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# LEGAL UPDATE

Insights and Developments in the Law

Summer 2008

## New Developments with Realty Transfer Tax

*By John F. Lushis, Jr.*

It has been common practice in real estate transactions for a buyer to sign an agreement of sale with a seller in the buyer's personal capacity. The agreement will typically contain the words "the buyer, his nominees or assigns"

and provide that the agreement is freely assignable to an entity, such as a new limited liability company (LLC) formed by the buyer. At the closing, the seller deeds the property directly to the assignee (the new LLC) and transfer tax is paid on the amount of the purchase price stated in the agreement of sale.

The foregoing has been the practice in view of the Pennsylvania Supreme Court case in *Allebach v. Commonwealth of Pennsylvania, Dept. of Fin. & Revenue*, 683 A2d 625 (1996). In *Allebach*, the seller agreed to sell real property for \$610,000. The buyer subsequently assigned his interest in the agreement of sale and the agreement was thereafter assigned two additional times. The ultimate assignee agreed to pay \$3.2 million for the assignment to it. At the closing, the seller deeded the property to the ultimate assignee for the original purchase price and transfer tax was paid on that amount. The Department of Revenue argued the seller undervalued the property and that transfer tax should have been paid on a value of \$3.2 million, not the original price. The Supreme Court disagreed ruling that transfer tax is imposed only on the amount of the original purchase price between the seller and the assignor, not any assignment price as well. The case was heard on an appeal made by the Department against the seller, not the buyer or any of the other assignors. Even though the case dealt

### Employment Discrimination Claims: *What to Expect and How to Defend Your Business*

PRESENTED BY THE LAW FIRM OF  
*Tallman, Hudders & Sorrentino*

**Wednesday, October 8, 2008 • 3:00 to 5:00 p.m.**  
**Lehigh Country Club**  
**319 S. Cedar Crest Boulevard, Allentown, PA**  
**Reception to Follow**

*Featuring a presentation by and a panel discussion with some of Tallman, Hudders & Sorrentino's top legal minds in the areas of employment discrimination law and litigation.*

**George Hlavac, Esq. • Steven Hoffman, Esq.**  
**Thomas Sadler, Esq.**  
**The Honorable Thomas Wallitsch (retired)**  
Moderated by **Scott Allinson, Esq.**

RSVP by Friday, October 3, 2008 by calling  
610-391-1800 or e-mailing [lbeidler@thslaw.com](mailto:lbeidler@thslaw.com)

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## Announcements

**Donald H. Lipson** was recently appointed to the Board of Directors of North Penn Legal Services (NPLS). The mission of NPLS is to provide civil legal representation to low-income people and ensure equal access to justice for all. NPLS helps low-income people throughout 20 Counties in Northeast Pennsylvania.

**Barbara L. Hollenbach** has been elected Chair of the Pennsylvania Bar Association's Workers' Compensation Section for 2008-2009.

**Scott B. Allinson** has been appointed to the Greater Lehigh Valley Chamber of Commerce Foundation board and also serves as its solicitor. The mission of the Foundation is to create vibrant downtown and main street communities by serving as a valley-wide advocate and partner for business development and success in the Lehigh Valley's downtowns.

**Wendy R.S. O'Connor** has been elected to the Board of Trustees of The Hillside School located in Macungie, Pennsylvania. Founded in 1983, The Hillside School has become recog-

nized as a benchmark institution for the support of children with learning disabilities. The mission of The Hillside School is to maximize the potential of the child with learning disabilities through excellence in education and to educate and develop community awareness of the needs of children and adults with learning disabilities. Hillside provides highly individualized instruction designed to allow students to make continuous progress and prepares them to return to a mainstream private or public school setting.

**Stephanie A. Kobal** has been elected to the Board of Directors of the Ballet Guild of the Lehigh Valley. Founded in 1958, the Ballet Guild of the Lehigh Valley has become recognized as the premier pre-professional dance program in the greater Lehigh Valley. The mission of the Ballet Guild of the Lehigh Valley is to foster the art of theatre dance, primarily through classical ballet, education and performances. In December 2008, the Ballet Guild of the Lehigh Valley will celebrate its 40th Anniversary per-

## In the News

For the 4th year in a row **Tallman, Hudders & Sorrentino** has been voted "Best of the Valley" in *Lehigh Valley Magazine*.

