Phillips Lytle LLP

Beyond Dispute

JUNE 2013

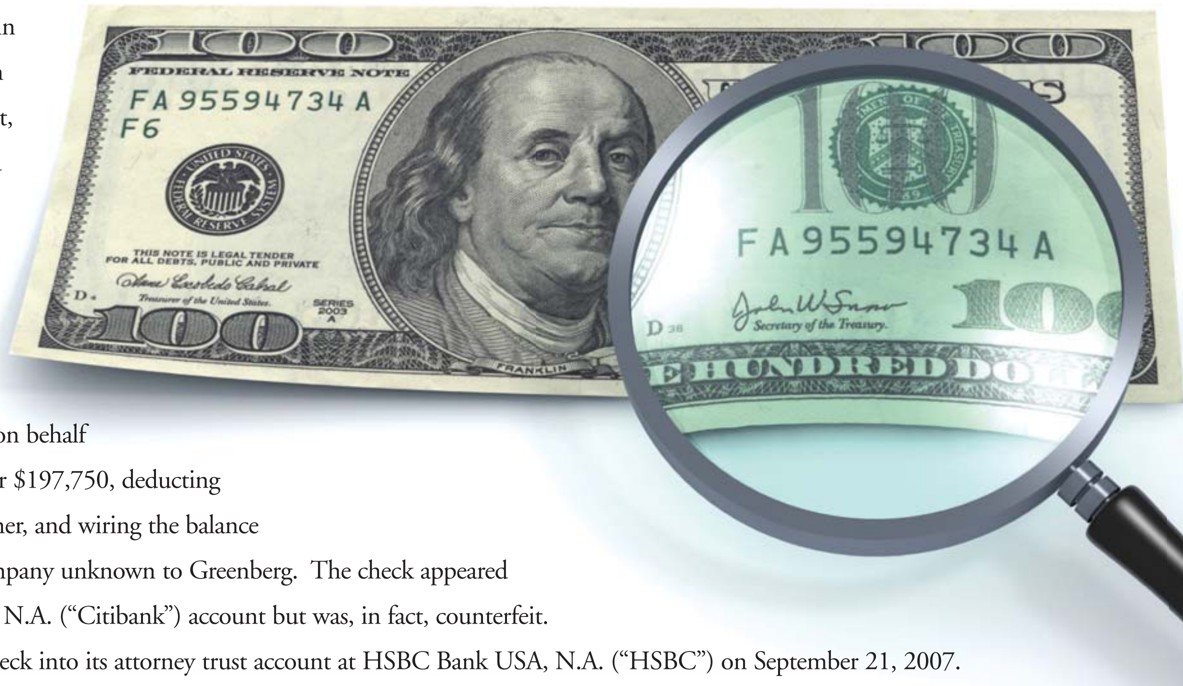
A BUSINESS AND COMMERCIAL LITIGATION REPORT FROM PHILLIPS LYTLE

New York's Highest Court Clarifies Who Bears the Risk of Loss in Counterfeit Check Schemes

In a case argued successfully by Phillips Lytle LLP,[1] the New York Court of Appeals clarified that the depositor bears the risk of loss on a counterfeit check until settlement becomes final. *Greenberg, Trager & Herbst, LLP v. HSBC Bank USA*, 17 N.Y.3d 565 (2011). Statements concerning "clearing" of a check and funds availability are irrelevant.

BACKGROUND

In *Greenberg*, a partner in the New York City law firm Greenberg, Trager & Herbst, LLP ("Greenberg") received an email purporting to be from a potential client in Hong Kong seeking legal representation. That "legal representation" included receiving a check on behalf of the Hong Kong client for $197,750, deducting $10,000 for the firm's retainer, and wiring the balance to another Hong Kong company unknown to Greenberg. The check appeared to be drawn on a Citibank, N.A. ("Citibank") account but was, in fact, counterfeit. Greenberg deposited the check into its attorney trust account at HSBC Bank USA, N.A. ("HSBC") on September 21, 2007. The next business day, HSBC, following federal funds availability law that requires a bank to make funds from a deposited check available within short time periods, provisionally credited Greenberg's account for $197,750. Based on the check's routing number, HSBC submitted it for processing to the Federal Reserve Bank in Philadelphia, which presented it to Citibank in New Jersey for payment. Citibank's New Jersey processing center did not recognize the routing number and returned the check to HSBC on



continued on page 2

Attorney Advertising

IN THIS ISSUE / New York's Highest Court Clarifies Who Bears the Risk of Loss in Counterfeit Check Schemes **1-3** / A Litigation's Venue May Determine Whether the Producing Party Can Shift E-Discovery Costs to the Requesting Party **4-5** / Buy-Sell Agreements Can Avoid Uncertainties in Business Valuations **6-7** / Super Control Board May Be in the Near Future for New York State **8-10** / Spotlight **11** ■

September 25, 2007 with the notation "sent wrong." HSBC then repaired the routing number, determined that the check belonged to Citibank in Las Vegas and resubmitted it to the Federal Reserve Bank in San Francisco on September 26, 2007.

