

## Providing a Helping Hand (or Paw)

Animals have been the most popular subject in the 30-year history of this newsletter. These articles have always informed and entertained, and our readers have let us know how much they enjoy them.

Enter our client Penelope “Penny” Quick, her canine partner, Baylynn, and Canine Companions for Independence. We recently received the following:

*Hi Dick,*

*I greatly appreciate your kind words and friendship. As you might know, two years ago I finally decided to accept the fact that I am profoundly hard of hearing and that I needed additional “ears” so I applied for a Service Hearing Dog from Canine Companions for Independence.*

*This past June, I received the invitation to attend two weeks of training at the Canine Companions Headquarters in Santa Rosa, CA, and was paired with a beautiful two year*

*old Labrador/Golden cross named Baylynn. She had already completed two and a half years of training before meeting me.*

*She is everything and more than I expected! For the past few weeks she has been busy settling in our home and we have been learning about one another. You will see us out and about soon.*

Penny kept her promise, and we had the pleasure of meeting with Baylynn and



Penny, as well as Pat Lawson of Canine Companions for Independence. Baylynn is young and very intelligent; she has been trained to assist the hearing impaired, and now is training a very happy Penny.

We are pleased to introduce them to you. For more information about Canine Companions for Independence, visit their website at [www.cci.org](http://www.cci.org)

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*Canine Companions for Independence hearing dogs, like Baylynn, are specially bred Labrador and Golden Retrievers who alert partners to key sounds by making physical contact such as nudging the leg or arm. Among the many sounds hearing dogs are trained to recognize and respond to are the sound of a doorbell, an alarm clock, someone calling a name or a smoke alarm.*



### In Memoriam Richard A. Segal 1933 – 2014

Much has been written about Dick Segal – a fine family man, citizen and exceptional lawyer.

One of Dick’s extraordinary qualities, which might not be evident to most clients and even most lawyers, was that his feelings, personal beliefs and ego never got in the way of effectively

representing the best interests of his clients.

All too often in the pressure-packed and arduous practice of law, attorneys may allow their own personalities to emerge and contribute to the client’s problems: not Dick Segal. He seemed to specialize in dealing with difficult parties, attorneys, witnesses, and judicial officers, never losing sight of his primary task: to effectively and honorably represent the best interests of his clients. All of us will miss Dick and this special quality.

*By Susan P. Segal and Richard H. Whitney*

*Dick Whitney practiced law with Dick Segal for more than 50 years.*

## Municipal Bankruptcy: What Every Lender Should Know

Banks generally view lending to municipalities as a low-risk proposition, as well as a benefit, not least because of the opportunity to cross-sell other services of the bank. However, recent bankruptcies such as the City of Detroit are changing the municipal lending landscape and placing greater emphasis on good due diligence and credit review by investors and financial institutions.

Banks make various types of loans directly to municipalities. These loans are repaid through property taxes, general cash flow or through specific revenue streams, such as water and sewer fees. The security of these loans vary in a bankruptcy proceeding.

**Revenue-producing bonds** often finance revenue producing projects, e.g., utility projects, and are payable solely from cash flows generated from the project. If cash flows are insufficient to meet the debt service requirements, the lender might be forced to restructure

SEE MUNICIPAL BANKRUPTCY ON PAGE 2

# Prayer at Town Council Meetings

The separation of church and state is a topic that generates lively discussion and interest among Americans. Many celebrated U.S. Supreme Court cases have helped to define that statement under our Constitution, but no Supreme Court decision has definitively settled the ongoing debate as to what that phrase means to people of varying beliefs.

Earlier this year, the Supreme Court issued a decision that further adds to the debate. In *Town of Greece [N.Y.] v. Galloway*, the Supreme Court had to decide whether the town's practice of opening its Council meetings with a prayer by a local clergy member violated the First Amendment's Establishment clause ("Congress shall make no law respecting an establishment of religion..."). Arizona's top legislators—the then-Speaker of the House and the Senate's Majority Leader—submitted a friend of the court brief in support of the town's position.

The Court noted that "It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" While the prayers at the meetings were largely Christian, this wasn't due to a policy or official practice of the town, but reflected the "predominantly Christian identity of the town's congregations," stated the Court. There was no official town policy that discriminated against minority faiths. The Court also emphasized that the Constitution doesn't demand that we be protected from things that we may disagree with, noting "That many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content."

The Supreme Court focused on the idea that legislative prayer is a longstanding tradition in our country. The Court found that previous decisions of the Court on such prayer do not demand a non-sectarian prayer and do not dictate the content of a particular prayer before a governmental body.

