GASSMAN CROTTY & DENICOLO P.A.

ATTORNEYS AT LAW

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On this date in 1762, Catherine the Great overthrew King Peter III and became the first Empress of Russia. Historians believe the coup went smoothly primarily because Peter was off picking a peck of pickled peppers.

On This Day In History

By: Wesley Dickson

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- On July 9, 1922, Johnny Weissmuller swam 100-meters in under 60 seconds, for the first time in history. He had a time of around 59 seconds, so the margin he beat the record by was minute.
- July 9 was a big day for constitutions. On July 9 in 1789 the French National Assembly begins drafting a constitution for their country and in 1932 on the same day, the State of Sao Paulo rebels against Brazil in what will be called the Constitutionalist Revolution… I'm not sure exactly why this matters… hopefully whatever this is constitutes humor.
- On July 9, 1937, a fire broke out at the Fox Film vault destroying most of the silent films put out by Fox. The question still remains, if a silent film reel is burned down, and no one is around to hear it, does it make a sound?
- The Russell-Einstein Manifesto was issued on July 9, 1955. This call for countries to rethink the potential harm of nuclear weapons fell on deaf ears as exactly 7 years later, the U.S. would conduct Starfish Prime, its largest nuclear missile test in space. Martians were not too happy about the act of unbridled aggression.
- Elias Howe, best known as the inventor of the sewing machine, was born on this day in 1819. While this invention is widely used and respected today, Howe's idea was not as popular in his time. It is said that when he brought the designs to the Patent Office, his presentation had the Patent employees in stitches.
- Big news: Tom Hanks turns 64 today.

SOMETHING IS FISHY IN THE PPP WORLD - PPP RULES FOR FISHERMAN

"Fishing for forgiveness..."

By: Patrick Collins

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Those who are familiar with the rules governing the Paycheck Protection Program know how much of a challenge it has been to efficiently implement the program. The rules that determine the amount of a borrower's loan and (later) forgiveness vary wildly depending on how the borrower's business is designated for tax purposes - and more simply - what kind of business it is. Payroll plays an enormous role in the PPP process so borrowers with many employees and payroll costs will likely experience the loan and forgiveness process differently than a borrower with fairly few employees and payroll costs.

The PPP was designed to be broad and accessible so as to provide aid to as many different kinds of businesses as possible. While well intentioned, this made the rules governing the program overly broad in many respects. Broad rules have consistently created confusion for businesses that are more niche, or those that have unique employer-employee relationships. The SBA and the Treasury have tried to bridge these gaps in understanding by releasing specifically targeted bits of guidance. Some examples of this has been extra guidance for telephone cooperatives, electric cooperatives, and seasonal employers.

The latest and perhaps most interesting release of targeted guidance is the Interim Final Rule on Certain Eligible Payroll Costs issued on June 25th which addressed PPP questions pertaining to fishing vessel owners and crew members. Fishing vessel owners have a unique PPP scenario because Section 3121(b)(20) of the Internal Revenue Code makes the relationship between a crew member and a fishing boat owner analogous to a joint venture or partnership for PPP purposes.

While this may feel bizarrely specific, these rules may give us a hint about future guidance to come.

The new rules are explained below:

1. Fishing boat owners can include payroll costs attributable to crew members in their PPP loan applications.

Many fishing boat owners wondered if they could include costs expended on crew members in their loan application because I.R.C. Section 3121(b)(20), in effect, makes them non-employees. The SBA's answer was yes.

The exact language of the Interim Final Rule is as follows:

"The Administrator, in consultation with the Secretary, has determined that the relationship of a crew member described in Section 3121(b)(20) of the Internal Revenue Code (Code) and a fishing boat owner or operator (fishing boat owner) is analogous to a joint venture or partnership for purposes of the PPP. As a result, a fishing boat owner may include compensation reported on Box 5 of IRS Form 1099–MISC and paid to a crew member described in Section 3121(b)(20) of the Code, up to $100,000 annualized, as a payroll cost in its PPP loan application." Presumably, since boat owners are able to report expenses paid for crew members as if they were normal employees, the normal employee compensation caps at $15,385 ($100,000 x 8/52) for an 8 week covered period and $46,154 ($100,000 x 24/52) for a 24 week covered period would apply.

