Re: Live Long and Thursday

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This week's Thursday Report is dedicated to Michael Piller, an American television scriptwriter and producer, who died on November 1, 2005. Piller was best known for his contributions to the Star Trek Franchise. He was credited for turning a basic "alien of the week" show into a riveting series focused on well-rounded characters.

Quote of the week

As I approach a new project, my process always begins with the question: what is it about? Here's one answer that might apply to a Star Trek movie...

I want it to be about the most horrible, treacherous aliens ever known to man who are about to destroy life as we know it, leading to the most spectacular thrill ride of an adventure with fantastic space battles and huge explosions and great special effects -- a white knuckle ride for the movie audience.

Yeah, but what's it about?

I can write space battles with the best of them, but what makes that space battle interesting to me is: why are they fighting? What are the stakes? What does the hero lose if he loses? And what does he win if he wins? Why should we care?

I'm talking about the second level of story-telling. The level that examines what's going on inside the characters — their moral and ethical dilemmas, their doubts, fears, inner conflicts, how they change as the story progresses. These are the things that make us, as members of an audience, get emotionally involved.

— Michael Piller, Fade In: The Writing of Star Trek: Insurrection

Is it Possible for a Triple Net Lease to be considered a "Trade or Business for the Purpose of 199A Deductions

by Kelsey Weiss and Alan Gassman

A. Introduction

The 2017 Tax Cuts and Jobs Act introduced the new, and sometimes problematic, Section 199A to the Internal Revenue Code. Section 199A was designed to provide taxpayers with a 20% deduction for qualified business income earned through qualifying trades or business. This deduction for business owners was added, most likely, in response to the significant tax cut the Act created for large corporations.[1] Unfortunately, there is no single accepted definition of "trade or business," so many taxpayers are in limbo, not knowing what to do or not do as the months go by on situations that may or may not qualify.

Instead of supplying taxpayers with a definition, the Proposed Regulations state that a qualifying "trade or business" must meet the requirements of the Internal Revenue Code Section 162. However, Section 162 does not provide a clear definition either. Section 162 states that expenses can be deducted when they are incurred for a legitimate and active trade or business. Section 199A of the Act simply defines "trades and businesses" by exclusion. The term excludes "the trade or business of performing services as an employee and 'specified service' trades or businesses: those involving the performance of services in law, accounting, financial services, and several other enumerated fields, or where the business's principal asset is the reputation or skill of one or more owners or employees." This definition begs the question: who actually qualifies for the 199A deduction? And where do real estate investors fall into this?

This article will focus primarily on using previous court decisions to define the term "trade or business" as best as possible for the purpose of determining whether a real estate investor with a triple net lease can qualify for the 199A deduction under the Proposed Regulations.

B. Case History Defining "Trade or Business"

The U.S. Supreme Court has been faced with the task of defining a "trade or business" in the tax context multiple times over the last century. Going back to 1911, the

[1] Tony Nitti, *Understanding the new Sec. 199A business income deduction*, THE TAX ADVISOR (April 1, 2018). https://www.thetaxadviser.com/issues/2018/apr/understanding-sec-199A-business-income-deduction.html.

Court in *Flint v. Stone Tracey* used the Bouvier Dictionary to broadly define a business as, "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit."[2] Then, in 1935 the U.S. Supreme Court provided a limitation to the definition by distinguishing between an active trade and an investor.[3] In *Snyder v. Commissioner*, the Court determined that an investor seeking to merely increase his personal holdings was not engaged in a trade or business.[4] However, in this opinion, Justice Brandeis also stated that a taxpayer who made his livelihood from buying and selling on the stock exchange would be a trade or business.[5] This was the first of many instances where the activity level of the taxpayer is a deciding factor in whether the definition of a "trade or business" applies.

Not long after *Snyder*, the Court was faced with two "trade or business" cases in one year which centered upon estate preservation. In the 1941 *Higgins v. Commissioner* case, the Court determined that a taxpayer managing and preserving his own estate did not qualify as carrying on a business.[6] Next, in *City Bank Farmers Trust v. Helvering*, the Court decided that asset conservation and maintenance by way of estate or trust efforts is not a trade or business.[7] These cases highlight the struggle of the U.S. Supreme Court in deciding whether a certain activity qualifies as a trade or business without a succinct definition from Congress or its agencies.

In its 1987 sentinel case *Commissioner v. Groetzinger*, the U.S. Supreme Court laid out a definition for what qualifies as a trade or business that is still good law.[8] In *Groetzinger*, the Court determined that a full-time gambler who wagered for himself alone was engaged in a "trade or business" within the meaning of the applicable Internal Revenue Code.[9] The Court rejected the previously used 'goods and services' test, reasoning that almost every activity could potentially satisfy the test leading to litigation over the meaning.[10] The Court held that to be an engaged in a trade or business:

> (1) the taxpayer's involvement must be continuous and regular; and
>
> (2) the primary purpose of the activity must be for income or profit.[11]

The Court then cautioned future courts to examine the facts of each case, as this is not a test for all situations, and highlighted that it is the responsibility of Congress to make changes or revisions to this Court's interpretation of the definition.[12] While it is true that

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[2] *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).
[3] *Snyder v. Commissioner*, 295 U.S. 134 (1935).
[4] *Id.*
[5] *Id.*
[6] *Higgins v. Commissioner*, 312 U.S. 212 (1941).
[7] *City Bank Farmers Trust Co. v. Helvering*, 313 U.S. 121 (1941).
[8] *Commissioner v. Groetzinger*, 480 U.S. 23 (1987).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

Congress has the ultimate responsibility to define "trade or business" as used in its rules and proposed regulations, they have not done so. Therefore, the best definition available still comes from the Supreme Court in *Groetzinger*.