Also, the Court determined that the prayers offered before a

legislative body or town council were notably directed at the members of the body itself and not an attempt to proselytize to the general public. The dissent written by Justice Kagan disagreed strongly, noting that the prayers offered in the Town of Greece were directed to the public, in the town hall, at the main civic meeting of the community.

Ultimately, the 5-4 Court decision found that the town's prayers do not violate the First Amendment when such prayers comport with the longstanding legislative prayer tradition of our country and do not coerce participation by non-adherents.

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## **MUNICIPAL BANKRUPTCY** FROM PAGE 1

the transaction or seek to obtain financial support from the municipality. Municipalities typically do not guarantee this type of debt but often offer financial support to ensure that services to their citizens continue. Under a Chapter 9 bankruptcy filing, holders of revenue backed bonds generally are considered secured creditors.

**General obligation bonds** are another type of lending with varying degrees of security. The most secure general obligation bond involves the levy of a property tax dedicated to the payment of the bonds. A less secure version of the general obligation bond is payable simply from the general fund of the municipal issuer and any lawfully available funds.

Under a Chapter 9 bankruptcy filing, it is not clear how a general obligation bondholder will be treated. The Detroit bankruptcy resulted in general obligation bondholders being treated as unsecured creditors. Some states specifically create a statutory lien

on any property taxes pledged for the payment of general obligation bonds. Other states, such as Arizona, do not.

The least secure form of municipal financing, from a lender's point of view, is **the annually appropriated** or "walk-away" **financing**, which avoids any requirement to obtain voter approval. State law allows borrowers to enter into these loans or leases, which provide payments that must be annually appropriated by the governing body. However, state budget law may limit a bank's ability to recover in the event of a shortfall or non-appropriation. Lenders should take a close look at the financials of such transactions, as well as the nature of the asset or project being financed. Some lenders only lend money for essential government projects under the theory that the municipality is less likely to default on an essential government service. Annually appropriated financings can be very beneficial to both borrower and bank, but

SEE MUNICIPAL BANKRUPTCY ON PAGE 3

# Defamation is Defamation, EVEN when it's Online

In a classic case of checking common sense at the computer keyboard, a recent Arizona case highlights how the Internet is just another forum for getting oneself into legal trouble. The case, *Larue v. Brown*, involved a husband and wife who brought a defamation lawsuit against the wife's ex-husband and his new wife after an acrimonious divorce and custody proceeding.

After the divorce was finalized, the ex-spouses each remarried. The defendants in the defamation lawsuit, namely the new wife and the ex-husband, posted two articles online accusing the ex-wife of allowing their child to be "molested and tortured" by the new husband. The accusatory posting noted that, despite the child's report, no criminal charges were filed, and the child remained in the home. The posting warned readers to "beware," and listed the names, phone numbers, and address of the ex-wife and new husband, as well as his employer information.

This case is notable not for its window into the acrimony of divorce and custody proceedings, or because it involved the very serious issue of potential child abuse. Instead, the case is notable because the Internet is treated like any other medium of publication in a defamation case. The law that applies to a printed publication like a book, newspaper, or pamphlet is applied to publication on the Internet.

The case itself focuses on the statute of limitations for allegations of defamation. In Arizona generally, defamation cases must be brought within one year after the publication of a defamatory statement. The applicable rule in this online case is the "single publication rule," in which the first publication of the alleged defamatory statement starts the clock on the one-year

time limit. A new visitor to a website or refreshing a browser does not restart the clock, preserving the one-year statute of limitations. Unless the article is changed or added to in some way, the "single publication rule" applies to the first online posting.

The court found in this case, however, that the article had been "republished" by the defendants, because it had been updated and modified in response to comments to the posting. The new wife had added additional information in the comments section in response to questions related to the article. The court found that the comments added to and altered the substance of the original material by "providing additional information in response to a reader's questions, and re-urging the truth of the original articles in response to another reader's criticism." Thus, the lawsuit brought by the plaintiffs was timely, because it was less than one year after the republication of the alleged defamatory article.

What are the takeaways from this case? (1) The Internet is everywhere and forever; (2) writing something online is just as potentially legally serious as putting something in the newspaper or buying space on a billboard; (3) the rules governing defamation apply regardless of the medium in which you publish (e.g., Facebook, Twitter, Reddit); and (4) don't defame people, online or otherwise.



*If a child reports abuse to you or you suspect that a child has suffered abuse, call the Arizona Child Abuse Hotline at 1-888-767-2445, Arizona Department of Child Safety.*

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## MUNICIPAL BANKRUPTCY FROM PAGE 2

greater due diligence is required.