2. Fishing boat owners cannot seek forgiveness for compensation paid to crew members who also received PPP loans.

Because many crew members are not technically "employed" by the boat owner they "work" for many were able to get PPP loans of their own. This left boat owners wondering if they could include payroll costs for compensation paid to a crew member who received their own PPP in their forgiveness application. The SBA's answer was no.

The language of the rule is as follows:

"If a fishing boat crew member obtains his or her own PPP loan and seeks forgiveness of that loan based in part on compensation from a particular fishing boat owner, the fishing boat owner cannot also obtain PPP loan forgiveness based on compensation paid to that same crew member. This restriction applies only if the crew member is performing services described in Section 3121(b)(20) of the Code for the particular fishing boat owner."

The intention here is clearly to prevent double dipping on forgiveness. The unique employer-employee relationship between the boat owner and crew member allows both the employment provider and the labor provider to have PPP loans out at the same time.

The Interim Final Rule goes on to provide "The Administrator, in consultation with the Secretary, has determined that this restriction is necessary to prevent fishing boat owners and crew members from claiming forgiveness for the same payroll costs (for the owner's PPP loan, the compensation to a

specific crew member; for the crew member's PPP
loan, the compensation from the owner to that crew member). As a result, only the crew member's PPP loan is eligible for forgiveness, and the owner may not obtain forgiveness for any payroll costs paid to the crew member.

Interestingly, the crew member's loan forgiveness will take priority over the boat owner's. The rule also explicitly puts the impetus to be aware of which crew members have taken PPP loans on the owner. There doesn't appear to be any duty on the crew member to disclose.

Finally, the rule explicitly states "Due to the increased risk of duplicate payroll costs, PPP loans to fishing boat owners are more likely to be subject to an SBA loan review." This should be seen as a warning to borrowers who have a unique business structure that could create PPP loan overlap between owners and "employees" or independent contractors. These kinds of borrowers should ensure their expense documentation is air tight so as to avoid any extra scrutiny from the SBA or Treasury.

What does this mean for regular PPP borrowers?

One theme that is really highlighted by this Interim Final Rule is the SBA and the Treasury's desire to prevent overlapping loans and forgiveness. This is significant because some questions still lingering about the forgiveness process involve the treatment of expenses and forgiveness that overlap between different companies.

In an Interim Final Rule released on May 22nd the SBA discussed caps on owner's compensation at the lesser of 8/52 of 2019 compensation or $15.385. The rule stated that the cap applied "in total across all businesses." Many advisors believed this meant that if an individual owns more than one business, the cap on owner's' compensation is an aggregate across each of the businesses. This may become a problem, however, because many thousands of borrowers likely took the full owner's compensation amount available for each business.

For example, say you have a borrower who owns 100% of 4 different S corporations. The borrower's 2019 compensation from each business was over $100,000 so they take the maximum amount of owner compensation for an 8 week period ($15,385) for all 4 businesses for a total of $61,540. After the SBA imposed the aggregate cap he will now only be able to count $15, 385 of that total towards forgiveness. This leaves $46,155 leftover that the borrower will have to cover with other expenses if they still want to reach full forgiveness.

The question then becomes how will the SBA treat these individuals considering they retroactively capped the amount borrowers were allowed to consider as forgivable owner's compensation. On one hand, the SBA retroactively imposed the cap so it would be quite unfair to punish borrowers for breaking a rule that didn't even exist at the time they took the loan. On the other hand the SBA and the Treasury have been very intentional in ensuring that borrowers do not double dip on loans or forgiveness, as evidenced by the new rules governing fishing boat owners. We have yet to receive any further official guidance on this dilemma.