On September 27, 2007, a partner at Greenberg called HSBC to ask if the check had "cleared." The partner alleged that the HSBC banker, with whom the firm had a five-year banking relationship, told him that the check had cleared.[2] Relying on the HSBC banker's oral statement, the partner wired the $187,750 balance of the Hong Kong check later that day as instructed by the Hong Kong email.

On October 2, 2007, Citibank dishonored the check and returned it to HSBC as "Suspect Counterfeit." HSBC relayed this information to Greenberg, revoked the provisional credit from its account, and charged back the account.

COMPLAINT ALLEGATIONS

Faced with owing HSBC $187,750, Greenberg sued Citibank in New York Supreme Court for failing to discover that the check was counterfeit. The firm also sued HSBC for negligence and negligent misrepresentation for failing to inform it that the check was returned as dishonored on September 25, 2007, and for stating to the Greenberg partner that the check had "cleared" on September 27, 2007.

DECISION

The Supreme Court granted summary judgment for both banks, dismissing all of Greenberg's claims against them. The Appellate Division affirmed. The Court of Appeals granted leave to appeal and affirmed the dismissal of Greenberg's claims. The Court of Appeals reaffirmed that the Uniform Commercial Code ("UCC") prescribes the duties the various banks owe to the depositor. The Court held that Citibank, as the payor bank, owed no duty to Greenberg to detect forgery because the firm was not Citibank's customer. Under UCC §§ 4-301 and 4-302, Citibank's only duty to a non-customer like Greenberg was to take one of the following actions by midnight on the banking day after it received the check: pay it, return it, or send written notice of its dishonor. Citibank satisfied its duty by returning the check to HSBC one day after receiving it. Greenberg argued that Citibank should have known the check was counterfeit because six other checks for the same amount were returned by Citibank on that same date. The Court declined to extend the duty a payor bank owes its own customers—to exercise ordinary care in detecting and refusing to honor forged checks—to non-customers. Because Citibank did not breach any duty it owed to Greenberg as a non-customer, the Court held that the Supreme Court had properly dismissed the negligence claims against Citibank.

Greenberg alleged two claims against HSBC. As to the negligent misrepresentation claim against HSBC, the Court noted that liability for negligent misrepresentation is "imposed only on those persons who possess unique or specialized experience, or who are in a special position of confidence and trust with the injured party." An arms-length relationship between a bank and its depositor, the Court explained, is not such a relationship, even where a long-standing or familiar relationship exists between a customer and a bank employee. The Court declined to impose a fiduciary duty upon HSBC, citing the express waiver included in the trust account's contract, which prevents the firm from pursuing claims based on bank employees' oral or written representations about the account's balance. The Court considered the oral statement that the check had "cleared" to be ambiguous because it "may have been intended to mean only that the amount of the check was available"—as it was in this case. As a result, the Court held that the partner's reliance on the oral statement as assurance that final settlement had occurred was "unreasonable as a matter of law."

As to the negligence claim against HSBC, the Court held that HSBC had no duty to inform Greenberg when the check was initially returned by Citibank's New Jersey processing center as "sent wrong" on September 25. Greenberg argued that the return constituted a dishonor of the check pursuant to UCC § 4-212(1), thereby triggering HSBC's duty to inform Greenberg of the dishonor and charge back its account by midnight of the following banking day—September 26, the day before Greenberg wired the funds to Hong Kong.[3] The Court disagreed, explaining that banks can satisfy their duty to handle a depositor's check with ordinary care imposed by UCC § 4-202 by following accepted banking industry practices. The Court found that treating the return as an "administrative return"—where, after a bank determines that a check's routing number is damaged or illegible, it repairs the routing number and resubmits it for processing—was an "accepted practice." By following the accepted "administrative return" practice, the Court held, HSBC met its duty of ordinary care and the negligence claim against it was, therefore, properly dismissed.

Finally, the Court rejected Greenberg's claim that it should prevail against both Citibank and HSBC under the doctrine of equitable estoppel. Greenberg argued that both banks should bear the loss, since their collective failure to maintain fraud prevention procedures enabled the counterfeiters to defraud the firm. The Court disagreed, holding that the firm was in the best position to protect itself from counterfeit check fraud by knowing its "client." The Court concluded that the banks did not breach any duty owed to Greenberg, and that Greenberg's claims were properly dismissed.