**Matthew R. Sorrentino and Barbara L. Hollenbach** were selected as Pennsylvania "Super Lawyers" for 2008 by *Philadelphia Magazine*. The objective of the Super Lawyers selection process is to create a credible, comprehensive and diverse listing of outstanding attorneys that can be used as a resource to assist attorneys and sophisticated consumers in the search for legal counsel. No other legal publisher goes through the unique multi-step process that Super Lawyers employs to find evidence of peer recognition and professional achievement. Only 5 percent of the total lawyers in the state are selected for inclusion in Super Lawyers.

## New Attorney

The Firm is pleased to announce the addition of one new attorney.

**R. Nicholas Nanovic** — Mr. Nanovic received a B.B.A. in Accounting from the University of Notre Dame in 2004, and his J.D. from the University of Miami School of Law in 2007. He also earned his LL.M. in Taxation from the University of Miami School of Law in 2008. While at law school, Mr. Nanovic interned for the SBSE division of the Internal Revenue Service in the Miami office. He also served as a project leader for the Volunteer Income Tax Assistance program. Mr. Nanovic is engaged in the practice of tax law, estates and trusts, and estate planning.

## TH&S Receives Award for Excellence in Lawyer Advertising

The Pennsylvania Bar Association (PBA) presented the inaugural *Award for Excellence in Lawyer Advertising* to the Allentown-based law firm of Tallman Hudders & Sorrentino during the Association's Annual Meeting on June 5th, at the Hershey Lodge, Hershey, PA.

Tallman, Hudders & Sorrentino in partnership with its advertising agency, Jangle Advertising, Marketing & Communications, created a variety of innovative and unique advertisements that the PBA named best in the state. The variety of program advertisements not only highlighted the firm's professionalism and dedication to the community, but also its willingness to showcase a sense of humor not stereotypical of attorneys. Tallman, Hudders & Sorrentino makes giving back to the community a priority in its practice. The firm is consistently donating time, funds and energy to local organizations, both as a company and as individuals. As a sponsor of many nonprofit fundraisers and events, Tallman, Hudders & Sorrentino is often given the opportunity to advertise in event programs.

The *Award for Excellence in Lawyer Advertising* was established to recognize lawyers for their efforts in developing advertising that is unique, creative and effective in generating new business and enhancing existing client relationships. Criteria for the award include advertising with truthful and accurate presentation of facts, positive representation of the profession as well as of the firm being promoted, creativity and statements of success among other qualifications.

# Why You Should Select Tallman, Hudders & Sorrentino as Your Title Agent

By Charles F. Smith, Jr.

When you purchase a residential or commercial property you have the right to select who will handle your real estate closing and provide title insurance. You may be pressured by a real estate agent or lender to use a certain title agency, often an in-house or affiliated entity, but you owe it to yourself to make your own choice. At Tallman, Hudders & Sorrentino we have several licensed title agents, including a number of our attorneys, on staff who provide the same services as an abstract or title company at no additional cost. We do not charge an attorney's fee for routine closings and yet you have the benefit of our legal expertise and objectivity as an independent agent representing your interests. The closing will be held at our office and will be conducted by experienced professionals who have made a career of representing buyers and sellers at real estate closings.

• **So what exactly does a title agent do and what is title insurance?**

A seller has the responsibility to deliver clear and marketable title to a purchaser. Lenders always require title insurance to insure their loan position. Buyers are also issued a separate insurance policy which essentially protects against unknown defects in title. The title agent is responsible for "searching" the title to the property to determine whether there exists anything that negatively impacts, limits or restricts title to the property. For example, open mortgages, liens, unpaid taxes, easements, covenants, conditions, restrictions and prior adverse conveyances all limit or negatively impact title. The title agent is responsible for clearing title which includes ordering loan payoffs and satisfying all outstanding mortgages, taxes and liens encumbering the property.

• **What services are included in the cost of title insurance?** The cost of title insurance in Pennsylvania is regulated by the Pennsylvania Insurance Commission. Routine real estate purchases can be handled for a flat rate, known as the "all inclusive rate" set by the Pennsylvania Insurance Commission. That rate is intended to cover the cost of searching the title, preparing the settlement sheet, collecting the money, conducting closing, making disbursements and recording documents. You should not, for example, be separately charged for the title search in routine residential closings where a policy of title insurance is issued.

• **What costs can I anticipate at closing?** You can anticipate charges from your lender for appraisals, flood search certificates, document preparation and possibly points (a charge based on a percentage of the loan for buying down the interest rate). Customarily the buyer and seller split the realty transfer tax which is usually 2% of the purchase price. Some transactions qualify for exemption from transfer tax and we can provide you with guidance to make certain the transaction, if eligible, meets the requirements.