The window to apply for PPP loans has been extended to August 8th so the SBA and Treasury have one last opportunity to complete and clarify all guidance on the loan application process. Keep a close eye on the Treasury's website (https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses) as they may release a wave of guidance in response to the extension of the program in the coming days. Furthermore, if you've been following the PPP closely then buckle up for round 2 as Congress will begin to negotiate the next round of Coronavirus aid over the coming months. We're gonna need a bigger boat...

Governor DeSantis Extends Executive Orders Amid Increased Coronavirus Cases in Florida

By: Ian Maclean

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Florida has had a major increase in the number of COVID-19 cases in recent weeks. In response to this Governor DeSantis extended Executive Order 20-166, 20-80 (Airport Screening and Isolation), and Executive Order 20-82 (Isolation of Individuals Traveling to Florida) on July 7th.

Executive Order 20-166
Section 1 of Executive Order 20-166 extends the state of emergency declared in Executive Order 20-52 for 60 days. The language is as follows:

> *Section I. The state of emergency declared in Executive Order 20-52, as extended by Executive Order 20-114, will be extended for 60 days following the issuance of this order for the entire State of Florida.*

Executive Order 20-80
Executive Order 20-80 directs "all persons whose point of departure originates from outside the State of Florida in an area with substantial community spread, to include the New York Tri-State Area (Connecticut, New Jersey and New York), and entering the State of Florida through airports to isolate or quarantine for a period of 14 days from the time of entry into the State of Florida or the duration of the person's presence in the State of Florida, whichever is shorter." This Order does not apply to "persons employed by the airlines and those performing military, emergency or health response."

Section 2 of Executive Order 20-80 states that Executive order 20-80 shall "expire upon the expiration of Executive Order 20-52, including any extensions . . . ." Because Executive Order 20-166 extends the state of emergency declared in Executive Order 20-52, the provisions of Executive Order 20-80 are still in place. The direct language of this executive order is as follows:

> *Section 2. This Executive Order shall expire upon the expiration of Executive Order 20-52, including any extensions, or upon an Executive Order lifting the isolation or quarantine after advice from the State Health Officer and Surgeon General.*

Executive Order 20-82 directs "all persons who enter the State of Florida from an area with substantial community spread, to include the New York Tri-State Area (Connecticut, New Jersey and New York), to isolate or quarantine for a period of 14 days from the time of entry into the State of Florida or the duration of the person's presence in the State of Florida, whichever is shorter." This Order does not apply to "persons employed by the airlines and those performing military, emergency or health response."

Executive Order 20-82
Section 4 of Executive Order 20-82 states that Executive order 20-82 shall "expire upon the expiration of Executive Order 20-52, including any extensions . . . ." Because Executive Order 20-166 extends the state of emergency declared in Executive Order 20-52, the provisions of Executive Order 20-82 are still in place.

> Section 4. This Executive Order shall expire upon the expiration of Executive Order 20-52, including any extensions, or upon an Executive Order lifting the isolation or quarantine after advice from the State Health Officer and Surgeon General.

Executive Order 20-80 and 20-82 both provide that individuals who are required to isolate or quarantine, but do not do so, are committing a second-degree misdemeanor which is punishable by imprisonment not to exceed 60 days, a fine not to exceed $500, or both.

This is a step in the right direction for Florida, but only time will tell if this is too little too late as Coronavirus outbreaks are occurring throughout the state.

SCOTUS Rules NY Prosecutor is Entitled to Trump Tax Returns

By: Patrick Collins

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On the morning of July 9th, the Supreme Court of the United States handed down its long awaited decision in Trump v. Vance. This case was more commonly recognized as the public's best hope to get its hands on President Trump's tax returns and other relevant financial documents.

The decision was 7-2 in favor of Vance with Chief Justice John Roberts authoring the court's opinion. Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, Elena Kagan, Brett Kavanaugh and Neil Gorsuch joined in the opinion. Justices Clarence Thomas and Samuel Alito dissented.