If you seek additional information about the check collection process, contact Preston L. Zarlock, Partner and Team Leader in the Business & Commercial Litigation Practice, at (716) 847-5496 or pzarlock@phillipslytle.com. This article was co-authored by Preston Zarlock and Andrew P. Devine, Associate in the Business & Commercial Litigation Practice. ■

1. Phillips Lytle partner Preston L. Zarlock argued HSBC's case at the New York Court of Appeals. Michael R. Mendola of HSBC assisted with the brief at the Court of Appeals and argued the case at the New York Supreme Court and the Appellate Division.
2. HSBC disputed the substance of this conversation, but the Court accepted Greenberg's version at the summary judgment phase of the litigation.
3. To support its argument that the check was dishonored, Greenberg cited an HSBC internal document that labeled the check return as "insufficient funds." However, the Court accepted HSBC's explanation that the label "insufficient funds" was the default setting in its check processing system and that this particular check was mislabeled. As a result, the Court considered the "insufficient funds" label to be a clerical error, not a dishonor.

A Litigation's Venue May Determine Whether the Producing Party Can Shift E-Discovery Costs to the Requesting Party

To date, courts within New York have not been in agreement as to who bears the costs of producing electronically stored information ("ESI"). New York, however, may soon adopt the test federal courts have used for over a decade to determine whether a party requesting ESI should bear the costs of producing it.

FEDERAL COST SHIFTING TEST

In *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("*Zubulake I*"), the first of many seminal federal court decisions on electronic discovery, Southern District of New York Judge Shira A. Scheindlin set forth a test to determine whether cost shifting between parties is appropriate, particularly as it relates to ESI. *Id.* at 322 (applying the test and holding that the producing party had to pay its own production expenses).

The general rule is that the producing party pays the costs of producing responsive data. *Id.* at 324. In *Zubulake I*, however, the court held that the requesting party may bear these costs when ESI discovery imposes an "undue burden or expense" on the producing party. *Id.* at 318. Yet, undue burden or expense will not be assumed just because a party requests ESI; rather, the inquiry turns upon whether the requested ESI is accessible or inaccessible. *Id.* at 318-19. Accessible ESI includes active/online data and offline storage/archives, such as removable optical disks or magnetic tape media. Inaccessible ESI includes backup tapes and erased, fragmented or damaged data. *Id.* The court also held that courts should consider cost shifting "*only* when electronic data is relatively inaccessible, such as in backup tapes." *Id.* at 324.

Next, courts should determine what data may be found, and take a "sensible approach" to production, such as "restor[ing] and produc[ing] responsive documents from a small sample of the requested backup tapes." *Id.* (emphasis in original).

Finally, seven factors must be considered, "weighted more-or-less in the following order:"

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of information from other sources;
3. The cost of production, compared to the amount in controversy;
4. The cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

Id. at 322-24 (noting that the first two factors are the "most important").

NEW YORK STATE COURTS ARE DIVIDED

New York State Courts have not agreed as to who bears the cost of producing documents (much less ESI), or when, if at all, such costs may be shifted to the party requesting the information. There may be, however, a change in the tide. Although the New York Court of Appeals has not addressed the issue, for the first time since the 2003 *Zubulake I* decision, a New York Appellate Division has adopted the federal cost shifting test. *U.S. Bank N.A. v. GreenPoint Mortg. Funding, Inc.*, 94 A.D.3d 58, 64-65 (1st Dep't 2012) (adopting the *Zubulake I* standard but dismissing defendant's motion for cost

shifting as premature). In *U.S. Bank*, the First Department held that "the adoption of the *Zubulake* standard is consistent with the long-standing rule in New York that the expenses incurred in connection with disclosure are to be paid by the respective producing parties and said expenses may be taxed as disbursements by the prevailing litigant." *U.S. Bank N. A.,* 94 A.D.3d at 65.

