



At the intersection of commercial finance, technology, and the law, this bi-monthly newsletter explores the emerging legal topics impacting the secured lending and equipment finance industry. Thought-leading attorneys from **Moritt Hock & Hamroff's Secured Lending and Equipment Finance (SL&EF)** practice share their legal insight, experience, and best practices on this rapidly evolving area of law and invite your thoughts and questions.

We the People, of Equipment Finance: **ELFA Annual Convention Session Aims to Improve Workplace Diversity and Well-being**



The Equipment Leasing and Finance Association (ELFA) has organized a timely session focused on “The Human Side of Equipment Finance” at its annual convention this year in Orlando, FL. The session, scheduled to take place at 10:45 a.m. on Monday, Oct. 10, will cover mental health strategies in the workplace to ensure that employees come to work as their full authentic selves; women in leasing and the continued challenges they face; best practices to assist corporations to create an inclusive culture and diverse workforce; and how to cultivate the next generation of emerging talent.

Panelist [Julia Gavrilov](#), a partner at MH&H, will discuss inroads made by women in the industry, the continued challenges they face, corporate motivation and strategies for supporting women, and legal other considerations related to DEI. Jesse Johnson of JDR Solutions will moderate the panel, which will also include the insight from Lovern Gordon of Boston Financial & Equity Corporation, Nancy Robles of Eastern Funding, and Ryan van de Boogaard of Key Equipment Finance.

“We are now at a crossroads where talent is leaving the workforce at extraordinary rates and reassessing the workplace environment,” says Gavrilov. This “Great Resignation,” together with “quiet quitting,” increasing regulatory pressures, demands for supporting data and other legal and socioeconomic implications, makes the call for diversity, equity and inclusion even more urgent. “This panel session is, therefore, more timely than ever,” she notes.

Other notable convention sessions will include “Legal Updates Mean Business,” scheduled to take place at 2:30 p.m. on Tuesday, Oct. 11. Robert S. Cohen, a partner at MH&H, participated in the planning of the session regarding New York and California commercial finance disclosure requirements, and will be answering questions at the conclusion of the panel.

[ELFA Convention Learn More](#)

New York and California Commercial Finance Disclosure Regulations Are Here!

On June 9, the California Department of Financial Protection and Innovation adopted final regulations to implement the state’s 2018 commercial finance disclosure law, requiring non-bank lenders



and other finance companies to provide written disclosures for certain commercial transactions, including small business loans and merchant cash advances. The final adopted California law and regulations go into effect on Dec. 9.

The New York Department of Financial Services recently issued its proposed final regulations for the state's commercial finance disclosure requirements ("Final Regs"), which are currently out for comment. The compliance date for the Final Regs will be six months after final adoption and publication of the Final Regs in the State Register.

[Robert S. Cohen](#), of MHH regularly speaks on state commercial finance disclosure requirements at various ELFA conferences and other trade association panels. The firm is actively serving clients to keep them informed with updates on the status of the state regulations and preparing their respective organizations to comply with these industry-changing laws.

MH&H Weighs in on Landmark Reversal and Return of \$500 Million to Citibank



On Sept. 8 the United States Court of Appeals for the Second Circuit issued a Decision and Order, reversing the Southern District of New York's Decision and requiring participating lenders to return over \$500 million to Citibank, which had accidentally wired nearly \$1 billion of its own funds to a group of Revlon Inc. lenders. The Second Circuit Decision vacated a February 2021 Southern District of New York Decision that had sided with the participating lenders, holding that those lenders were not required to return the mistakenly issued funds because those funds could be used to satisfy the debt owed to them even though the wired funds were not intended for that purpose.

"Commercial finance and banking attorneys have been closely monitoring this case and advising lenders to add new preventative language to loan documentation to prevent a similar legal situation from arising," said Marc Hamroff, managing partner of MHH. "Although the Second Circuit ultimately ruled in favor of Citibank, we would nevertheless recommend that such preventative language remain in place, as other jurisdictions may differ in their analysis."

The Second Circuit Decision comes down two years after Citibank, acting as the administrative agent on the credit facility, mistakenly wired nearly \$1 billion instead of the approximately \$8 million interest payment that it had intended to make to certain lenders of Revlon. Although Citibank was able to recover approximately \$385 million from those lenders that agreed to return the funds, the action was commenced when the remaining lenders refused to return the funds that they mistakenly received.

Brett Garver Answers Key Questions About 1071, Notes Burden on Smaller Lenders



Amid concerns about Dodd Frank Section 1071's potential impact on the secured lending and equipment finance industries, Brett Garver answers key questions about the new requirements and their implementation timeline. Garver, a partner at MH&H, has been heavily involved in this issue, both as an attorney for the firm's clients and as an advocate for their industries.

Garver believes that many finance executives are unaware of how broadly the new rules will apply. He says compliance will be burdensome, especially for smaller lenders and some customers will consider the required questions on gender and race to be intrusive.