The case was brought about after Manhattan District Attorney, Cy Vance Jr., issued a subpoena seeking Trump's financial records from his long-time accounting firm, Mazars. While the subpoenas were relatively vague in their stated purpose they are likely connected to Vance's investigation into possible state tax fraud and hush money payments that Trump allegedly made in the run up to the 2016 general election.

The President's lawyers argued that the President is immune from state criminal subpoenas while Vance's office argued that "no one – not even a president – is above the law."

In the end, SCOTUS sided with Vance's office. In his opinion, Chief Justice John Roberts opined "The President is neither absolutely immune from state criminal subpoenas seeking his private papers nor entitled to a heightened standard of need. . . . In our judicial system, 'the public has a right to every man's evidence.' Since the earliest days of the Republic, 'every man' has included the President of the United States."

The decision was not a total victory for the Manhattan District Attorney, however. The court decided to remand the case back to the lower court for further deliberation. Writing for the court, Chief Justice Roberts said, in the lower court, Trump should be able to "raise further arguments as appropriate," regarding any burden the subpoenas might put on his official duties.

Justices Clarence Thomas and Samuel Alito both argued that a sitting President should be granted greater deference [read protection] from subpoenas given the nature of the job. Alito explained "The court's decision threatens to impair the functioning of the presidency and provides no real protection against the use of the subpoena power by the nation's 2,300+ local prosecutors . . .."

Justices Brett Kavanaugh and Neil Gorsuch, both of whom Trump appointed to the bench, wrote, "The court today unanimously concludes that a president does not possess absolute immunity from a state criminal subpoena, but also unanimously agrees that this case should be remanded to the district court, where the president may raise constitutional and legal objections to the subpoena as appropriate . . ."

While this appears to be a legal victory for the Manhattan District Attorney's office, Trump's counsel is also claiming a victory. Because the case was remanded Trump and his legal team will effectively be able to litigate the issue all the way past election day. Many had hoped that a favorable decision in this case would give prosecutors, as well as Congress, access to Trump's financial statements before the 2020 general election. Any hope of that happening seems to be gone now that the case has been returned to the lower court. It is unclear how long it will be before the New York grand jury will get access to the documents they have requested.

While Vance's office seems to have won the legal battle, Trump still appears poised to escape any political ramifications that a unfavorable opinion in this case could have brought with it.

Arbitration and the Dissolution of Marriage

By: Ian Maclean and Alex Sorley

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Case law has liberally construed Florida Statute § 44.104(14) to not allow arbitration during the dissolution of marriage if there is any relationship to child custody, visitation, or child support.

Fla. Stat. § 44.104(1) provides that when "[t]wo or more opposing parties who are involved in a civil dispute may agree in writing to submit the controversy to voluntary binding arbitration, or voluntary trial resolution, in lieu of litigation of the issues involved, prior to or after a lawsuit has been filed, provided no constitutional issue is involved."

However, § 44.104(14) provides that "this section shall not apply to **any dispute involving child custody, visitation, or child support**...."

The full text of Fla. Stat. § 44.104(14) states the following:

> *This section shall not apply to any dispute involving child custody, visitation, or child support, or to any dispute which involves the rights of a third party not a party to the arbitration or voluntary trial resolution when the third party would be an indispensable party if the dispute were resolved in court or when the third party notifies the chief arbitrator or the trial resolution judge that the third party would be a proper party if the dispute were resolved in court, that the third party intends to intervene in the action in court, and that the third party does not agree to proceed under this section.*

Analysis:

In general, agreements may contain provisions that require that future disputes be resolved by way of arbitration in accordance with F.S. 44.104; however, there have been two Florida cases which call into question the enforceability of an

arbitration provision in any action that involves issues of child support. The statute excludes all actions that involve issues of child support, child custody, or visitation from arbitration. Both of these Florida cases have construed this statutory exclusion broadly.