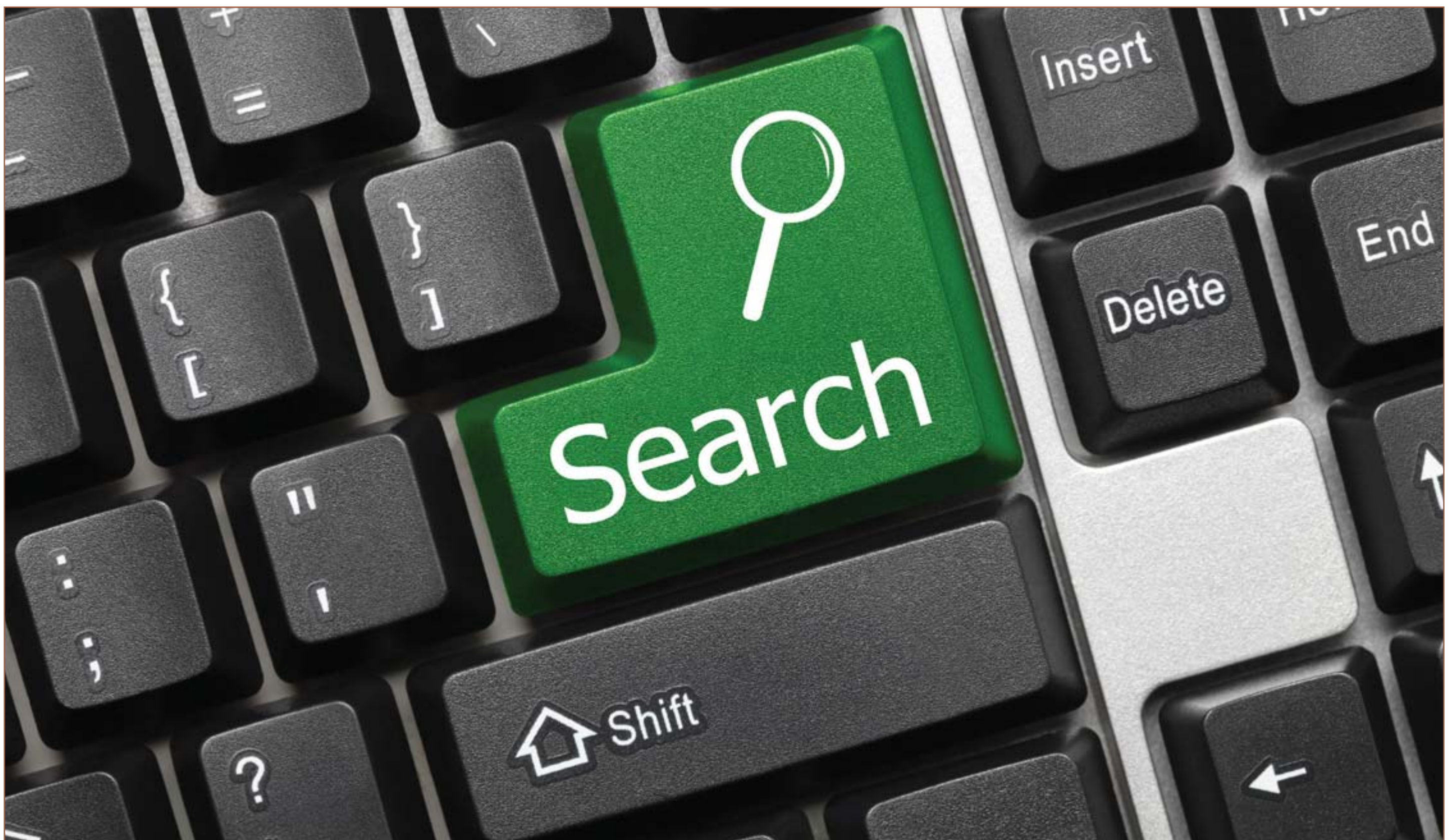
Two courts within the First Department have cited *U.S. Bank* in addressing cost shifting, although neither specifically applied the test. *Aldrich v. N. Leasing Sys., Inc.,* No.302803-07, 2012 N.Y. Slip Op. 32193(U) (Sup. Ct. N.Y. Cnty. Aug. 20, 2012) (granting protective order in defendants' favor with respect to producing emails because "a comparison of the cost of production with the amount in controversy does not warrant imposing this expense upon defendants at this time"); *Estate of Tilimbo v. Posimato*, 36 Misc. 3d 1232(A), 2012 N.Y. Slip Op. 51579(U) (Sur. Ct. Bronx Cnty. Aug. 22, 2012) (noting that New York law is still developing on the issue of cost shifting between parties, but recognizing that, as to non-parties, the requesting party is to defray the non-party's reasonable production expenses).

Although the Second Department has not adopted the *Zubulake I* test, courts within the department have—contrary to the general rule—held that the *requesting* (not producing) party should pay for e-discovery related costs. *Etzion v. Etzion,* 7 Misc. 3d 940 (Sup. Ct. Nassau Cnty. 2005) (in response to plaintiff's request that defendant pay for plaintiff's computer expert, the court held that "the party seeking discovery should incur the costs in the production of discovery material"); *Lipco Elec. Corp. v. ASG Consulting Corp.,* 4 Misc. 3d 1019(A), 2004 N.Y. Slip Op. 50967(U) (Sup. Ct. Nassau Cnty. Aug. 18, 2004) (same) (note, *U.S. Bank* disagreed with this decision).

The Third and Fourth Departments have not addressed the *Zubulake I* test as it concerns ESI, but courts within those departments have followed the general rule that the producing party bears the cost of production. *E.g., Gehen v. Consol. Rail Corp.,* 289 A.D.2d 1026 (4th Dep't 2001) (not addressing ESI, but holding that "[a]ny expenses incurred by a party in connection with discovery should be paid by the party incurring the expenses and may be taxed as disbursements by the party who ultimately prevails").

Until New York law is settled, venue provisions may be important in cases involving the costly production of ESI. Parties with a significant amount of relevant ESI to produce, may prefer federal court, with better chances of cost shifting to the requesting party.

If you have a question or would like more information about electronic discovery, contact Jennifer A. Beckage, Phillips Lytle Business & Commercial Litigation Associate, at (716) 847-7093 or jbeckage@phillipslytle.com. ■



Buy-Sell Agreements Can Avoid Uncertainties i

A business valuation can reward years of work and commitment by timely determining the proper value of an interest to a withdrawing equity holder. It can also end in years of dispute in the courts with former business partners vying for advantage. This article reviews several factors involved in buy-sell agreements and how they affect dispute resolution.