The Supreme Court, however, only hears a select number of cases. The majority of disputes related to tax matters are heard by the Tax Court. The Tax Court has held that, beyond the definition provided in *Groetzinger*, the threshold test for deduction of income expenses under Section 162 is whether the primary purpose and intention of the taxpayer was to make a profit,[13] and there was enough activity involved. For example, if a taxpayer loses money by participating in a hobby, the taxpayer cannot receive benefits of income tax deductions by calling the hobby a trade or business. In the 1988 U.S. Tax Court case of *Seebold v. Commissioner*, a married couple decided to breed horses to add to their retirement income.[14] In this case, the court explicitly placed greater weight on the objective factors showing the couple's intent to profit rather than simply their statement of intent.[15] For example, they worked hard to learn the subject area, sought advice from experts in the field, used a veterinarian for the purpose of breeding, and consulted an accountant.[16] Additionally, Mrs. Seebold eventually quit her job to work on the breeding farm full time.[17] The Tax Court determined that this level of activity met the threshold showing that the primary purpose and intention of the Seebolds was to incur a profit, regardless of the loss they sustained when they first started and the Seebolds' horse breeding qualified as a trade or business.[18] As a result, in addition to the *Groetzinger* test, taxpayers must also be able to show that the primary purpose and intent of the activity is to make a profit. According to the court in *Seebold*, the petitioner bears the burden of proving they meet the threshold. Therefore, a taxpayer must prove that they meet this burden before benefitting from the 199A deduction.

It is noteworthy that the case law on ranching, farming and other real estate activities allows the taxpayer to use the expected increase in value of property owned that is used for the activity to be considered in determining whether there is a profit motive.

C. Application to Real Estate

The issue of whether a taxpayer is engaging in a trade or business is an issue of fact that involves analyzing the scope of activities the taxpayer is engaged in, either personally or through an agent. Passive ownership of a rental property will commonly not be enough to qualify as a trade or business, however, active management of such a property historically has been viewed as a trade or business. Because qualifying as a trade or business is based on a question of fact, the line distinguishing passive ownership and active ownership can become blurry.

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[13] *Seebold v. Commissioner*, 55 T.C.M. 723 (1988).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*

A typical court, when considering whether a real estate venture qualifies as a trade or business, will evaluate four factors.[19] First, the court will consider the type of property owned and/or managed by the taxpayer (i.e. commercial, residential, condominium, or personal).[20] Second, the court will consider the number of properties rented out by the taxpayer.[21] Third, and what seems to be most importantly, the court will consider the day to day involvement of the owner or agent.[22] And finally, the court will consider the type of rental (i.e. triple net lease, traditional lease, short term lease, or long-term lease).[23]

The Tax Court, in the 1946 case *Hazard v. Commissioner,* ruled that even one single family rental was a trade or business.[24] The Internal Revenue Service has since adopted the same reasoning and the rule still stands in most jurisdictions.[25] Therefore, it would be reasonable for the IRS to continue to follow the *Hazard* standard with regards to 199A deductions and allow single family, or single property, rentals to qualify as a trade or business. However, much case law has shown that simply renting the property alone is not enough.

In *Neill v. Commissioner*, the 1942 Tax Court ruled that the mere collection of rent without any other activity was not enough to constitute a trade or business.[26] Additionally, in *Hendrickson v. Commissioner*, the Tax Court ruled that a passive investment in an oil gas well where the owner simply purchased the lease and collected income from it did not qualify as a trade or business.[27] Therefore, while it is possible for a rental business to constitute a "trade or business" for the purpose of deductions under Section 162, simply owning the business and collecting money is not enough.

Based on the relevant case law, in order to qualify as engaging in a trade or business, the taxpayer must have some active role in running the rental. For example, in *Schwarcz v. Commissioner*, the Tax Court determined that a landlord owning, managing, and operating apartment buildings was engaging in a trade or business.[28] Interestingly, the owner could do so through an agent and would still qualify.[29]

In some tax cases not related to the 199A deduction, taxpayers may want to avoid being labeled as a tax or business in order to avoid paying additional taxes as a trade or

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[19] Tony Nitti, *IRS Provides Guidance On 20% Pass-Through Deduction, But Questions Remain*, FORBES (Aug. 9, 2018), https://www.forbes.com/sites/anthonynitti/2018/08/09/irs-provides-guidance-on-20-pass-through-deduction-but-questions-remain/#7cf566562ff8.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Hazard v. Commissioner*, 7 T.C. 372 (T.C. 1946).
[25] The Second Circuit decided in *Grier v. US* that "broader activity" on the part of the owner was needed in order for a rental to constitute a trade or business.
[26] *Neill v. Commissioner*, 46 B.T.A. 197 (1942).
[27] *Hendrickson v. Commissioner*, 78 T.C.M. 322 (1999).
[28] *Schwarcz v. Commissioner*, 24 T.C. 733 (1955).
[29] *Id.* See also *Elek v. Commissioner* showing that having an agent actively manage and maintain the rental property does not disqualify the owner from engaging in a trade or business.

business. In *Bennett v. Commissioner*, two partners leased equipment to site organizations allowing people to play a form of lottery called Keno under the company name of Lucky Keno.[30] The partners both reported their business income from Lucky but did not report self-employment tax.[31] The partners argued that they did not have to pay the self-employment tax because Lucky was a passive owner of the equipment and not actively engaged in trade or business.[32] However, the Tax Court disagreed, stating that the partners oversimplified their role.[33] Lucky's name was on all of the Keno advertisements and Lucky controlled the funds and distributed them to the winners, municipalities, the state, and the site organizations.[34] Therefore, Lucky was not a passive owner and the partners were required to pay self-employment taxes because they owned a trade or business.[35]

D. Application Specifically to Triple Net Leases

In a triple net lease, the tenant is mostly responsible, and the lessor does very little by way of managing the rental. The tenant usually agrees to pay the normal fees like rent and utilities plus the three "nets" – real estate taxes, building insurance, and maintenance. Using the *Groetzinger* test, a triple net leaseholder will most likely not qualify as having a trade or business because, while owning the property for the purpose of making a profit would meet the second prong of the test, the involvement of the leaseholder is not continuous and regular enough to meet the first prong.

