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Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP

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P R E S E N T S

The COUNSELOR

IN THIS ISSUE

COVER

SHAREHOLDER RIGHTS
UNDER NEW YORK LAW

PAGE 2

FIRM NEWS, APPEARANCES
& ARTICLES

PAGE 3

SUCCESSFUL LAWYERS
SUCCESSFUL CLIENTS

PAGE 3

FIRM ADDITIONS

BACK COVER

EVENTS

Important New York Labor Law Amendment:

All New York employers need to be aware of an amendment to New York's Labor Law that took effect on October 27, 2009. Under an amendment to Labor Law §195 employers are now required to notify all newly hired employees in writing at the time of hiring of their rate of pay, including overtime rates for employees eligible to receive overtime pay, and the regular payday designated by the employer. The employer is required to obtain a written acknowledgment from each newly hired employee that they have been provided with the required information.

Partner Russell G. Tisman is available to prepare the required notices and acknowledgment forms and to advise you on overtime eligibility issues, along with other regulatory obligations imposed on employers.

SHAREHOLDER RIGHTS UNDER NEW YORK LAW

By Anthony V. Curto and Joseph V. Cuomo

While a "majority interest" (50+%) shareholder ("majority shareholder") of a New York corporation holds significant rights, such rights are not without limits. In the absence of a shareholders agreement, the rights of shareholders of a New York corporation – including "minority interest" shareholders ("minority shareholder(s)") – are governed by the New York Business Corporation Law ("BCL") and New York common law. These laws provide minority shareholders with significant rights that the majority shareholder must understand. The majority shareholder therefore should always consider the need for a shareholders agreement.

Rights and Obligations of Shareholders under New York Law in the Absence of a Shareholders Agreement

While the BCL and New York common law tend to favor the majority shareholder, minority shareholders are provided with several important rights and certain important obligations are imposed on the majority shareholder so that he is in a position to control the corporation. These rights and obligations include:

Fiduciary Duties of Board of Directors: The Board of Directors of a New York corporation is appointed at the direction of the majority shareholder and in most closely-held corporations the Board consists of the majority shareholder and/or its designees. The directors, however, have fiduciary duties to all of the shareholders of the corporation. These include the duty of loyalty and the duty of care.

Right to Petition for Judicial Dissolution: BCL Section 1104-a provides that shareholders holding at least 20% of the voting stock may petition the court for the dissolution of the corporation if: (a) the directors have been guilty of "illegal, fraudulent or oppressive actions" towards the complaining shareholders; or (b) the property or assets of the corporation are being "looted, wasted, or diverted for non-corporate purposes." The court then determines if involuntary dissolution is warranted to provide the petitioners with a fair return on their investment and to protect the rights and interests of the petitioners or shareholders generally. In the event a Section 1104-a action is commenced, BCL Section 1118 provides that any non-petitioning shareholder may elect to purchase the shares of the petitioner(s) at their fair value.

Right to Inspect Corporate Books and Records: Under the BCL, any shareholder has the right to review certain documents—such as financial statements, shareholder lists, and the minutes from shareholder meetings, provided the request is for "[a]ny purpose reasonably related to such person's interest as a shareholder." Under New York common law, shareholders also have the right to review the corporation's other books and records, so long as the inspection is sought in good faith.

Right to Annual Meeting: BCL Section 602 provides that a shareholders meeting "shall be held annually for the election of directors and the transaction of other business." While a minority shareholder's voting interest may not be sufficient to effect any corporate change, the annual meeting requirement does provide a forum for a minority shareholder to speak directly to management, raise issues and ask questions.

Rights and Obligations Often Addressed in a Shareholders Agreement

In evaluating the need for a shareholders agreement, the majority shareholder should always consider the following matters:

Restrictions on Right to Transfer Shares: In the absence of a shareholders agreement, a shareholder generally has the right to transfer its shares. In a closely-held corporation, it is almost always contemplated that the ownership of the corporation be tightly controlled, and that shares not be freely transferable. Failure to regulate the transfer of shares could result in the shares ending up in the hands of an ex-spouse or other family member of the shareholder, a creditor of the shareholder, or worst yet, even a competitor. It is common for a corporation (or the other shareholders) to have a "right of first refusal" to purchase the subject shares in the event of any proposed transfer.