Most of the recent municipal bankruptcy cases resulted from poor fiscal management, changing demographics and falling real estate values, which adversely affected revenue sources for municipalities. Municipalities are sometimes unable to cut expenditures that are fixed by other governing bodies, union contracts, or pension obligations. A thorough review of rating agency reports, as well as knowledge of the political dynamics of the municipal borrower, is a critical part of any credit decision process when dealing with would-be municipal borrowers.

To protect against financial loss and to mitigate risks, banks should implement a robust due diligence process and conduct ongoing monitoring to ensure that the debt can be satisfied or, in a worst-case scenario, recovered. Consideration should be given to the municipality's willingness and ability to increase taxes or cut

operational costs, as well as past financial practices. A thorough review of state law must also be undertaken.

Banks should obtain and maintain current financial statements and other relevant documentation to assess the municipality's financial condition and its ability to repay its debt. It is also imperative to understand the lien position in a direct loan context of the creditors and the presence of any parity or senior lien bonds.

Unlike the public capital markets, there is no requirement that municipal borrowers provide continuing disclosure of financial data; therefore, it is important that any loan agreement or trust indenture provide a mechanism for the bank to obtain reasonable financial data on an ongoing basis.

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# The Importance of Trusts

Historically, a revocable living AB trust—where ‘A’ represents survivor trusts and ‘B’ represents decedent trusts—was used by estate planning attorneys for a number of reasons, including reducing their clients’ estate tax liability. As recently as 2001, the applicable exclusion amount (“APA”), which is the amount one may transfer to another without incurring estate or gift tax liability, was limited to \$675,000. On January 1, 2013, Congress passed a law changing the APA to \$5,000,000, adjusted annually for inflation.

In 2014, the APA is \$5,340,000, which means it is estimated that only the wealthiest 0.14 percent of estates will pay any estate tax. Although reducing estate tax liability is no longer a driving force to implement a trust, there are many non-tax reasons for having a trust.

- Avoidance of probate may continue to be the biggest advantage of a trust. Probate is a court process through which a person’s estate is administered. Under current Arizona law, probate is required if an estate consists of equity in real property exceeding \$100,000, or personal property of more than \$75,000. Administration of a trust typically requires no court involvement. Usually the clients are the initial trustees. A successor trustee steps in immediately and distributes the trust property according to the terms of the trust.
- A trust allows individuals to maintain privacy. In today’s electronic age, privacy is ever important in minimizing identity theft and fraud.
- A trust also provides significant benefits for those that own real property in multiple states. By titling all real property in a trust, individuals may exercise centralized management of their assets and, upon death, probate may be avoided wherever the real property is located.
- If a person becomes incapacitated, then management of the person’s property may require a conservatorship, which involves a public court hearing. In contrast, a trust provides for a successor trustee to step in and manage the trust assets without court involvement.
- A trust can also protect assets. For example, where a married couple has simple wills or owns assets “with right of survivorship,” a surviving spouse may re-marry and redirect the deceased spouse’s assets to a new spouse or others in a way that was never intended by the couple. With a trust, a husband and wife may dictate that their assets are to meet the needs of the surviving spouse and preserve the remaining assets for their desired beneficiaries.

- While an individual’s own trust offers no protection against his or her own creditors, a trust can offer the beneficiaries protection against their creditors.

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## ET·Y·MOL·O·GY COR·NER

### HAPPY ANNIVERSARY!

An anniversary, from the Medieval Latin *anniversarium* meaning to turn a year, is something that comes around yearly on the same date. In early Church Latin, it referred to Saints’ Days. It has now come to refer to any annually celebrated event. The first thing to come to mind for many is a wedding anniversary. In the present case, this is the 30th anniversary of the Gust Rosenfeld newsletter. Happy anniversary!

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# PERSONAL NOTES



**Chas W. Wirken** and **Scott A. Malm** won a case in the Supreme Court of Arizona that clarifies and solidifies a legal tenet of subrogation that real property buyers, lenders and title companies have relied upon for decades. The case, *The Weitz Company, L.L.C. v. Nicholas Heth, et al*, assures lenders that they can refinance an obligation and still maintain priority over a mechanic's lien.

**Craig L. Keller** was named to the Maricopa County Bar 2013 honor roll for pro bono work for the poor.

**John L. Hay** is now a member of the State Bar Fee Arbitration Committee.

**Jody A. Corrales** was recently certified in consumer bankruptcy law with the American Board of Certification. At the 2014 Annual Convention of the State Bar of Arizona, Jody spoke while appearing on a bankruptcy panel entitled "Consumer Best Practices."

**Frank S. Tomkins** is participating as an author and editor of the State Bar's Real Property Forms Manual, which is expected to be published later this year.

**Scott A. Malm** and **Frank S. Tomkins** presented at the Land Title Association of Arizona's annual convention in September on the issue of rights of way and corporate authority.