The Proposed Regulations under Section 199A, which can be relied upon by taxpayers until they become final or are withdrawn, offer two examples of real estate initiatives qualifying as a trade or business. In the first example, an individual who owns and manages land leased to airports for parking lots qualified as a Section 162 business. The management aspect of the owner is the likely reason why this example qualified as a trade or business. It is unclear, however, how this example could apply practically, because if the land is leased to airports, there isn't much management left for the owner to handle. In the second example, the owner developed the same land to build parking structures and then leased the parking structures to the airports. This example appears to allow for a triple net lease to qualify as a trade or business. However, relevant case law would suggest that this example would not qualify as a trade or business.

While case law is scant regarding whether a triple net lease specifically qualifies as a trade or business, one Revenue Ruling has addressed the issue. Under Section 871, there are special rules for the taxation of nonresident aliens who are engaged in trade and business in the United States. Revenue Ruling 73-522, 1973-2 C.B. 226 stated, however, that a rental under a net lease is not considered a trade or business for the purposes of Section 871.

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[30] *Bennett v. Commissioner*, 83 T.C.M. 1429 (2002).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

The question of whether a triple net lease can constitute a trade or business was also raised with regard to withdrawal liability under the Multiemployer Pension Plan Amendments Act (MPPAA) in the 2001 7th Circuit U.S. Court of Appeals case of *Central States, Southeast and Southwest Areas Pension Fund v. Fulkerson*.[36] Thomas and Dolly Fulkerson owned several triple net leases and were also shareholders of Holmes Freight Lines, Inc. (Holmes) when it became bankrupt.[37] As a creditor, Central States used the MPPAA of 1980 to calculate the withdrawal liability of Holmes.[38] Under the MPPAA, all "trades or businesses" are treated as one employer.[39] Under that theory, the Fulkerson's leasing business and Holmes were under the common control of the Fulkersons and the leasing business was thereby pulled in to help pay the remainder of what was owed to Central States.[40] Because the leasing business was unincorporated, the Fulkersons became personally liable.[41]

The MPPAA, like the IRC, uses the term "trade or business" but does not define it.[42] Therefore, the appellate court affirmed the Supreme Court's test in Groetzinger reasoning that the test comports with the common meaning and can be used generally.[43] In order to meet the first prong of the Groetzinger test, the taxpayer's involvement must be continuous and regular. However, because the leases were triple net leases, Mr. Fulkerson only spent about five hours per year involved with the properties.[44] The properties were purchased with the intent of pure investment. The court therefore held that the "mere holding of leases for ten years by shareholder was not such continuous and regular activity as to constitute a trade or business, for purpose of imputing withdrawal liability to company."[45]

In the 7th Circuit U.S. Court of Appeals case of *Central States v. Personnel*, the court reached the opposite decision with similar facts as *Fulkerson*.[46] In *Personnel*, the defendant was held responsible for withdrawal of liability because the defendant was much more frequently engaged in activities related to leasing such as buying and selling multiple properties annually and advertising.[47] The court concluded that this conduct was both regular and continuous.[48]

Based on the reasoning in these cases, it is clear that: (1) the *Groetzinger* test is still applicable and used by courts to determine whether an activity is a trade or business, and (2) courts truly use activity level of the taxpayer as a deciding factor. Based on the

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[36] *C. States, S.E. and S.W. Areas Pension Fund v. Fulkerson*, 238 F.3d 891 (7th Cir. 2001).
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Supra* note xvi.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] C. *States, S.E. and S.W. Pension Fund v. Personnel, Inc.*, 974 F.2d 789 (7th Cir. 1992).
[47] *Id.*
[48] *Id.*

relevant case law, it seems as though the courts are really looking for some degree of activity or legal responsibility of risk on part of the taxpayer. In order to show that, an owner of a triple net lease can do a few things to increase their level of activity with the rental such as: take on responsibility for maintenance, participate in tenant management, participate in advertisement initiatives, and be more active in pursuing new leases or selling leases.

E. Conclusion

Under the Proposed Regulations, being classified as a "trade or business" can provide a taxpayer with a significant tax reduction on business income. In order to be classified as a "trade or business," an owner must show that he or she is regularly and continuously involved with the property. Therefore, under the classic definition of a triple net lease, the lessor would not qualify for the 199A deduction. However, if the taxpayer is more active than a normal lessor with respect to a triple net lease, then the taxpayer may be able to take the 199A deduction.

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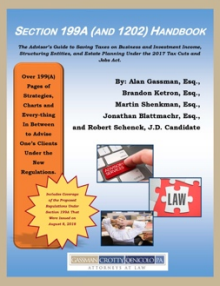

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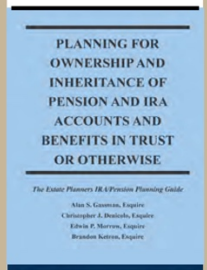

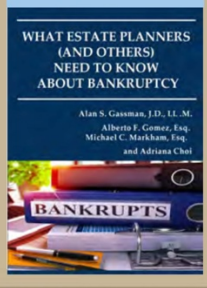

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Tenancy by the Entireties: For Doctors and Advisors

By Alan Gassman and Kenneth J. Crotty

Tenancy by the Entireties (TBE) is an important concept when talking about property or asset ownership among spouses in Florida and the 22 other states that recognize TBE protection for real estate and sometimes other assets. Tenants by the Entireties ownership ("TBE ownership) treats the husband and the wife as one single unit rather than as separate owners so that a creditor owed money by one spouse cannot reach into the jointly owned asset.