Rights Upon Termination of an Employee-Shareholder: In the absence of an agreement to the

contrary, a shareholder generally has the right to continue its share ownership regardless of death, disability, retirement, or termination of employment with the corporation. In certain termination situations – e.g., termination of an employee shareholder for cause – it is typically not desirable to allow the ex-employee, who perhaps now has an axe to grind with the corporation, to continue to own its shares. Most shareholders

continued on top of page 2



Partner
Anthony V. Curto
focuses his practice on corporate and commercial, tax, trusts and estates and entertainment matters.



Partner
Joseph V. Cuomo
focuses his practice on corporate and commercial, tax, banking and finance, employment and labor and entertainment matters.

agreements contain provisions that define the various rights and obligations of the corporation and the shareholders in the event of a shareholder's death, disability, resignation, retirement, termination of employment for cause or without cause, and the shares becoming subject to an involuntary transfer order (e.g., pursuant to a divorce or bankruptcy).

Drag Along Rights: While a majority shareholder typically can cause the disposition of the corporation's business in an "asset sale" transaction, it typically cannot do so unilaterally in a "stock sale" transaction. Stock sale transactions are often preferred from a seller's perspective as they can be structured on a tax deferred "stock for stock"

basis. Therefore, it is often important for a majority shareholder to have "drag along" rights i.e., the right in the event the majority shareholder wishes to sell its shares to a third-party buyer, to force (or drag along) the minority shareholder to sell its shares on the same terms and conditions. As a counter-balance, minority shareholders often seek "tag along" rights i.e., the right to participate (or tag along) in any sale by the majority shareholder of its shares.

Capital Contribution Obligations: Absent an agreement to the contrary, there is no obligation for a shareholder to make additional capital contributions to the corporation beyond the shareholder's initial contribution for

its shares. If such a further obligation is to exist, a provision in the shareholders agreement or a separate capital contribution agreement will be necessary.

* * * * *

This article enumerates many of the common issues that every majority shareholder should consider at the outset of the participation of a minority shareholder or shareholders in a New York corporation. Of course every situation is unique, and a majority shareholder should examine all of its concerns about having minority shareholders so that expectations can be protected.

FIRM NEWS, APPEARANCES AND ARTICLES

A scholarship in the sum of \$100,000.00 has been established at Brooklyn Law School in honor of Firm Managing Partner **Jeffrey D. Forchelli**. The scholarship was set up by the Lostritto family of Steel-Los III in Bethpage, NY.

John V. Terrana was quoted in *The Wall Street Journal* in an article entitled, "Entrepreneurs Take on Tax Man." The article spotlighted how the bad economy and deteriorating commercial real estate market have motivated small business owners to fight their tax assessments.

James C. Ricca, Peter M. Alpert & Kathryn Sammon Burns collaborated on a foreclosure defense case referred by First American Title. The decision was published in the *New York Law Journal*.

Daniel P. Deegan was quoted in *Newsday* about a recent Hempstead Town agency hearing involving proposed Industrial Development Agency (IDA) assistance for a Hempstead Village housing complex.

The Firm has been ranked #1 for the second consecutive year in the *Long Island Business News'* listing of top real estate law firms on Long Island.

Barbara S. Alesi's contributed article, "Real Estate Taxes," was published in the *New York Real Estate Journal*.

Daniel P. Deegan was featured in an article that spotlighted an industry IDA seminar, "IDAs Pitch Client Benefits to L.I. Brokers," in the *Long Island Business News*.

Russell G. Tisman and two other past presidents were honored by the Huntington Lawyers' Club at its Annual "Old Timers" Night. The Huntington Lawyers' Club, which was established in 1934, is the oldest Lawyers Club on Long Island. Mr. Tisman was president from 2002 to 2003 and previously served on its Board of Directors.