Business valuation disputes arise in many different contexts. Whether it is upon the death of a shareholder triggering a buy-sell provision, the removal of a minority shareholder from participation in the business, the withdrawal of a partner who wants to go his/her separate way, or some other variation, the goal is to obtain a valuation in a reasonable period of time on which all sides can agree. Failing that, a neutral (judge, arbitrator, mediator) may help in the process.

Attorneys are regularly involved in this process because of their experience in dealing with the numbers, legal issues and, more importantly, the parties in conflict. There is, however, always a support team needed to assist in the process, foremost among them the appraisers and accountants who work the numbers.

A BUSINESS VALUATION CAN REWARD YEARS OF WORK AND COMMITMENT BY TIMELY DETERMINING THE PROPER VALUE OF AN INTEREST TO A WITHDRAWING EQUITY HOLDER. IT CAN ALSO END IN YEARS OF DISPUTE IN THE COURTS WITH FORMER BUSINESS PARTNERS VYING FOR ADVANTAGE.

BUY-SELL AGREEMENTS

If the parties have planned ahead, there will be an agreement on how the valuation and division of interests will take place in a parting of ways. If not, a dispute resolution provision, or possibly a statute, may provide a means by which an equity-holder may exit and receive value, but this involves the costs of utilizing the judicial system. It is far better for the parties to map their own path, of course, and counsel is available to assist with this kind of planning.

1. AGREE TO VALUATION PRICE

The simplest arrangement may be where the parties have agreed to a valuation price, for example on an annual basis, which avoids even the need to get a bookkeeper involved, let alone accountants and appraisers. However, in one recent case, the parties agreed to a price when they signed their original agreement, but that was 20 years prior. The valuation was not updated annually, as agreed, and years of litigation ensued after a court refused to enforce the stale numbers. *In re Grande'Vie, LLC*, 93 A.D.3d 1281 (4th Dep't 2012).

In another case, the parties agreed in a buy-sell provision that the valuation would be "book value" as determined by the company's regular bookkeeper. This resulted in a low number for the selling shareholder, and though there was some minor skirmishing over the appropriate rate of depreciation, the matter was quickly concluded.

2. AGREE TO WHO WILL APPRAISE

An appraisal can be delegated to the company bookkeeper, or to another who is trusted by those who have put the business together, but parties must be careful that the designating language is clear and unequivocal. In one recent case, purchasing members attempted to force a valuation by their selected appraiser, who did not take input from the seller, an estate, but the courts held that the selection process was flawed and ordered a hearing. *Id.*

Different appraisers apply different criteria to valuations, or may have limitations on appraisal ability. A Member of the Appraisal Institute ("MAI"), experienced in real estate valuations, may not be suited to value the business operating on the real estate. An American Society of Appraisers ("ASA") appraiser may feel obliged to apply discounts to the valuation not found in the buy-sell agreement, but then face tough cross-examination on presentation. It is important to determine what appraiser or bookkeeper is best under the circumstances involved. It is also important to establish a back-up plan for selection of a substitute, in case the designated appraiser/bookkeeper is unavailable.

3. AGREE TO METHOD OF APPRAISAL

Parties to buy-sell agreements can specify the basis for a valuation, *e.g.,* "fair value" or "fair market value." Valuing assets at "fair value" or "fair market value" can carry much different meanings. What formula is to be used, for example, where the parties refer to "fair value" in an agreement made 20 years ago? A reference like this in a recent case sent

n Business Valuations

the attorneys to research publications of the ASA to determine the definitions as of the date of the agreement (20 years ago).

Generally speaking, a “fair value” valuation may be more favorable to the selling party. *See Friedman v. Beway Realty Corp.,* 87 N.Y.2d 161, 167 (1995). In a recent case, Phillips Lytle LLP argued (successfully) that the “fair market” language of the agreement meant that no minority discount should be applied, resulting in the avoidance of a substantial discount.

4. AGREE TO CONTROLLING V. NON-CONTROLLING INTERESTS AND MARKETABILITY

In valuing a business interest, it is important to distinguish between a controlling interest and a non-controlling interest. In the latter case, substantial discounts may apply to the valuation. A minority discount can have severe consequences on the valuation. The buy-sell agreement can define whether a valuation should apply a minority discount.

There is also a marketability discount that may be applied. One expert recently testified that if an interest cannot be sold within three days on the market, then it suffers from lack of marketability and should be discounted accordingly. There is a big difference, of course, between shares that are traded on the New York Stock Exchange, as opposed to shares in the family business that have never been offered to the public. Such discounts can range up to 30% of valuation.