For ownership to be considered TBE, you must have the following items, which are referred to by their legal names, and each have a host of definitions and meanings: (1) unity by possession, (2) unity in interest, (3) unity in time, (4) unity in marriage, (5) unity in title, and (6) unity in survivorship. Although this may seem pretty straightforward, there are some common mistakes that are made with these accounts.

Many clients are best served having their assets owned under LLCs or limited partnerships that are in turn owned mostly or wholly as Tenants by the Entireties. to assure that TBE status exists by reason of the ownership of a Florida Delaware on Wyoming LLC by the individual Floridian married couple, as opposed to verify in TBE ownership of each asset held under the LLC.

One of the most common mistakes with TBE is how the property or asset is owned, and more specifically the time period during which the property or asset is purchased. Assume, for example, that there is an unmarried couple who owns a house together. If they decide to get married, their house will not count as a TBE property because the house was purchased before they married, meaning that they did not have the unity of marriage at the time that they took the title of the house.

Another common mistake is opening a Joint With Right of Survivorship ("JWROS") account, rather than a TBE account, and attempting to turn that account that had been a JWROS account into a TBE account. This does not create an effective TBE account because the property in the account does not have the unity of time. Instead, setting up a new account and transferring the property or assets from the JWROS account into the new account would create an effective TBE account.

English Common Law required TBE ownership to originate from a person other than one member of the married couple. The law required a "strawperson" to take the title from one spouse and then transfer it to the TBE account.

This is no longer the case in Florida. According to Florida case law, one spouse is a separate entity from the TBE and can therefore transfer the property to a marital unit without the use of a strawman. This was explicitly held in the 1939 Florida Supreme Court decision of *Johnson v. Landefeld*, 138 Fla. 511 (Fla. 1939). Although Florida case law may not allow one spouse to use

an existing bank account or stock certificate, that is different than one spouse making a distinct transfer from himself or herself to facilitate the creation and funding of a new TBE account, stock certificate, or other asset.

As a result, if there is one spouse who wants to transfer the assets to TBE, a strawman should not be needed. However, some still argue that a strawman is needed. If someone wanted to create a joint tenancy with others, the owner would convey the property to a strawman or an intermediary party who then conveys it to all the other parties so they can have joint tenancy and unity of time.

In Florida, another third common issue is believing that you have a TBE account when you actually have a JWROS ("Joint With Right Of Survivorship") account. Oftentimes this happens simply because you check the wrong box when setting up the account. However, as a result of this, much of the work in Estate Planning is checking to make sure that TBE assets are actually TBE assets.

A TBE account needs to be created with a financial institution that is in Florida or one of the other states that recognize TBE, such as Delaware and Wyoming. However, when you are setting up this account, you have to be very careful to read the actual documents and ensure that the account being set up is a TBE account.

For example, if you want to set up an account with USAA, a Texas company, the agreement actually states that the account will not be a TBE account. Sun Bank also used to have accounts that specifically said the account would not be a TBE account. To make things even more complicated, in the Beal Bank decision, the Florida Supreme Court said that if you have a Joint with Right of Survivorship account between a husband and a wife, and the TBE was not offered, the account automatically becomes a TBE account.

Whether or not an asset is considered a TBE asset depends on intent, so we have our clients sign Agreements of Intent to show the intent to own these assets as TBE. For example, if the clients have a valuable piece of artwork in their North Carolina vacation home, is that TBE? It is possible that North Carolina law applies and is not TBE. However, the client may consider putting the piece of artwork into a Florida LLC that is owned as TBE to prevent this.

Always be aware of the three common mistakes and talk to your lawyer about how you can set up an effective TBE account to protect your assets.

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Is a Non-Voting Member of an LLC Responsible for Self-Employment Tax?

By Alan Gassman

A non-voting member of an LLC may—or may not—be responsible for paying self-employment tax depending on how the LLC has elected to be classified for Federal income tax purposes, and in what capacity the non-voting member is involved within the LLC.

An LLC can elect to be taxed as either an S Corporation or a C Corporation, and the IRS will treat that LLC accordingly. If the LLC is taxed as an S Corporation, then income from distribution of profits are not subject to self-employment tax. Members would only have to pay self-employment tax on wages or other compensation for services performed for the LLC. If the LLC is taxed as a C corporation, then members are considered employees; so there are no self-employment taxes. If the LLC does not elect to be taxed as either an S Corporation or a C Corporation, it is treated as a Partnership by default. In a Partnership, each partner pays self-employment tax on their share of the Partnership's income—so long as the LLC engages in active trade or business. Whether the other members of the Partnership must pay self-employment taxes depends on if they are considered a general partner or if they qualify for the "limited partner exception."

The limited partner exception applies to members who (1) do not have personal liability for the Partnership's debts; (2) do not have the authority to contract on behalf of the Partnership; and (3) do not participate more than 500 hours per year for the Partnership. A member must meet all three tests to qualify for the exception. This is illustrated by *Riether v. U.S.*, 919 F. Supp. 2d (D.N.M. 2012), where the court held that the sole two partners of an LLC taxed as a partnership had to pay self-employment taxes on their distributive share of partnership income because they had management power in the LLC and were personally liable for the debts of the LLC—even if they were not involved in the work of the LLC. The test to determine if a member qualifies as a limited partner was laid out by the IRS in 1997, but has yet to be finalized; however, it has also not been removed and continues to be used to differentiate between general and limited partners.

