with construction of an indoor riding arena for our client's 60 acre horse farm and boarding facility. Justice Galasso, also annulled the Zoning Board's decision finding it was arbitrary and capricious and not supported by the record. In the second decision against the SARB, Justice Galasso converted the Village's motion to dismiss our Article 78 proceeding into a motion for summary judgment in favor of our clients, finding that the Village had defaulted on its own time period in which to act on our client's application and as a result the application was approved by default.

Brian R. Sahn and **Dana Y. Lee** negotiated and closed the following:

\$30,000,000 permanent refinancing in a mortgage-backed securitized loan with Wells Fargo Bank for a 424-unit residential apartment complex development in Laredo, Texas;

\$2,450,000 permanent refinancing with Green Bank for a retail project leased to a Tractor Supply Company in Eagle Pass, Texas;

\$14,800,000 permanent refinancing in a commercial mortgage-backed securitization loan with Wells Fargo Bank for a 200-unit apartment complex development project in Killeen, Texas;

\$11,700,000 construction loan with Wells Fargo Bank for a 160-unit garden style apartment complex in Kyle, Texas.

\$9,932,500 construction loan with Compass Bank for a 156-unit garden style apartment complex in Eagle Pass, Texas.

Andrea Tsoukalas secured approvals from the Village of Sands Point for a three-lot subdivision of a waterfront Gold Coast estate to be developed with multi-million dollar luxury homes having a view of the New York City skyline and a 270-degree panoramic view of the Long Island Sound. Ms. Tsoukalas was able to establish that a significant lot area variance was appropriate for one of the lots based on the existing character of the neighborhood and the legal history of the parcel.

Andrea Tsoukalas secured approvals from the Village of East Hills for a floor area ratio variance for a second story addition and other improvements to a single-family residence. Ms. Tsoukalas was able to establish that the variance was appropriate because the massing of the new addition was in the rear and not visible from the street, the floor area proposed was consistent with other homes in the area, and the need for the variance was caused by an upzoning of the premises which unduly restricted any new development.

TAX CERTIORARI

The Tax Certiorari Department showed its expertise in specialized property tax matters: **John V. Terrana** and **Douglas W. Atkins** handled the representation of a regional auto dealership with a multi-use property in Huntington. By separately valuing the sales showroom, office space and auto repair area, they were able to secure the client a refund of over \$300,000.

Warren S. Arthur and **Robert L. Renda** represented the owner of a high end self-storage facility in the Great Neck area. By applying novel theories of valuation, they secured the client a refund in excess of \$100,000 in addition to a further annual tax reduction of approximately \$123,000.

John V. Terrana and **Douglas W. Atkins** prosecuted a tax certiorari matter for an assisted living facility in Rockland County. The tax assessing unit made no reasonable offers of reduction, so John and Douglas moved forward toward trial. After submitting expert reports from both real estate and business appraisers, the matter was resolved for approximately \$900,000 in refunds and savings.

The Tax Certiorari and Litigation departments collaborated with great success on a property tax matter pending in State Supreme Court, where it was demonstrated that the Firm's client was owed a refund of approximately \$1,000,000. The Town attorney made a motion to dismiss on a technicality. **Douglas W. Atkins** of the Tax Certiorari Department and **Danielle B. Gatto** of the Litigation Department partnered to oppose the motion. After submitting their opposition and orally arguing the matter, the Supreme Court ruled in favor of the Firm's client.

APPOINTMENTS

- **Mary E. Mongioi** and **Frank W. Brennan** named Firm Partners.
- **Daniel P. Deegan** appointed to the Long Island Association's Board of Directors.
- **Mary E. Mongioi** named co-chair of the Firm's Veterinary Practice Group.
- **Andrea Tsoukalas** as member of the Board of Directors of the Nassau County Women's Bar Foundation.



Marcum Workplace Challenge 2015 Firm Team

The Marcum Workplace Challenge is Long Island's largest corporate run-walk for charity. Charity beneficiaries include the Long Island Children's Museum, Long Island Cares, The Harry Chapin Food Bank, and the Children's Medical Fund of New York. This year the Firm was the recipient of the **Legal Challenge First Place Male Team**.

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NEW ADDITIONS



Peter B. Skelos

Peter B. Skelos, former Justice of the New York State Supreme Court, Appellate Division has joined the Firm as partner. He directs the Appellate Practice Group and is a member of the Litigation Department.

Judge Skelos has been engaged in litigation and appellate practice his entire legal career. Prior to his service on the bench, he served as a Deputy Nassau

County Attorney and engaged in the private practice of law.

Skelos has received awards for his exemplary public and professional service from many professional organizations. He is a career-long member of the Nassau County Bar Association.

In 2015, the Bar Association presented Judge Skelos with the President's Award for his leadership on behalf of the Lawyers Assistance Program. Skelos was elected to the Board of Directors in 2015. Skelos served three terms as the administrative chair of the We Care Fund Advisory Board of the Bar Association of Nassau County and continues to be an active member of the Advisory Board.

Judge Skelos was an editor of the two volume practice guide, *Civil Trials in New York* (West Group) and authorized Chapter 7 - Evolution of the Labor Law: A View from the Bench, *Construction Site Personal Injury Litigation*, 2d ed. (New York State Bar Association Publications).



Alexander Leong

Alexander Leong (J.D. Brooklyn Law School, 2002) is Of Counsel in the Firm's Employment & Labor Practice Group.

Alexander has represented employers in connection with employment discrimination cases, wage and hour and prevailing wage disputes and investigations, unemployment insurance tax audits and claims, and workers' compensation penalties matters, pending before courts, arbitrators, and government agencies, including the Equal Employment Opportunity Commission, United States Department of Labor and New York State Department of Labor, New York State Division of Human Rights, New York City Commission on Human Rights, and New York State Workers' Compensation Board. Alexander, has counseled employers on matters involving employee discipline, leave, and internal investigations of misconduct. He has also represented employers in unfair labor practice investigations and trials and representation hearings before the National Labor Relations Board, and unionized employers in labor arbitrations. Further, Alexander has been retained by businesses in matters involving trade secrets and restrictive covenants.

Clients include, large corporations and small businesses in the financial services, construction, relocation services, retail, property management, education, manufacturing and food services industries. Alexander has represented not-for-profit organizations.

Prior to joining the Firm, Mr. Leong was counsel at a nationally recognized law firm.