But should a marketability discount be applied if the entity’s principal asset is real estate? It is well known that it takes time to market and sell real estate. A school of thought holds that under such circumstances, no marketability discount is appropriate because of the nature of the asset. *See Vick v. Albert*, 47 A.D.3d 482 (1st Dep’t 2008), a theory Phillips Lytle LLP successfully employed in a recent valuation trial.

5. PLAN AHEAD

The best practice is to create agreements that cannot be misunderstood when it comes to the process of withdrawal of an equity holder, and the best time to do the exit-planning is when the parties are entering into their business agreement. Having said that, if a dispute arises, there are a number of approaches that can be applied to try to resolve a dispute expeditiously and successfully.

If you have questions about buy-sell agreements, contact Alan J. Bozer, Partner in the Business & Commercial Litigation Practice, at (716) 504-5700 or abozer@phillipslytle.com. ■

Super Control Board May Be in the

Amid signs of an improving economic climate, municipalities continue to struggle to meet financial obligations. At a time when most industries are now showing positive job growth, the government sector continues to slash positions to stay within budget. As a result of increasing deficits, unfunded liabilities for retiree healthcare, and the ever increasing likelihood of exceeding the constitutional tax limit, several local governments are on the verge of bankruptcy in New York State. Consequently, there is growing discussion of imminent legislation that would create a "Super Control Board" patterned on the Emergency Financial Control Board, which was first created to address the New York City fiscal crisis of 1975. Creation of such a "Super Control Board" would affect, among other things, the approval of and payment on distressed municipalities' contracts with their vendors in the private sector.

In 1975, the New York City Financial Control Board ("NYC Control Board") was established pursuant to the New York State Financial Emergency Act of the City of New York ("Act") to oversee the financial management of New York City government and certain related public authorities. The Act gave the NYC Control Board powers and responsibilities of review and oversight. Thereafter, when other local governments were on the brink of fiscal crisis, the State responded on a case-by-case basis by legislatively creating other control boards. In addition to the NYC Control Board, today there are control boards in Erie County, Buffalo, Nassau County, and Troy (collectively, "Control Boards").

There is growing speculation that New York State Governor Andrew Cuomo and State Comptroller Thomas DiNapoli are reviewing proposals that would create what has been termed a "Super Control Board" with the power to oversee the finances of counties, cities and towns on the verge of bankruptcy; the "Super Control Board" would oversee all control boards, including the current existing Control Boards. However, the distinction from the prior implementation of the Control Boards is that the "Super Control Board" would be automatic without the need for a case-by-case implementation. Currently, eight local governments, including New York City, are close to exceeding their constitutional tax limit which ties the amount of money a local government can spend to a percentage of its property-tax value. Other communities approaching spending limits include Cortland County and the cities of Binghamton, Jamestown, Lackawanna, and Herkimer. According to State Comptroller Thomas DiNapoli, almost 300 local governments in New York State ended one of the last two fiscal years with a deficit and 27 have depleted their rainy-day reserves.

Near Future for New York State

A "Super Control Board" would not be unusual. The State of New York has typically created legal entities with a host of powers in an effort to restore fiscal health to a local government.

NASSAU COUNTY INTERIM FINANCE AUTHORITY

The New York State Legislature created the Nassau County Interim Finance Authority ("NCIF Authority") in June 2000. NCIF Authority is a corporate governmental agency and instrumentality of the State of New York constituting a public benefit corporation created by the Nassau County Interim Finance Authority Act, Chapter 84 of the Laws of 2000. The NCIF Authority is empowered to issue its bonds and notes for various County purposes, including the restructuring of a portion of the County's outstanding debt. In the absence of a control period, the NCIF Authority is empowered to review financial plans; make recommendations or, if necessary, adverse findings; monitor compliance; make transitional State aid available as it determines; and comment on proposed borrowings by the County.

The NCIF Authority's powers, however, are not limitless. On February 14, 2013, the U.S. District Court for the Eastern District of New York issued an opinion granting summary judgment to several law enforcement unions who were seeking to nullify the NCIF Authority imposition of a wage freeze in 2011. Honorable U.S. District Court Judge Leonard Wexler found that the NCIF Authority froze wages more than two years after its authority over the contracts expired. Specifically, Judge Wexler ruled that the NCIF Authority exceeded its powers to freeze police wages in 2010 after the period of greater state control expired. In March 2013, the NCIF Authority appealed the decision to the United States Court of Appeals for the Second Circuit. *Carver v. Nassau Cnty. Interim Fin. Auth.*, 2013 U.S. Dist. LEXIS 20149 (E.D.N.Y. Feb. 14, 2013), *appeals docketed*, No. 13-801 (2d Cir. March 6, 2013), No. 13-840 (2d Cir. March 8, 2013). If not reversed, this decision could cost Nassau County at least $20 million.

