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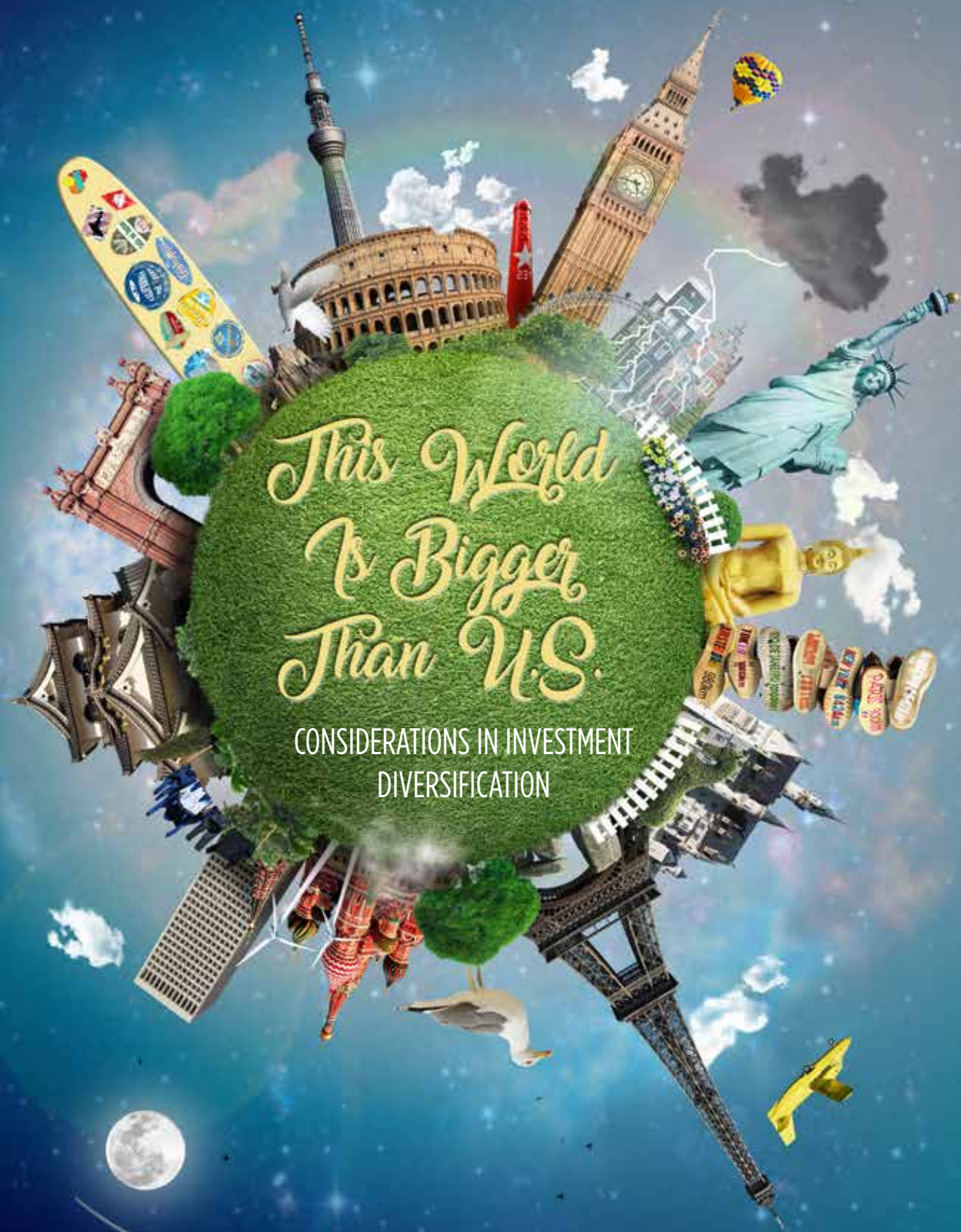
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VOL 39, NO 6
NOV/DEC 2025