For the third year in a row, **James W. Kaucher** has authored four employment law chapters in the Arizona Business Law Deskbook, which is scheduled for publication late in 2014.

**Michael S. Woodlock** was recently voted Chair-Elect for the State Bar Construction Law Section Executive Council. His term begins in June 2015.

**Gary Verburg** received the Career Achievement Award from the Public Law Section of the State Bar of Arizona.

**Christopher M. McNichol** is teaching classes at the Arizona School of Real Estate and Business on commercial real estate leasing, title procedures and contract drafting. He also spoke for the Arizona State Bar's Constitution Day at Lowell Elementary School.

**Kent E. Cammack** and **Christopher M. McNichol** spoke at the Arizona Trustee Association Annual Conference on real estate enforcement issues.

**Christopher M. McNichol** authored an article for the Arizona Banker's Association regarding judicial enforcement of security interests. Also, Chris is updating the real estate sections of the Arizona Civil Remedies treatise published by the State Bar of Arizona; **John A. Nasr** is assisting him.

**Christina M. Noyes** is co-editor of an American Bar Association book that has recently been released: *Mergers and Acquisitions in Franchise Companies* (ABA 2014).

**Shelby M. Lile** presented at the Arizona School Boards Association's Annual Law Conference in September about special education and the law. At the Arizona Council of Administrators of Special Education State Conference in February, she also gave a presentation on due process hearings.

**Kimberly M. McIntier** was voted in as a member of Gabriel's Angels Board of Young Professionals, whose mission is to provide board education, service, and experience to develop community leaders in Arizona. The board also raises awareness for the parent organization, Gabriel's Angels, which provides pet therapy to at-risk children, nurturing their emotional development and enhancing the quality of their lives.

In April, **Sarah C. Smith** spoke at the Arizona Association of School Business Officials' Spring Conference on "Best Practices for Intergovernmental Agreements." She also spoke at the Arizona Association of School Business Officials' Summer Conference in July on "Stretching Your Bond Dollars: What To Do As Funds Run Dry."

**Chas W. Wirken**, **Peter Collins, Jr.**, and **Timothy J. Watson** served on the faculty of the 2014 College of Trial Advocacy.

**James T. Giel** spoke at the Arizona Association of School Business Officials' Summer Conference in Tucson in July on "Finance Options—Lease Purchase of Buildings? Creative Financing for Capital Projects." He also spoke at the Arizona Association of School Business Officials' Spring Conference on "Decoding Solar when Tomorrow, the Sun Never Dies."

**Craig A. McCarthy** and **Justin M. Scorza** presented at the annual conference for PRIMA (Public Risk Managers Association) in Flagstaff in August, where the two reviewed key appellate court decisions affecting cities, towns and counties.

Several Gust Rosenfeld attorneys presented at the Arizona School Boards Association's Annual Law Conference. **Susan Plimpton Segal** presented on several topics including Common Core legal issues. **Robert D. Haws** spoke about employment background checks. **Jennifer N. MacLennan** presented "Just Kids Being Kids? What Is Bullying Under Law and Policy." **Christopher A. Schmalz** spoke about data breaches.

# GUST ROSENFELD

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## PACA—Protection for the Fruit and Vegetable Industry

In 1930, Congress enacted the Perishable Agricultural Commodities Act (PACA) in order to promote fair trade practices in the produce industry and to assure that sellers would be paid promptly.

PACA regulates fresh fruits and vegetables “of every kind and character.” This means not only perishable products but also goods frozen or packed in ice or held in storage. The United States Department of Agriculture (USDA) administers PACA and lists all the commodities affected. The list varies from strict botanical classifications of fruits and vegetables; e.g., mushrooms (a fungus) are covered while nuts (technically a fruit) are not.

PACA applies unless and until the product has been manufactured into something resulting in the loss of the essential nature of the produce. For instance, in addition to potatoes, battered and coated frozen potatoes are also covered.

One particularly potent provision later added to PACA created essentially a “floating trust” (think: lien) on all the goods and their

receivables until the grower or supplier is paid. That trust or lien is superior to the rights of any other creditors, including secured lenders.

Thus, if a grower was not paid for a crop of tomatoes which it sold to a distributor, which then sold some of the crop to a manufacturer, which then made tomato soup, some of which it sold to a national restaurant chain, then the grower could have a prior right and claim on the tomato soup and the monies from any sale of that product—even ahead of any lender to any of the parties in the chain.

PACA is a complicated structure, requiring licensing under many rules and regulations. Anyone potentially affected by PACA would do well to review the USDA website at [www.ams.usda.gov/PACA](http://www.ams.usda.gov/PACA) and obtain legal advice from Gust Rosenfeld, as necessary.

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