BUFFALO FISCAL STABILITY AUTHORITY

Similar to the NCIF Authority, in response to a State Comptroller's report on the financial condition of the City of Buffalo, and a subsequent determination by the New York State Legislature that the City faced a severe fiscal crisis that could not be resolved without State assistance, the Legislature passed, and then-Governor George E. Pataki signed, Chapter 122 of the Laws of 2003—the Buffalo Fiscal Stability Authority Act ("BFS Act") and the BFS Authority. The BFS Act, adopted with unanimous bipartisan

support in the State Legislature, declared the maintenance of a balanced budget by the City of Buffalo to be a matter of "overwhelming State concern." Toward the end of returning the City of Buffalo to fiscal stability, the BFS Act: (1) established the BFS Authority as a fiscal control agency over the City and its covered organizations; (2) required the annual development of a four-year financial plan for the City and its covered organizations, and invested the BFS Authority with the power to insure compliance with that plan; (3) authorized the BFS Authority to provide deficit financing assistance to the City and its covered organizations over a four-year period; (4) set forth a legal basis to create a highly-rated borrowing structure to reduce City borrowing costs and provide short term budgetary assistance; and (5) empowered the BFS Authority to impose financial control mechanisms if the City and its covered organizations were unable to adopt a balanced financial plan and/or operate in accordance with that plan.

The BFS Authority began its existence during a "control period," which means that it commenced operation with its maximum authorized financial control and oversight powers. Among them were the powers to review and improve or disapprove contracts, including collective bargaining agreements into which the City or any covered organization had entered; to approve or disapprove the terms of borrowing by the City and covered organizations; to approve, disapprove or modify the City's financial plans and take any action necessary in order to implement the financial plan; to impose a wage or hiring freeze, or both, with respect to employees of the City or any covered organization; and to review the operation, management, efficiency and productivity of the City and covered organizations.

ERIE COUNTY FISCAL STABILITY AUTHORITY

The Erie County Fiscal Stability Authority ("ECFS Authority"), a New York State Public Benefit Corporation, was created on July 12, 2005, by the Erie County Fiscal Stability Authority Act ("ECFS Act"), Chapter 182 of the Laws of 2005, as amended by Chapter 183 of the Laws of 2005. The ECFS Act declared Erie County to be in a severe fiscal crisis that could not be resolved absent assistance from the State. The ECFS Authority was established in an "advisory" capacity in order to preserve the confidence of those who had invested in the County's bonds and notes and to protect the economy of both the region and the State as a whole. The ECFS Authority is vested with control and advisory authority to oversee the budget, financial, and capital plans of the County and covered organizations; to issue

bonds or other obligations to achieve budgetary savings through debt restructuring or deficit financing; to finance short-term cash flow or capital needs; and, if necessary, to develop financial plans on behalf of the County if the County is unwilling or unable to take the required steps toward fiscal stability.

In accordance with the ECFS Act, the ECFS Authority is to switch from an advisory to control capacity if the County fails to adopt an on-time balanced budget; fails to pay debt service; incurs an operating deficit of more than 1%; loses access to the market for borrowing; or violates any provision of the ECFS Act. The ECFS Authority is required annually to review and approve the County's proposed budget and four-year financial plan, which details the County's future expenditures, revenues, and gap-closing measures. The ECFS Authority is also required to review County applications for State efficiency grants and approve efficiency grant funding made available in the State budget when it deems it appropriate to do so.

With several counties and cities on the verge of financial crisis, the creation of a "Super Control Board" is very near. The municipal fiscal crisis, however, is not confined to New York State. In August 2012, for example, San Bernardino became the third city in California to file for federal bankruptcy protection. One can only speculate that 2013's anticipated legislative solution to create a "Super Control Board" may serve as a model in addressing this crisis in New York.

This article was co-authored by Phillips Lytle Business & Commercial Litigation attorneys, Alisa A. Lukasiewicz, Special Counsel, (716) 504-5739 or alukasiewicz@phillipslytle.com, and Craig R. Bucki, Associate, (716) 847-5495 or cbucki@phillipslytle.com. ■

Spotlight

PHILLIPS LYTLE LLP RANKS NUMBER ONE IN BUFFALO FOR THE MOST ATTORNEYS LISTED IN THE *BEST LAWYERS IN AMERICA*® 2013

For the second consecutive year, Phillips Lytle LLP leads all other Buffalo area law firms for lawyers named to *The Best Lawyers in America*® 2013 list. The annual list, which includes lawyers from five Phillips Lytle offices across New York State, was compiled and published by Woodward/White, Inc. Aiken, SC.

We are proud to announce that the following Phillips Lytle attorneys have received this recognition within our Commercial Litigation Practice:

EDWARD S. BLOOMBERG

PETER D. BRAUN

WILLIAM J. BRENNAN

KEVIN J. ENGLISH

TAMAR P. HALPERN

RICHARD E. HONEN

PAUL F. JONES

MICHAEL R. LAW

KENNETH A. MANNING

DAVID J. MCNAMARA

MARK J. MORETTI

JOHN G. SCHMIDT JR.