The Firm hosted a meeting for the "United 7-Eleven Franchise Owners of Long Island," (UFOLI) in January. **Andrea Tsoukalas**, who is General Counsel to the Long Island Gasoline Retailers Association (LIGRA) and **Andrew E. Curto** organized the meeting with UFOLI's President Tariq Khan. UFOLI is a business association for Long Island area 7-Eleven Franchisees. Various Firm practice areas were highlighted at the UFOLI meeting. The featured speakers were **John V. Terrana** (Tax Certiorari), **Joseph V. Cuomo** (Corporate), **Frank Davis** (Real Estate Transactions), **Andrea Tsoukalas** (Zoning) and **Andrew E. Curto** (Litigation).

United 7-Eleven Franchise Owners of Long Island (UFOLI) recently retained the Firm along with LIGRA and other trade associations to commence an action against the Department of Taxation and Finance challenging the constitutionality of a statute that dramatically increases tobacco license fees based on the overall gross sales of a retailer. The action was commenced on behalf of the various association members whose profitability would be impacted by the new fee schedule. Partner **Andrew E. Curto**, the lead litigator on the license fee lawsuit, explained to the attendees at the meeting that the temporary restraining order that the Court granted in September 2009 was still in place and that the stay of the enforcement of the statute benefited all retailers state-wide that sold tobacco products.

James C. Ricca, has been re-appointed Chairman of the Banking Law Committee of the Queens County Bar Association for 2010. With over 2,200 members, including many distinguished members of the bench and bar, the Association has rendered service to the legal profession since it was founded in 1876.

Douglas W. Atkins was the featured LI Columnist, and his contributed article, "L.I. Commercial Property Taxes: Status & Valuation," was spotlighted in the *New York Real Estate Journal*. His article was also published in *The Suffolk Lawyer*.

Terence E. Smolev was featured in *Newsday's* "Ask the Expert" column offering expert advice to readers regarding how to handle an estate issue. Mr. Smolev provided expert insight when responding to the inquiry about rights of an elderly parent's estate after a will was rewritten.

Barbara S. Alesi, Kathleen Deegan Dickson, Judy Lynn Simoncic & Domenica R. Leone were featured in the *New York Real Estate Journal's* annual "Women in Real Estate" 2009 edition.

The Firm's Real Property Tax Certiorari practice was ranked #1 on Long Island by the *Long Island Business News*.

Gary M. Kushner and Brian J. Hufnagel were cited in an article in the *Daily Deal* about their bankruptcy case, "YL West 87th to Seek Approval to Tap DIP."

Daniel P. Deegan moderated a workshop session titled "How to Finance Smart Growth" at Vision Long Island's Fall Smart Growth Summit which spotlights actions being taken to accomplish Smart Growth on Long Island. Attendees at the networking luncheon and various workshops included business, community, and elected leaders.

N.Y. State Senator John J. Flanagan participated in the "Government Reports" Breakfast. State and local officials addressed community concerns and provided an update on government activities at a special breakfast roundtable sponsored by the Huntington Township Chamber of Commerce.

Terence E. Smolev and Mary E. Mongioi co-authored the article, "John D.: Appointing Monitor Not in Keeping with Legislative Intent of Article 81," published in the *New York Law Journal*, January 25, 2010.

Jeffrey D. Forchelli was recognized in *Long Island Business News* 2010 edition of "Who's Who in Commercial/Residential Real Estate Law."

Kathryn Sammon Burns was the featured LI Columnist, and her contributed article, "How New Residential Foreclosure Laws Affect Commercial Lending," was spotlighted in the February 2010 *New York Real Estate Journal*.

Kathleen Deegan Dickson has been invited to join other Long Island leaders, to participate in *The Energeia Partnership* at Molloy College in Rockville Centre. *The Energeia Partnership* is a two-year leadership academy dedicated to identifying and addressing the issues challenging the Long Island region.