If a member qualifies as a limited partner, then the member will only have to pay self-employment tax on the income received for work performed for the Partnership and not on any income received from their share of distributions of the Partnership income because that is received solely in their capacity as an investor. 26 U.S.C.A. § 1402. The court in *Renkemeyer, Campbell, & Weaver, LLP v. C.I.R.,* 136 T.C. 137 (Tax 2011) explained that the original intent of section 1402(a)(13) "was to ensure that individuals who merely invested in a partnership and who were not actively participating in the partnership's business operations (which was the archetype of limited partners at the time) would not receive credits toward Social Security coverage."

An example of a court disregarding the Partnership because of the control established is found in *Castigliola*, T.C. Memo. 2017-62. In *Castigliola*, the court emphasized how the members of the PLLC should not be treated as limited partners for self-employment tax purposes since they shared control over the PLLC under Mississippi law, which makes them lose that protection afforded to them. Additionally, the court found that the members should be treated as general

partners because of their management authority; and thus, should pay the self-employment taxes on their distributive shares.

If the non-voting member acts as more than just a passive investor of the LLC, they will have to distinguish what was and what was not compensation for their work. In *Howell v. C.I.R.,* 104 T.C.M. (CCH) 519 (Tax 2012), the court found Mrs. Howell, a majority investor, was more than just a passive investor because she had developed the business plan, contributed intellectual property, and continued consulting with her husband after she delegated management authority to him. The court held that although her contributions were relatively minimal, she had the burden of proving what was compensation for her work and what was income received solely in her capacity as an investor.

In a more recent case, *Hardy v. C.I.R.*, 113 T.C.M. (CCH) 1070 (Tax 2017), the court found that Dr. Hardy did not owe self-employment taxes because he received income only in his capacity as an investor. In this case, Dr. Hardy had his own medical practice, Northwest Plastic Surgery Associates, and joined Missoula Bone & Joint Surgery Center (MBJ), a surgery center for practicing physicians, where Dr. Hardy would periodically perform surgeries. When patients went to MBJ for surgery, they paid a facility fee to MBJ and a separate fee to Dr. Hardy for his services. The income that Dr. Hardy received from MBJ was from the investment relationship and not from his direct services to the patients. The court held that because he owned a minority interest, had no day-to-day responsibilities or input in management decisions regarding MBJ, and received remuneration for his services separately from MBJ, Dr. Hardy was not liable for self-employment tax on the income that he received as a member of MBJ because this was purely in an investment capacity.

Thus, when a non-voting member of an LLC acts as a limited partner, that member merely acts as an investor, and would not be liable for self-employment tax on their distributive share of Partnership income. If the non-voting member does provide services for the LLC, then the non-voting member would have to pay self-employment tax on income that is compensation for those services, and must be able to adequately distinguish between payment for services and income as an investor to not have to pay self-employment tax on the distributive share income. If the non-voting member participates more than 500 hours for the LLC, then the member will not qualify for the limited partner exception and will have to pay self-employment tax on all income received including the distributive share income. It all depends on how the LLC is being taxed and in what capacity the member is acting.

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Doctor Law and Wisdom: Three Key Profitability Tips

By Alan Gassman

Besides the main perk of helping people, one of the other best things about becoming a doctor is making money and paying off those student loans. Doctors are taught how to be doctors, but not how to run a profitable practice. Luckily, there are three key tips that when put into practice can make a practice profitable.

1. The first tip can be thought of as More Money, Less Problems. This tip applies Pareto's principle, which states that 80% of your revenues will come from 20% of your procedures, and 80% of your problems will come from 20% of your patients.

For the More Money portion of this tip, look at the procedures you perform and see which ones you do that you enjoy the most and which ones make the most money. The one that you enjoy the most and make the most money doing is what you want to focus on for your practice. Even if a different procedure makes more money, if you do not enjoy doing that procedure it will not be worth focusing on in the long run because you will not be enthusiastic about your practice, nor be willing to put in the work to make this tip work. Whichever procedure you choose, you want to become a top expert in. Take some time to write about the procedure and study it in as much depth as you can. Train others in how do it. The more credentials you can put under your experience with that procedure, the more well-known you will become. Eventually, you can become number one in your community in that procedure increasing your business traffic.

For the Less Problems portion of this tip, look at your clientele. Look to see if you have repeat problems with any patients, or if you see any patients causing difficulty for your staff or other patients. Then once you identify who the bad apples are, you fire them as patients. You can tell the problem patients that you no longer do the procedure that is bringing the problem patients to you. The problem patients will leave to find someone else who does it. It is also important to look at your procedures and see what ones you do not enjoy doing and which ones are not making money. It is ok to do procedures that are not the most profitable if you really enjoy them, and you may need to do procedures you do not really enjoy because they make such good money, but keep these to a minimum. Remember that 80/20 rule. If you are doing unprofitable or unenjoyable procedures more than 20% of the time, you are costing yourself money. Even if a procedure is profitable, if you hate doing it, you are not going to put in the time to make it a strong focus of your practice. People, including your staff and patients, can sense when you are passionate about what you do and if you spend too much time doing something you do not enjoy doing, it will affect staff and patient morale, which in turn will cost you business.

2. The second tip is to Expand Your Horizons. Look into expanding your staff to include more nurse practitioners or physician assistants, or a scribe. Having other staff members able to oversee patients enables you to have more time to research and write about your focus procedure, network with colleagues, and do more of the procedures you enjoy doing. Having a scribe could allow you to have a deeper conversation with patients because you can make eye contact while you listen to what the patient says instead of looking at your notes. This creates a deeper trust and better relationship with your patient that is likely to keep them coming to you and to refer other people to you.