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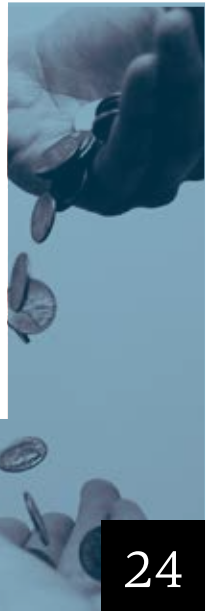
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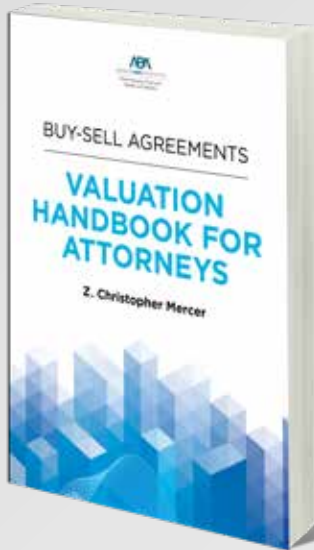
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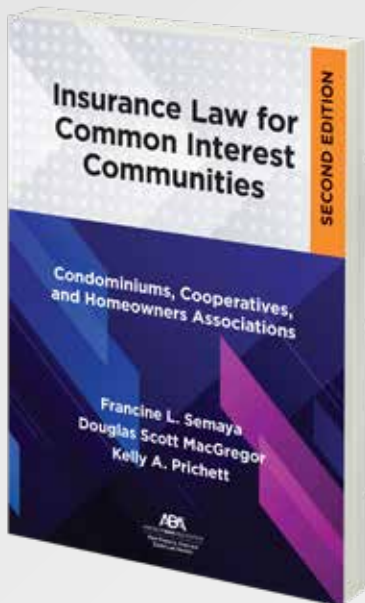
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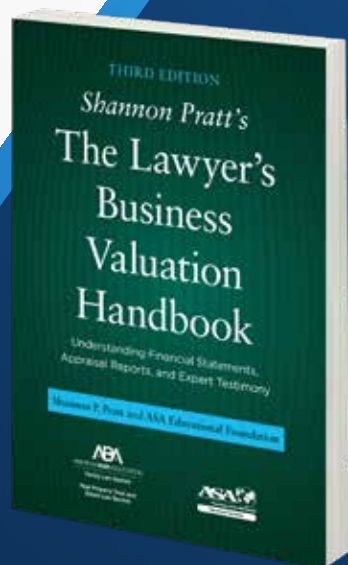


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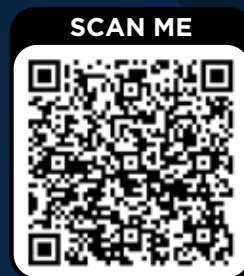
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UNIFORM LAWS UPDATE

Update from the Uniform Law Commission 2025 Annual Meeting

The Uniform Law Commission (ULC) met in July for its 134th annual meeting in Santa Fe, New Mexico. Two new uniform acts were approved and published for consideration by state legislatures:

Uniform Assignment for Benefit of Creditors Act

An assignment for benefit of creditors (ABC) is a voluntary, debtor-initiated state law alternative to the bankruptcy process, state receiverships, and voluntary workouts. An assignment is a liquidation procedure in which the “assignor” (usually a distressed business entity) voluntarily assigns all of its assets to an “assignee,” a person who liquidates the assets and distributes the proceeds to the assignor’s creditors. The assignment creates a fiduciary relationship with the assignee serving as a fiduciary for the benefit of the assignor’s creditors.

ABCs are relatively common in some states and rarely used in others. Local practices also vary. The Uniform Assignment for the Benefit of Creditors Act is intended to provide greater clarity and consistency for debtors who wish to use this alternative liquidation procedure. The act provides a streamlined assignment process, allowing states to modernize their assignment statutes and codify aspects of common law. It sets out a straightforward method for commencing and completing an assignment and provides a uniform scheme for distributions to the assignor’s creditors. It lays out the duties and powers of the assignor and assignee, a process for allowing and disputing claims, and limitations on liability for the assignor and assignee.

Uniform Laws Update Co-Editor: Benjamin Orzeske, Uniform Law Commission, 111 N. Wabash Avenue, Suite 1010, Chicago, IL 60602.

Uniform Laws Update provides information on uniform and model state laws in development as they apply to property, trust, and estate matters. The editors of *Probate & Property* welcome information and suggestions from readers.