Andrew E. Curto was a speaker at the Theodore Roosevelt American Inn of Court's Continuing Legal Education program entitled "Expert Witnesses: When and Where to Use Them - The Problems Confronted in Federal and State Jurisdictions." The Inn of Court promotes excellence in legal advocacy, the preservation and promotion of strong ethical values, and collegiality among legal professionals of the bench and the bar.

Danielle B. Notaro was listed in *Newsday's LI People on the Move* and *Long Island Business News* "Newsmakers" section for becoming an Associate at the Firm.

Thomas D. Glascock was a speaker at Conrad Capital Management's client seminar in Melville. Conrad Capital Management (CCM) is a Registered Investment Advisor, offering nationwide investment counseling.

Russell G. Tisman was recognized in the *Long Island Business News* 2010 edition of "Who's Who in Labor Law."

SUCCESSFUL LAWYERS SUCCESSFUL CLIENTS

Our firm's attorneys continue to enhance our clients' economic quality of life

Corporate and Commercial

Anthony V. Curto and Joseph V. Cuomo represented Medford, NY based Advanced Energy Systems, Inc. in an international agreement with Germany based Fritz Haber Institute to manufacture and install in Germany an electron accelerator and transport system. Advanced Energy Systems is a leading international provider of advanced radiation sources and superconducting radio frequency accelerator systems.

Joseph V. Cuomo and Thomas D. Glascock represented Allied Urological Services, L.L.C. in a private offering of its Class A Units to investors. Allied leases office space and medical equipment, and provides strategic and operational management services and administrative services to New York metro area urologists.

Joseph V. Cuomo and Thomas D. Glascock represented Stonehenge Growth Capital in a mezzanine debt investment in MilMar Food Group. Stonehenge Growth Capital manages over \$677 million across venture capital, private equity and debt funds, operating out of five regional offices across the United States including New York City. Goshen, NY-based MilMar Food Group manufactures and distributes a variety of frozen hors d'oeuvres and entrees to the food service, retail, club, private label and airline markets throughout the United States and Canada.

Real Estate

Brian R. Sahn represented Northrop Grumman Systems Corporation in lease negotiations for 94,000 square feet of office space in Bethpage, NY.

Litigation

Russell G. Tisman recently obtained dismissal of discrimination claims filed with the New York State Division of Human Rights ("NYSDHR") and the Washington D.C. Office of Human Rights. In separate complaints to

the NYSDHR, two students accused their private vocational school of discriminating against them because of their national origin and ancestry. After receiving position statements and documentation demonstrating that equal opportunities were made available to all students regardless of their background, and that discipline received by these two students was appropriate for the circumstances and consistent with disciplinary action taken with other students, the NYSDHR found that there was no probable cause to believe that they were victims of discrimination and dismissed their complaints.

In the third case, the Washington D.C. Office of Human Rights found no probable cause, and dismissed an employment discrimination complaint by a sales person who was terminated. The employee, who was the oldest salesperson employed by the company and was gay, claimed that she had been terminated on account of her sex, sexual orientation and age. Based on comparative performance evidence, the Commission of Human Rights issued a no probable cause determination.

Andrew E. Curto defended a Motion for Summary Judgment made by defendants in an \$11 million art fraud case, successfully convincing the Court that based upon representations made by the defendants during the course of a multi-year transaction for nearly 50 items of ancient Chinese artwork, the statute of limitations would be tolled based upon specific intentional statements designed to prevent our client from discovering the inauthentic nature of the various objects in the collection. This substantially reduced the burden of proof at trial to allow plaintiff to merely show that the goods were not what they were purported to be, rather than the more difficult burden of demonstrating a fraud claim, which would have required our client to demonstrate that the defendants knew at the time of sale that the items they were selling were not authentic.

Donald Jay Schwartz recently settled a negligence case pending in Nassau County Supreme Court for \$125,000.

Banking and Finance

Steven G. Gaebler represented Citibank, N.A. in negotiating and issuing a substitute letter of credit in the amount of \$4,500,000 to support California Statewide Communities Development Authority Tax-Exempt Bond Issue relating to industrial property. It would be used by Interplex Nascal, Inc., a leader in the manufacturing of precision stamped products for the connector, electronic and telecommunications industries.