Also look into expanding your procedures or techniques. Staying on the cutting edge for procedures you offer and procedures just coming out is a great way to keep your practice relevant and interesting. It says to the public that you are passionate about what you do and care enough about your patients to continue learning and adapting your practice to what will best serve your patients. Also, new procedures may also be great revenue generators, especially when they are useful but not yet widely available. And you never know when you might just find a new procedure that you will enjoy doing. You may also be able to find new techniques for procedures you already offer. It is important to keep an open mind. One way to find or explore new techniques is to shadow a colleague in another state. Going to a different state takes the taint of competition out of the interaction and makes the other person more likely to be open and helpful because they are not afraid that you will take business away from them.

Further, you want to expand your advertising. Performing procedures does you no good if no one knows you do them. While advertising costs money and time, it is worth it to get your name out in the public. The old adage is true in this case… it takes money to make money. This is one of the main differences between practices that get by and practices that are very successful. Writing papers and giving talks on your focus procedure will help get your name out there and will be advertising for you as well, but if you train your staff on advertising and maybe even hire someone to help with it, you can increase your business traffic and in turn increase how much money you make.

3. Lastly, the third tip is to Trim The Fat. Look at your practice. Write down all of the things you like about it and write down all of the things you dislike. Write down a list of all of the things you do that are not patient/procedure related. Do you have to do a lot of administerial work? Are you taking out the trash or wasting your time doing similar important but rudimentary tasks? Look at everything you do and then ask yourself, what can I hire out? Although hiring someone costs money, you will make more money in the end by being able to do more procedures and being able to focus on being a doctor. It is amazing how quickly a minute here and a minute there to do simple tasks can add up over a day. Trimming out this daily task fat from your schedule will make your practice run more efficiently, tend to more patients, and in the end make more money.

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Liability: The Other Never-Ending Story Part I

How Can Business Entities Shield Liability from Dangerous Activities?
Move Them Out – How to Redesign Relationships

By Amanda Schillinger

Amanda Schillinger is originally from Melbourne, Florida where she graduated from Keiser University while working full time at the Brevard County Clerk of Courts. She later taught high school English at Eau Gallie High School. She currently is attending Stetson Law School in Gulfport, Florida, where she will be graduating in May of 2019.

Businesses have a lot to fear when it comes to strict liability–vicarious liability–mere instrumentality, and negligence actions in general. This is probably the reason why businesses have a hard time choosing between hiring their own employees or contracting for outside employment through independent contractors.

Independent Contractors, Employees, and Vicarious Liability…Oh My!

The Kane Case

The majority of courts use the Restatement Second of Agency, Section 220 (1958) as the guideline to determine whether an individual is employed or independently contracted by a business through the individual alone or through another business or corporation. This will get very interesting when franchisor/franchisee relationships are created.

There are 10 factors that the Restatement describes as quintessential for deciding this issue. They are as follows:

1. The amount of control the contract delegates to a master (employer) over the details of the work to be performed by the servant (employee);
2. Whether the employee is engaged in a distinct occupation or business;
3. The kind of occupation (is the work supervised under the employer or is the work performed by a specialist without supervision);
4. The skill required in the particular occupation;
5. Who supplies the instrumentalities, tools, and the place of work for the employee;
6. Length of time the person is employed;
7. Is the pay by the time worked or by the task completed;

8. Is the work a part of the business of the employer;
9. Do the parties themselves believe they have an employer/employee relationship; and
10. Is the individual or corporation who has the legal authority to make decisions or actions (the "principal") a business.[1]

The Florida Court of Appeals for the Second District in *Kane Furniture Corp. v. Miranda* helped explain these factors, and established that these factors are to be viewed as a scale–weighing the facts either towards an employer/employee relationship or an independent contractor relationship.

The facts in *Kane* involve a tragic car accident in which a carpet installer drove his truck into another vehicle, killing the wife of the driver. The very unfortunate cause of this collision was that the carpet installer was intoxicated. The driver filed a wrongful death suit in which he sought to hold Kane Furniture and the other business owner of the installation service vicariously liable for the actions of the carpet installer.

The Court found that the carpet installer was not an employee of the carpet installation business, nor was he a sub-employee of Kane Furniture. He was an independent contractor who was solely liable for his own actions. Taking a look at the factors, the Court applied the facts[2] of the case to weigh in favor of the independent contractor relationship:

I. **Control**: The installation business and the carpet installer had sole discretion over their performance. The installation business did not report to anyone at Kane; and it had the absolute discretion in contracting out the installation jobs. The only instructions Kane gave to the installation business was to have the installers dress neatly and not be intoxicated while on the job. Once the installer received the job, he was on his own and required no supervision from Kane or the installation business. Upon completion of the job, the carpet installer was free to do what he pleased.

II. **Distinctness**: Carpet installation is a distinct occupation. Both the installation business and the carpet installer had their own independent installation businesses.

III. **Supervision**: Carpet installers, more often than not, do their work without supervision. Kane only "employed the installation business and its installers on an "as needed" basis; and the installers were responsible for their own work once they had the

[1] *Kane Furniture Corp. v. Miranda*, 506 So. 2d 1061, 1063 (Fla. 2d DCA 1987).

[2] *Id.* at 1064-1066.

job. Furthermore, any lost items or damage caused by the installer came out of their own pocket.

IV. **Skill**: Carpet installers normally are required to complete an apprenticeship prior to working on their own. Additionally, the installation business was contracted for a trial period before Kane committed to working with it.