PAUL K. STECKER

JAMES W. WHITCOMB

THOMAS W. WISWALL

PRESTON L. ZARLOCK

PAUL B. ZUYDHOEK

Phillips Lytle's Business & Commercial Litigation Practice received a Metropolitan First Tier Ranking on *U.S. News & World Report's* Third Annual *Best Law Firms*® 2013 list.

Our attorneys have extensive practice in all phases of disputes, including:

- Breach of Contract
- Banking/Lender Liability Litigation
- Trade Secrets/Unfair Competition
- Shareholder/Member/Partnership Disputes
- Securities Litigation
- Professional Liability
- Trade Practices/Antitrust
- Business Torts
- E-Commerce/Computer Law
- ERISA
- Franchise and Distributorship Relations
- Fraud/RICO
- Health Care Litigation
- Machinery/Technology Warranties
- Real Estate Litigation
- Tax Litigation/Investigations
- Auto Dealership Foreclosure
- Consumer Finance Defense Litigation

E-Newsletter Sign-up

Different people have different preferences in communication styles. Therefore, Phillips Lytle is offering this newsletter in an electronic format as well as the printed version. To start receiving *Beyond Dispute* via e-mail, visit our website at www.phillipslytle.com and click on "E-Publication Sign-up" under the Publications menu.

Phillips Lytle has one of the largest Business & Commercial Litigation teams in Upstate New York. Covering every corner of New York State, our attorneys have extensive experience in all phases of disputes, including banking, contracts, sales and product distribution, services, financing, construction, insurance coverage, joint ventures, employment, franchising, licensing, leasing, real estate finance and development, trusts, shareholder and partnership disputes and contract disputes.

For additional information or advice, please contact one of our Business & Commercial Litigation attorneys listed below:

John G. Schmidt Jr., Partner, Team Leader
Preston L. Zarlock, Partner, Team Leader

John E. Abeel, Associate
Jennifer A. Beckage, Associate
Edward S. Bloomberg, Partner
Alan J. Bozer, Partner
William J. Brennan, Partner
Craig R. Bucki, Associate
Joanna J. Chen, Associate
William D. Christ, Partner
Andrew P. Devine, Associate
Joanna Dickinson, Associate
James D. Donathen, Partner
Spencer Durland, Associate
Kevin J. English, Partner
Chad W. Flansburg, Associate
Marc H. Goldberg, Associate
James R. Grasso, Partner
Christopher L. Hayes, Associate
Kevin M. Hogan, Partner
Richard E. Honen, Partner
Timothy W. Hoover, Partner
Myriah V. Jaworski, Associate
Paul F. Jones, Partner
Minryu (Sarah) Kim, Associate
Eric M. Kraus, Partner
Michael R. Law, Partner
Craig A. Leslie, Partner
Amanda L. Lowe, Associate
Alisa A. Lukasiewicz, Special Counsel
Kenneth A. Manning, Partner
David J. McNamara, Managing Partner
Sean C. McPhee, Associate
Anna R. Mercado, Associate
Mark J. Moretti, Partner
Paul Morrison-Taylor, Partner
John A. Mosychuk, Associate
Peter C. Obersheimer, Associate
Scott T. Peloza, Associate
Michael B. Powers, Partner
Todd A. Ritschdorff, Associate
Nicolas J. Rotsko, Associate
Jodie L. Ryan, Associate
Joseph B. Schmit, Special Counsel
Aaron M. Schue, Associate
Martin V. Schwartz, Special Counsel
Jennifer A. Shah, Associate
Michael S. Silverstein, Associate
William J. Simon, Associate
Paul K. Stecker, Partner
Richard T. Tucker, Associate
Andrew J. Wells, Associate
James W. Whitcomb, Partner
Thomas S. Wiswall, Partner

ALBANY OFFICE
Omni Plaza
30 South Pearl Street
Albany, NY 12207-3425
Phone 518 472 1224
Fax 518 472 1227

BUFFALO OFFICE
3400 HSBC Center
Buffalo, NY 14203-2887
Phone 716 847 8400
Fax 716 852 6100

CHAUTAUQUA OFFICE
201 West Third Street
Suite 205
Jamestown, NY 14701-4907
Phone 716 664 3906
Fax 716 664 4230

GARDEN CITY OFFICE
1305 Franklin Avenue
Suite 200
Garden City, NY 11530-1630
Phone 516 742 5201
Fax 516 742 3910

NEW YORK CITY OFFICE
The New York Times Building
620 Eighth Avenue
23rd Floor
New York, NY 10018-1405
Phone 212 759 4888
Fax 212 308 9079

ROCHESTER OFFICE
1400 First Federal Plaza
Rochester, NY 14614
Phone 585 238 2000
Fax 585 232 3141

CANADIAN OFFICE
The Communitech Hub
151 Charles Street West
Suite 152, The Tannery
Kitchener, Ontario N2G 1H6
Canada
Phone 519-570-4800
Fax 519-570-4858

Prior results do not guarantee a similar outcome. © 2013 Phillips Lytle LLP