***Toiberman v. Tisera*, 998 So.2d 4 (Fla. 3d 2008.**

After a Dissolution of Marriage, the two parties "agreed to binding arbitration [of] all of the issues in this case." The question for the court was whether this language contravenes section 44.104 of the Florida Statutes. This statute specifically forbids arbitration of disputes involving child custody, visitation, or child support, and the court vacated and reversed the portion of the award directly related to this.

The next question depended on the meaning of the term "dispute" within section 44.104. The court stated that it is, "evident that the legislature intended for the term "dispute" to address the entirety of a legal action between the parties, and not merely individual claims that involve child custody, visitation, or child support issues." The court goes on to state, "the legislature intended to exclude from arbitration all lawsuits that involve issues of child custody, visitation, or child support."

In regards to alimony the court held that "because issues of alimony and child support are interrelated, there is not a single case that has allowed binding arbitration of an alimony award while contemporaneously affording judicial review of child custody, visitation, and child support issues. Thus, bifurcation of such clearly interrelated issues within a lawsuit would be not only *sui generis*, but also imprudent and illogical."

***Martinez v. Kurt*, 45 So.3d 961 (Fla. 3d 2010).**

Following the Dissolution of a Marriage and initiation of the arbitration process to address financial issues, the former wife filed motion requesting that the trial court resume jurisdiction. The Circuit Court ruled that the arbitration clause in the parties' marital settlement agreement was not enforceable. The Third District Court of Appeals affirmed this decision and held that parties were not entitled to arbitrate their post-judgment dispute regarding financial issues.

The court stated the following:
The underlying logic of *Toiberman* is that a decision on the financial issues in a matrimonial case can affect the ability of one or both parties to comply with the provisions governing child custody, visitation or (where applicable) child support. The logic applies equally to the initial dissolution proceedings and post-judgment proceedings. We conclude that the trial court correctly interpreted the *Toiberman* decision.

When	Organizer	Upcoming Events	Get Involved
Friday, July 10, 2020	Free webinar from our firm	Kevin Cameron presents: **My 8-week Covered Period is Over, Now What?** from 12:30 to 1 PM ET	**Register**
Thursday, July 16, 2020	Free webinar from our firm	Ken Crotty presents: **Inheritance Trust Implementation And Planning** from 12:30 to 1 PM ET	**Register**
Thursday, July 23, 2020	Free webinar from our firm	Ken Crotty presents: **Estate Tax Return Tips and Traps** 12:30 PM to 1 PM ET	**Register**
Tuesday, September 15, 2020	Estate Planning Council of Northern Nevada	Alan Gassman presents: **Dynamic Planning With Irrevocable Trusts After TRA** from 9 to 12 PM PDT	**Register**

When	Organizer	Upcoming Events	Get Involved
Thursday, October 29, 2020	46th Annual Notre Dame Tax & Estate Planning Institute	Christopher Denicolo presents: **Two Hours Re: SECURE Act**	**Register**
Friday, October 30, 2020	46th Annual Notre Dame Tax & Estate Planning Institute	Alan Gassman and David Herzig present: **CARES Act Loans And Their Aftermath** Alan Gassman participates in a panel to discuss **Termination Of Charitable Lead Annuity Trusts (Ideas Are Welcome)**	**Register**
Monday, November 16, 2020	AICPA Sophisticated Tax Conference in Washington, D.C.	Alan Gassman presents: **Dynamic Planning for Professionals and Their Entities** from 4:45 to 5:35 PM ET	**Register**
Tuesday, November 17, 2020	AICPA Sophisticated Tax Conference in Washington, D.C.	Alan Gassman and Brandon Lagarde present: **COVID-19: Lessons Learned/What Did I Miss?** from 10:40 AM to 12:20 PM ET	**Register**
Tuesday, December 1, 2020	Ohio Bar Association's Great Lakes Asset Protection Institute	Alan Gassman presents: **60 Minutes On Asset Protection**	**Learn More**

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