V. **Supplies**: Both the installation business and the installer provided their own tools to do their jobs. They owned and insured their own cars/trucks; and they were never reimbursed for mileage or other expenses.

VI. **Employment Length**: Kane Furniture only worked with the installation business on an "as needed" basis. Additionally, neither was obligated to work exclusively for the other; Kane had other installation businesses it contracted with, and the installation business contracted with other businesses as well.

VII. **Pay**: The installation business was paid by Kane per yard/per job. Kane made checks out to the installation business, and the installation business paid the installers by the jobs assigned/completed.

VIII. **Type of Business**: This was one of the only factors that favored an employer/employee relationship, which was not enough when weighed against all of the other factors. Kane was in the business of selling carpet; and offered installation as a "one price for everything" arrangement.

IX. **Intent**: The Court noted here that intent and course of dealings between the parties was also a factor that weighed heavily on the type of relationship established. Here, the installation business and the installer paid taxes as owners of their own businesses. Kane Furniture did not withhold any monies, and filed a 1099 form for non-employees. Additionally, the installation business as well as the installer, were free to accept or reject jobs Kane Furniture gave out, as well as work for other companies. There was no employment agreement between the parties, and the installation business and the installer did not enjoy any benefits found in an employer/employee relationship – fringe benefits, health care, unemployment compensation, worker's compensation, or paid vacation and holidays.

X. **Principal in Business**: The Court did not have much to say on this factor. It found that Kane Furniture was in business, but the relevance of this factor was unclear.

The second holding was even more of a surprise. The Court found that even if the installation business and the installer were employees of Kane Furniture, neither of Kane Furniture or the installation business would have been found to be vicariously liable. Under the doctrine of *respondeat superior*, an employer can be sued by third parties who have been injured in accidents caused by an employee's negligence, as long as the employee is within the scope of the employment.[3]

The scope of employment simply means that the act the employee performed was within the time and space limits, when the employee is clocked in to be working, or on a job or going to a job or going back to the place of employment to report back from the job, and it is triggered in part by a purpose to serve the employer.[4]

The installer deviated from his scope of employment as soon as he had completed the job assigned and headed to the bar. His drinking and socializing did not serve Kane Furniture's interest and he was not returning to work while he was driving; he was merely dropping off the passenger, who needed to return to his own car that was parked at Kane Furniture, in his truck.[5]

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[3] *Id.* at 1067.

[4] *See id.*

[5] *See id.*

Thoughtful Corner

Scholarship Honoring the Memory of Zack Donatti

Kelsey Weiss

Kelsey Weiss is a third year law student at Stetson University College of Law. She graduated from the University of Central Florida in 2015 with a B.S. in Molecular Biology & Microbiology and a B.A. in Anthropology and after spending a year working in the Emergency Department of and Orlando hospital, enrolled in law school. Upon graduating from law school in May of 2019, Kelsey hopes to become an attorney specializing in the practice of health care and corporate law.

In June of 2014, my nineteen year old brother fell through a skylight of a newly constructed building. Zack was working as an apprentice under our Dad in order to attain his state contractor's license and take over the family roofing and construction company. That day, Zack was inspecting a newly completed roof and was on the phone with an employee, when he didn't realize that the skylight was tarped because the skylights had not been installed. He fell twenty feet onto concrete flooring and was rushed to Halifax Medical Center in Daytona Beach, Florida where he was diagnosed with a skull fracture and brain bleed. After five days in the Intensive Care Unit, Zack passed away.

Even at nineteen, Zack was an influential member of the racing community in Central Florida and after he passed, many people donated money to our family. My parents decided that this money would be better served helping young people in our community. Zack loved to teach younger kids. He was known for taking those younger than him under his wing and helping them with whatever they needed. Our family believes that this Fund helps not only keep the memory of Zack alive, but that it is something Zack would have loved.

My parents' created the ZDR Fund, named after Zack Donatti Racing, and asked that all further donations be made to the Fund.

In order to receive a scholarship from the ZDR Fund, our family asks only one thing: for the young person to personally write a letter to our family explaining what the scholarship would be used for and why. Since 2014, the Fund has allowed multiple children from our local

community participate in pageants, attend volleyball competitions, buy new parts for racing vehicles, and more.

Additionally, our family has committed to providing two graduating seniors from New Smyrna Beach High school (where my brother and I graduated from) with a $500 scholarship each year based on essays submitted by the students. Every year, my Dad and I attend Honors Night at the High School to personally give the scholarships to the two winning students.

Recently, our family discovered that Zack had filed for an LLC before his passing. We will now be transferring the Fund into Donatti Industries, LLC and will use Zack's very own LLC to continue to help young ones in the community achieve their goals and keep the memory of my brother alive.

This scholarship fund is a perfect example of taking a tragedy and making some good come out of it for the community.

It is also important to note that donating to scholarship funds, such as the one in memory of Zack, is a great way to qualify for certain tax deductions.

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Forbes Nation with Alan Gassman

What is an Independent Contractor? Here's Why it Matters Under the Trump Tax Law.

Harsh consequences may befall those who mis-categorize themselves or others.

Individuals who work for themselves are treated differently than employees, but the distinction is sometimes very hard to make.

The IRS leans towards having individuals, in the interest of making sure that everyone is on the tax system with withholding and for the sake of watching out for the benefit of individual workers who have employment tax contributions, workers' compensation, unemployment, and other benefits required by law.

To view the full article, click HERE

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Richard Connolly's World

Insurance advisor Richard Connolly of Ward & Connolly in Columbus, Ohio often shares pertinent articles found in well-known publications such as *The Wall Street Journal*, *Barron's*, and *The New York Times*. Each issue we feature some of Richard's recommendations with links to the articles.