[Follow this link to our blog for the full Q&A.](#)

Part 2: Taking Care of Business: Succession Planning



Robert S. Cohen (left), partner and member of MH&H's Secured Lending practice group, interviews Brian Adelman (right), counsel with the firm's Trusts & Estates practice and Closely Held/Family Business practice.

As many SL&EF professionals own their own businesses and have significant estates to consider, succession is an important consideration. In the following Q&A with Robert S. Cohen, Brian Adelman discusses the unique, and often complex, issues involved in planning one's estate. It is our hope that this discussion will help you *take care of business*.

Find Part 1 of our series on succession planning in the last SL&EF newsletter [here](#).

Bob: Everyone, but especially business owners, need to carefully consider structuring their estates. One common area of confusion is the difference between gifts and estates. Could you explain the difference, and the issues encountered with both when it comes to taxes?

Brian: Sure. Generally speaking, an estate is made up of everything owned by a decedent or which the decedent has certain interests in at the date of the decedent's death. Essentially, a gift is any transfer made, during an individual's lifetime, to a donee (the "receiver" of the gift—for example, an individual or a charity), either directly or indirectly, where full consideration (measured in money or money's worth) is not received by the donor (the person who made the gift) in return.

One issue we often encounter is people fail to realize the income tax consequence when a person makes a lifetime gift of his/her property to another individual. The tax "basis" is the original purchase price of an asset plus the cost of improvements less any depreciation. For a lifetime, outright gift, the donee retains the donor's income tax basis (known as "carry-over" basis). If the donee inherited the same asset on the death of the donor, then the basis of the asset is stepped up to the fair market value of the asset as of the date of death of the donee. In many cases, the difference between the asset's carry-over basis and the stepped-up basis is substantial as the value of assets typically appreciate over time. Accordingly, the income tax consequence of passing assets during your life (versus on upon your death) could be significant.

Bob: What's the difference between federal gift/estate tax laws and NY state gift/estate tax laws?

Brian: Federal gift/estate tax laws and state gift/estate tax laws are significantly different. The gift tax is a tax on the transfer of property gifted during your life. The estate tax is a tax on property (cash, real estate, stock, or other assets) transferred from a deceased person to his/her heirs. In other words, it's a tax against a decedent's estate for the privilege of transferring property on death. The amount of the gift and estate tax depends upon a number of factors including the state where the donee resides, the type of asset and value of amounts gifted during life and the type of asset and the value of the assets the decedent owned or controlled at death. It is important to realize that not only is there a difference between federal estate/gift tax law and a specific state's estate/gift tax law but it is equally important to realize that there is no uniformity among each state when it comes to legislating gift/estate tax laws. For example, to the surprise of many, there is no gift tax imposed for residents of all states other than Connecticut. However, I strongly advise your readers to contact counsel in their state of domicile to determine the tax consequence of making a gift. For example, New York State has a three-year "claw-back" on all taxable gifts (not annual exclusion gifts) made prior to an individual's death. This means any gift made within three years of death are includable in the decedent's estate for estate tax purposes. Many states that do not impose a state estate tax at all while some states determine a decedent's estate tax by looking at what amount of estate tax was paid by the decedent to the federal government.

On the federal level, the IRS allows individuals to gift up to \$16,000 per year (\$32,000 for a married couple) to an unlimited number of persons tax free. This sum is called the "annual exclusion." Moreover, individuals can pay third-party providers for medical expenses and tuition expenses with no limitations and no gift tax consequence. Payments for tuition or medical expenses must be paid directly to the educational institution or medical provider.

Turning to estate taxes, the IRS provides an exemption for estate taxes. The exemption is the amount of money that a person can own before his/her federal estate will be subject to estate tax. As of January 1, 2022, the federal gift tax and estate tax exemption is \$12,060,000 per individual. Since the IRS taxes gifts (unlike New York for example), if an individual gifts in excess of the \$16,000 annual exclusion to any donee, the excess gift is deducted from such individual's lifetime exemption. These gifts must be reported on a gift tax return. For example, if someone was to gift \$76,000 to an unmarried child in 2022, the value of the gift in excess of \$16,000 (i.e., \$60,000) would be deducted from the donor's federal estate tax exemption. If this was the only gift made by the donor and the donor died in 2022, the donor could only transfer \$12,000,000 upon death (\$12,060,000 less \$60,000). This concept is designed to prevent individuals from gifting their assets shortly before death ("death-bed gifts") to avoid the imposition of an estate tax.

Fairly recently, the IRS has allowed a surviving spouse to include the "unused" portion of his/her deceased

spouse's exemption amount when determining the surviving spouse's exemption. This is called portability. With some exceptions, portability allows a married US citizen/resident couple to transfer \$24,120,000 during life and upon death without federal gift and estate tax consequences. Unfortunately, if there are no changes in the law, this \$12,060,000 exemption (\$24,120,000 for a married couple) is scheduled to significantly decrease on January 1, 2026. If the law does not change, the federal estate tax exemption will be reduced to approximately \$6,500,000 (adjusted for inflation).