Uniform Judicial Interview of Children Act

Existing laws in many states permit judges in certain private civil proceedings to interview children outside of open court to ascertain the child’s views. However, procedures vary widely from state to state and even from courtroom to courtroom. The Uniform Judicial Interview of Children Act provides procedures and standards for such interviews in proceedings regarding child custody, visitation, parenting time, relocation, other custodial rights, and other ancillary private matters.

The new act balances two compelling, but sometimes competing, interests: protecting a child when that child’s views are solicited by a judicial officer and protecting the due process rights of the parties. Under the act, when a court conducts a judicial interview, the court must assess the child’s maturity and ability to communicate and express views free of parental influence. This act includes provisions that ensure that a party’s due process rights are respected when a child communicates information that impacts a party’s fundamental rights. Judicial interviews under this act provide the child with an effective opportunity to be heard while protecting the due process rights of other parties. A state may choose to pursue adoption of the act as either a statute or a court rule.

Both of these new uniform acts are now available for enactment.

Pending Acts

The commissioners also read and reviewed six other draft acts currently in development on the following subjects:

1. Financial interests of child entertainers
2. Commercial financing disclosure
3. Conflict of laws in trusts and estates
4. State law interaction with the federal Indian Child Welfare Act (ICWA)
5. Occupational licenses of service-members and military spouses
6. Revisions to the Uniform Transfers to Minors Act (UTMA)

Each of those drafts could be approved by the ULC as a new uniform act as early as summer 2026.

The ULC is currently studying several other topics for possible future drafting projects, including the following, which may be of particular interest to members of the Section of Real Property, Trust and Estate Law:

- Deed fraud
- Installment land contracts
- Marketable title laws
- Integration of probate and non-probate transfers
- Regulation of long-term care facilities

A complete list of the ULC’s current drafting and study committees is available at www.uniformlaws.org. Click on the “Projects” tab for a list of committees with links to further information. All ULC drafting committees are open for any interested person to join and contribute to developing new uniform state laws. RPTE members with expertise in a particular subject area are especially encouraged to join ULC drafting committees. ■

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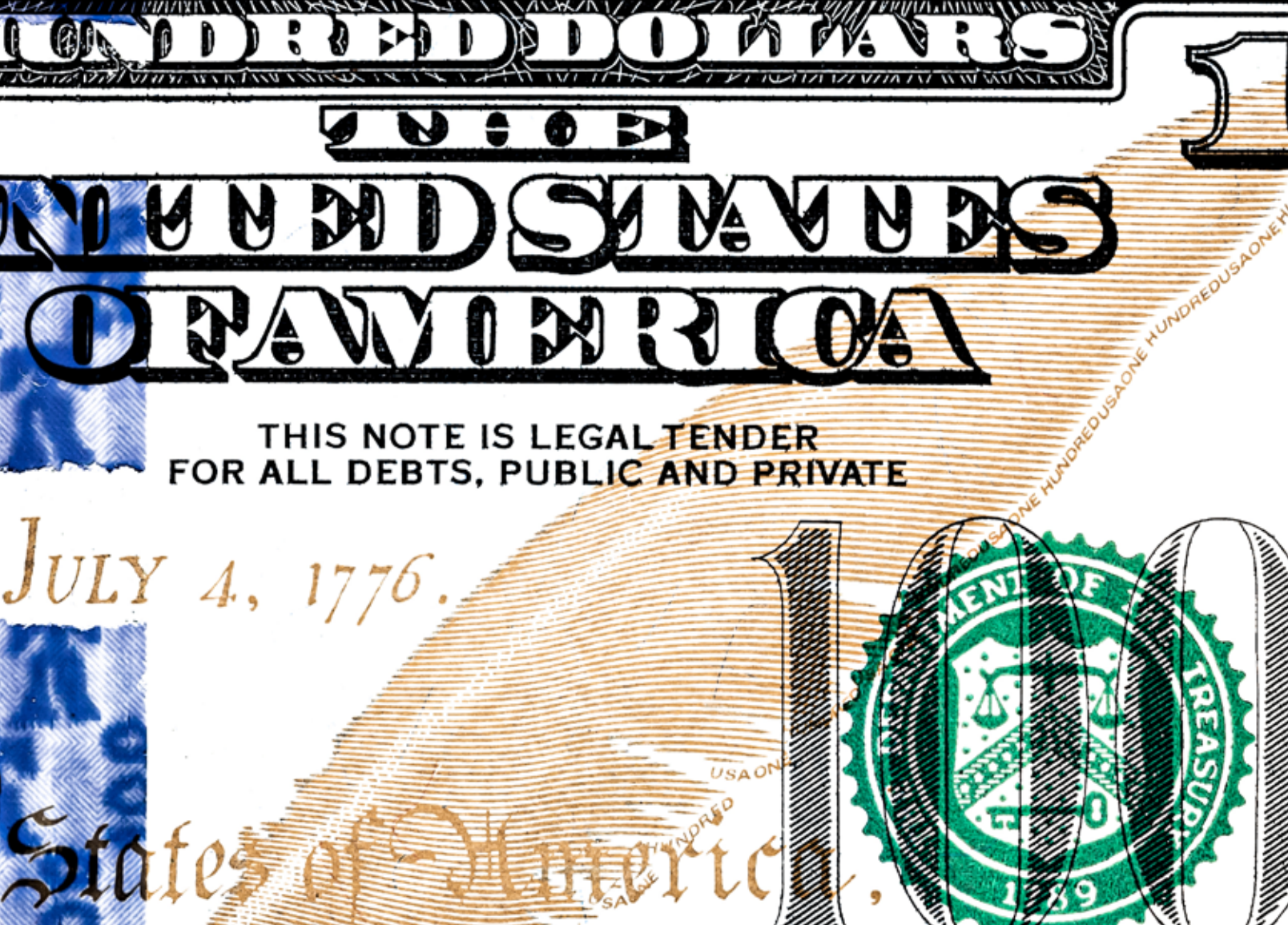
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The Beautiful New Tax Bill Act **Helps** **the Real Estate** **Industry**