The attached article from Forbes reports:

An under-the-radar Surrogate's court opinion is upending the staid world of trusts and estates in New York.

In the matter of the will of Evelyn Seiden, the court overturned the state's 2014 tax grab on the marital trust established on her husband's death in 2010, ordering a refund of $530,000 to her estate.

The result could be far reaching: Using the same arguments, many families could be in line for big estate tax refunds and future savings. For example, it could even impact the estate of billionaire George Steinbrenner.

In their briefs, the state lawyers were apoplectic. They called the taxpayer's move one of "gamesmanship" and warned of "a potential opening of the flood-gates" for similarly situated estates and "an untenable risk" to state revenue.

The executor's argument boiled down to this: New York cannot tax what the IRS cannot tax.

Normally, QTIPs-as these trusts are called-allow tax deferral, not tax avoidance. At the first spouse's death, assets go into a trust for the lifetime of the surviving spouse, avoiding estate taxes on the first death. When the surviving spouse dies, the trust assets are includable in the second estate.

But because of the bizarre interplay of the one-year federal estate tax repeal in 2010 and the New York state estate tax laws, the Seiden estate lawyers argued that they could avoid including the value of the trust in the widow's estate altogether.

To view the full article, click HERE

To view the Surrogate Court's Opinion, click *HERE.*

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Humor

Here are some quips from Star Trek sure to make you laugh:

- “The best diplomat that I know is a fully-loaded phaser bank.” – Lt. Cdr. Montgomery Scott

- Picard: "Number one, will you set a course for Starbase 227? I'll join you on the bridge shortly."
  Riker: "Wait a minute. You've been declared dead. You can't give orders around here."
  Data: "If we are to adhere to the exact letter of Starfleet regulations, then technically, sir, you have been declared a renegade. In fact, I believe you are facing 12 counts of court martial offenses. You cannot give orders either, sir."
  Picard: "That's quite right. And as I am supposed to be dead, I'll go and get some sleep, and Mr. Data, I suggest that you escort Commander Riker to the brig."
  Data: "Aye, sir... this way, sir." (Data grabs Riker and leads him to the brig.)
  - TNG: Gambit part II, 7.05

- Scotty: “What a mess.”
  Spock: “Picturesque descriptions will not mend broken circuits, Mister Scott.”
  - The Galileo Seven

- Troi: “It’s a primitive culture. I’m just trying to blend in.”
  Riker: “You’re blended alright.”
  - Star Trek: First Contact

This picture was taken in Nevada several years ago. Nimoy and Shatner were having a conversation that was not interrupted by Alan being shuttled in for the picture which he paid $200 for.

Some Trivia:

- Q: How did each episode begin?
  A: "Space… the Final Frontier. These are the voyages of the starship Enterprise…"

- Q: Which of the following is not a name used to describe the stable wormhole on “Deep Space Nine”?
  - The Passageway
  - The Eye of the Universe
  - The Anomoly
  - The Galactic Vortex

  A: The Galactic Vortex

- Q: What are McCoy’s medical specialties?
  A: Surgery and Space Psychology

- Q: What is the name of Captain Kirk’s Iowa hometown?
  A: Riverside

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Calendar of Events

EVENT	DATE/TIME	LOCATION	DESCRIPTION	REGISTRATION
AAA-CPA Conference	November 5, 2018	Miami, FL	Homestead Tricks and Traps, Vacation Home Planning and 199A Strategies presented by Christopher Denicolo.	Contact: Agassman@gassmanpa.com
Network Lunch for Venice Chamber of Commerce	November 5, 2018, 12:00 PM – 1:00 PM	Venice, FL	Brandon Ketron will be presenting: *Creative Planning Under Section 199A*	Contact: Agassman@gassmanpa.com
MER Primary Care Conference	November 8-11, 2018	JW Marriott Los Cabos Beach Resort & Spa	1. Lawsuits 101 2. Ten Biggest Mistakes That Physicians Make in Their Investment and Business Planning 3. Essential Creditor Protection & Retirement Planning Considerations. 4. 50 Ways to Leave Your Overhead & Increase Personal Productivity.	Contact: Agassman@gassmanpa.com
Leimberg Information Services Webinar	November 16, 2018	Gotowebinar.com	Dynamic Planning Strategies for the Well Informed Advisor	Contact: Agassman@gassmanpa.com
Mote Vascular Foundation Symposium	November 30 – December 2, 2018	The Westin-Sarasota, 1175 N. Gulfstream Ave, Sarasota, FL 34236	Estate, Medical Practice, Retirement, Tax, Insurance and Buy/Sell Planning – The Earlier You Start, the Sooner You Will Be Secure	Contact: Agassman@gassmanpa.com

Johns Hopkins All Children's Foundation 2019 Estate, Tax, Legal and Financial Planning Seminar	February 7, 2019	TBD	Alan will be serving as moderator and speaking	Contact: Agassman@gassmanpa.com
9th Annual Pinellas County Medical Association Continuing Medical Education Cruise	March 14-18, 2019	Port of Tampa	Biggest Mistakes Physicians Make in Medical Practice	FOR INFORMATION AND RESERVATIONS CONTACT JEN BOLL 727-526-1571 / 1-800-422-0711
45th Annual Notre Dame Tax Institute	October 26-27, 2019	South Bend, Indiana	TBD	Contact: Agassman@gassmanpa.com
New Jersey Bar Presentation	TBA	TBA	What New Jersey (and other) Lawyers Need to Know About Florida Law and Trust and Estate Planning for Their Florida Based Clients (Four 50 minute sessions).	**Contact:** **Agassman@gassmanpa.com**

Newly announced events in RED

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