Bob: How can valuation discounts make a difference in an estate plan?

Brian: Discounts make a difference by reducing the value of your estate which reduces the possibility of an estate tax. Let's play this out.

Logically, if you owned 100 percent of a corporation which business was valued at \$1,000,000 you would assume that if you gave away 30 percent of the shares of stock of that business, you would give away assets valued at \$300,000. However, this is not true because the value of the business interest is discounted. The combined discounts typically range between 20 percent and 40 percent. In theory, the value of the gift could be reported at \$180,000 to \$240,000. This is a significant reduction in the value of the asset transferred, and, thus, the value of a decedent's estate and the estate taxes due (to the extent the amount transferred upon death is in excess of any applicable exemption).

The two discounts which are typically available are a discount for lack of marketability and a minority discount. A lack of marketability discount reflects the fact that company's shareholders' agreement will restrict the sale or transfer of ownership interests. Plus, it is difficult to complete a sale of ownership interests in a private company—there is no ready market for those interests. A minority discount reflects the inability of the buyer to compel certain company actions since the buyer doesn't have a majority interest (and lacks control of the company).

The proper use of discounting techniques allows business owners to transfer a portion of their business to the next generation at a reduced value and is an effective tool to reduce, or possibly eliminate, an estate tax.

Bob: And what about the use of life insurance? How should those planning their estates, particularly business owners, consider using insurance?

Brian: Life insurance is considered by many to be the ideal way to preserve estate assets and alleviate liquidity problems. Obviously, the proceeds become payable at exactly the time they are needed (*i.e.*, at the time of death of the insured). Moreover, the death benefit generally represents discounted dollars far exceeding the total premiums paid.

For a business owner, life insurance creates an effective and economical method to create the cash necessary to pay estate settlement costs (for example, estate taxes). Many business owners are "cash poor." Many times, we see a family have to mortgage a family-owned real estate investment property to help pay estate expenses as the decedent has insufficient liquid assets. An adequate amount of insurance eliminates the necessity of a business owner from using other assets, both liquid and non-liquid, to meet estate expenses. Insurance permits these other assets to be preserved for the business and/or surviving family members.

Another consideration for any business owner is the purchase of "key-man" insurance. In general terms, this is insurance that a company purchases on the life of an owner, a valuable executive or another individual considered to be critical to the operation of the business. The company is the beneficiary of the insurance policy and pays the premiums. Upon the death of the insured, the insurance proceeds can be used to cover the costs to be incurred due to the death of the "key-man" (for example, the costs of recruiting, hiring and training a replacement for the deceased person). Moreover, if the company doesn't believe it can continue to operate without the key-man, the insurance proceeds are available to pay off debts and otherwise close the business down without financial risk.

Bob: How can you help?

Brian: At Moritt Hock & Hamroff, we have a significant Trusts and Estates practice, which can help business owners develop and implement the right estate plan for their needs. Our strategies are designed to meet each client's unique needs and to effectuate estate and income tax savings through the use of wills, revocable and irrevocable trusts and other estate planning tools.

We also have a Closely-Held/Family Business Succession Practice that understands the unique challenges arising from widely differing personalities and unlimited combinations of inter-relationships among individuals, family members and the entities they own and manage. To this end, our attorneys collaborate closely with business owners, management teams, family members and other professional advisors to provide creative and effective solutions to the broad array of legal issues that family enterprises encounter on a day-to-day basis and as they evolve over generations.

News Briefs



MH&H Wins Best Financial Law Firm

MH&H was named a top three winner for Best Financial Law Firm for its financial services practice in [Long Island Business News'](#) 2022 Annual Reader Rankings List. LIBN reader rankings is a months-long survey series inviting LIBN readers to cast their votes for their favorite firms and businesses in dozens of B2B categories.

Theresa Driscoll Co-Authors Arbitration Article

The extent to which arbitration clauses must be enforced within the context of a bankruptcy case has sparked much debate and decision making in recent years. Theresa Driscoll, partner of the firm and chair of the firm's Bankruptcy Practice, and Leslie Berkoff, also a partner of the firm, discuss this in their [latest article](#) published in the *Norton Journal of Bankruptcy Law & Practice*, Vol. 31 No. 3 issue.

Julia Gavrilov Named to the ELFA Equity Committee and the ELFA Legal Resources Subcommittee.

The ELFA Equity Committee is committed to fostering diversity, equity and inclusion within the ELFA, its member organizations and in the equipment finance industry at large. Gavrilov has also been appointed to serve as a member of the ELFA's Equity Forum subcommittee to plan the inaugural ELFA Equity Forum, scheduled to be held on Nov. 6 to 7 in Washington, D.C. On behalf of the ELFA Legal Committee, the Legal Resources subcommittee provides updates to the Association's 50-state compendium and other ELFA resources on legal matters pertinent to the industry in various jurisdictions.

Who We Are: Meet Some of Our Secured Lending and Equipment Finance Attorneys



Marc Hamroff

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Bob Cohen

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Brett Garver

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