Recording fees are charged at closing for the recording of documents. The charges may be based on the number or type of instrument presented for filing, the number of pages, names and legal descriptions, for example. Real estate taxes from the local municipality, county and school district will have to be pro-rated as of the date of settlement. We procure tax certifications from each taxing authority regarding current taxes and search the local tax claim bureau for delinquencies from prior years. It is the job of the title agent to ensure that all current year and de-

linquent taxes are paid and pro-rated accurately as of the date of closing to prevent the seller's debts from becoming your problem.

• **Address problem issues BEFORE closing.** There are essentially two extremely disparate phases to a real estate transaction: (1) pre-closing; and (2) post-closing. A buyer has leverage against the seller during the "pre-closing" phase. That leverage instantaneously evaporates at the close of settlement. The best course of action is to address outstanding issues and potential problems in the "pre-closing" phase because, as a matter of practical reality, once you own the property and the seller and the realtors have been paid, you are on your own.

• **Why should I use TH&S instead of a settlement company?**

"Don't go to a law firm . . . you don't need a lawyer . . . lawyers are deal breakers." That sentiment resonates throughout the real estate sales community and casts a wide and overreaching net. Lawyers are charged with scrutinizing a deal and making sure the interests of their clients are protected but they are not "deal breakers". Brokers, agents and abstract company employees are not licensed to practice law and do not have your interest in mind. Their interest is to close the deal and receive their commissions and fees. In the event you follow legal advice from them that is incorrect, you have no recourse to recover your losses.

If you are buying or selling real estate, do not hesitate to contact us. We will make sure your interests are protected.

*Attorney Charles F. Smith, Jr. concentrates his practice in the area of civil litigation, real estate transactions and estates.*

*Actual resolution of legal issues depend upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*

## Realty Transfer Tax

*Continued from page one.*

specifically with the seller, it has consistently been interpreted to mean that in any transaction involving the assignment of an agreement of sale of real property, transfer tax is imposed only on the original amount of the purchase price, not any assignment price as well.

As a result of the *Allebach* decision, the Department of Revenue amended the Realty Transfer Tax Regulations effective December 15, 2007 and reiterated these regulations in April 2008. Although the Department claims the amendments do not overturn the holding in *Allebach*, we believe they are specifically designed with that intent. The Department contends that the new amendments also address the taxation of the *assignor*, as opposed to the seller (which was the situation in *Allebach*). Outlined below are some examples of the Department's interpretations of the regulations.

In situations where an agreement for the sale of real property is assigned by a buyer, transfer tax now is imposed not only on the amount of the purchase price between the seller and the assignor *but also on the value of each assignment of the agreement*. Thus, if Party A agrees to sell property to Party B for \$750,000 and before closing, Party B assigns the agreement of sale to Party C for 100,000, the transfer tax imposed will be on a value of \$1,600,000 (\$750,000 on the transfer to Party B, \$750,000 on the transfer to Party C and the \$100,000 Party B received from Party C for the assignment; the assignment value is deemed to be the original purchase price *plus* \$100,000). Further, the Department's view is that even in situations where an individual as buyer signs an agreement of sale with the right to assign, subsequently assigns the agreement to a LLC that is formed by the buyer after the agreement is executed for \$1.00

and the seller then deeds the property to the new LLC, transfer tax is imposed on the amount of the purchase price plus the value of the assignment (this value is computed by a formula using the county's "common level ratio factor"). The Department's position is that because the new LLC is not a party to the agreement of sale and the buyer is not acting as a straw party (the Department states that a person or entity cannot act as a straw party for a party that does not yet exist), the assignment to the new LLC after the agreement of sale is signed but before closing constitutes a taxable transfer in the amount of the value of the assignment, even though there was no deed given by the assignor to the assignee. The Department contends that the seller and the assignee are jointly and severally liable for transfer tax on the original purchase price and that the assignor and assignee are jointly and severally liable for transfer tax on the value of the assignment. Thus, under the new amendments to the regulations, a buyer under an agreement of sale is effectively precluded from ever assigning it, even for \$1.00, without incurring transfer tax on an amount substantially greater than the original purchase price.

It should be noted that the Department of Revenue audits sales transactions and the failure to pay transfer tax can result in the imposition of a lien on a liable party's real and personal property as well as the imposition of penalties.

In view of the foregoing, we are advising our clients of our preferred procedure to avoid this trap and what we believe is a serious risk of double taxation. In the event you are contemplating a real estate purchase for business purposes, we suggest you contact us for guidance through this minefield.

*Attorney John F. Lushis, Jr. concentrates his practice in the area of general business law, real estate and commercial transactions.*

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