Tax, Trusts and Estates

Terence E. Smolev and Stephanie M. Alberts successfully represented individual taxpayers in a U. S. Tax Court case relating to an alleged deficiency in their 2007 personal income tax return. During 2007, the individual taxpayers completed an I.R.C. Section 1035 exchange of an annuity contract for a different annuity contract. The new annuity contract contained a free-look provision providing a time period during which the contract could be returned if it was determined that it was not a good investment. The taxpayers ultimately decided to exercise the free-look privilege and the funds were returned to the original annuity contract. The taxpayers received a Form 1099 for the new annuity contract indicating that the entire amount transferred was a taxable exchange. The taxpayers did not report this as a taxable distribution on their 2007 personal income tax return because it was an I.R.C. Section 1035 exchange. This office successfully challenged the Notice of Deficiency issued by the Commissioner of Internal Revenue by demonstrating through the facts at hand and documentary evidence that the taxpayers completed a successful I.R.C. Section 1035 exchange and therefore, no tax was due. Based upon the foregoing, the U. S. Tax Court issued a decision stating that there was no deficiency in the taxpayers' income tax for tax year 2007.

NEW ADDITIONS – EXPANDED LITIGATION PRACTICE

The Firm has expanded its Litigation practice with the addition of James P. O'Brien, Jr. and Christopher G. Gegwich as new partners who focus on Labor & Employment and the promotion of Danielle B. Notaro to Associate.



James P. O'Brien, Jr. represents employers in all areas of labor and employment law. He defends employers in connection with all manner of labor and employment litigation, including claims of discrimination and harassment. Mr. O'Brien also counsels clients on difficult employment law subjects including termination decisions, managing employee absences, and wage and hour issues and routinely conducts internal investiga-



tions for employers. Mr. O'Brien has developed particular experience in representing institutions of higher education and private schools.

Christopher G. Gegwich has extensive experience defending management clients in a wide variety of labor and employment litigation matters in federal and state courts as well as before a variety of administrative governmental agencies, involving claims of discrimination, harassment and retaliation, breach of employment contracts, and trade secret and restrictive covenant matters. Mr. Gegwich regularly counsels and trains employers in a variety of industries in all aspects of labor and employment law. Mr. Gegwich also has

significant experience representing educational institutions with respect to employment matters and student-related issues.



Danielle B. Notaro concentrates her practice in the areas of litigation, bankruptcy and insolvency, and employment and labor. While earning her degree, Danielle worked as a law clerk with the Firm. Prior to working for the Firm, Ms. Notaro had a judicial internship with Justice Stephen A. Bucaria of Nassau County Supreme Court and a legal internship at the United States Attorney's Office for the Eastern District of New York. *The Attorney of Nassau County* also covered her promotion.

EVENTS



Left - Bruce Ferguson, head of the Suffolk IDA
 Middle - Partner Daniel P. Deegan
 Right - Joe Gioino, head of the Nassau IDA



Left - Daniel Denihan, Chairman of the Board of St. Francis Hospital
 Center - Jeffrey D. Forchelli, Managing Partner
 Right - Alan D. Guerci, M.D., President & CEO of St. Francis Hospital

The Firm sponsored an Industrial Development Agency (IDA) Roundtable discussion moderated by Daniel P. Deegan. The seminar hosted by the Commercial Industrial Brokers Society (CIBS) was attended by over 100 Long Island brokers and attorneys. Tax breaks and financing information were the principal discussion items. Also on the expert panel were Joe Gioino, head of the Nassau IDA, and Bruce Ferguson, head of the Suffolk IDA.

The "Challenge 2009" event hosted by St. Francis Hospital honored Jeffrey D. Forchelli for his continued commitment and contributions. "I am appreciative of the recognition from St. Francis Hospital. I feel privileged to have been in a position to assist the organization over the years and plan to continue to be supportive of the Hospital for years to come" Forchelli stated.

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