By Philip R. Hirschfeld

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On July 4, 2025, the One Big Beautiful Bill Act (the OBBB), Pub. Law No. 119-21 (2025), was signed into law by the president. OBBB makes permanent several tax provisions of the Tax Cuts and Jobs Act, Pub. Law No. 115-97, 131 Stat. 2054 (2017) (the 2017 Tax Act), that would have otherwise expired at the end of 2025 and implements other priorities of the president and Congress. Many of these changes will provide enhanced tax incentives for investment in real estate, which can serve to stimulate new construction as well as purchase and rehabilitation of existing structures.

Set forth below is a discussion of these tax incentives, which can serve as a guide for future investing. Also helpful is the fact that OBBB did not restrict granting carried interests in partnerships, which can still be granted tax-free to service providers if certain conditions are met. Rev. Proc. 93-27, 1993-2 C.B. 343; Rev. Proc. 2001-43, 2001-2 C.B. 191. A few changes may dampen some real estate planning, but, overall, the OBBB is good news for the real estate industry.

Philip R. Hirschfeld is counsel in the New York office of Buchanan Ingersoll & Rooney. He is the vice chair of RPTE's Special Investors and Investment Structures Group and vice chair of RPTE's Groups and Substantive Committee.

First Year Depreciation Allowance for Qualified Production Property

Under current law, commercial real estate is generally depreciable over 39 years on the straight-line basis. Code § 168(c). OBBB § 70307 adopts a new elective 100% depreciation allowance for qualified production property (QPP), which is defined as newly constructed nonresidential depreciable real estate used for manufacturing, production, or refining of certain tangible personal property in the United States. *Id.* § 168(n)(1). This benefit also may be available to purchasers of existing buildings whose use is to be changed to comply with the QPP rules. The ability to immediately deduct the cost of these properties offers a significant tax incentive, which can materially reduce their net cost.

The changes apply to property for which new construction begins after January 19, 2025, and before January 1, 2029, and that is placed in service before January 1, 2031. Existing property also must be acquired after January 19, 2025, and before January 1, 2029, and must meet certain other conditions, discussed below.

QPP is that portion of any nonresidential real property that meets the following requirements: (1) it is subject to depreciation, which would exclude land; (2) it is used by the taxpayer

as an integral part of a qualified production activity; (3) it is placed in service in the United States or any possession of the United States; (4) the original use commences with the taxpayer; (5) construction begins after January 19, 2025, and before January 1, 2029; (6) an election is made by the taxpayer to treat such portion as QPP; and (7) the property is placed in service before January 1, 2031. But if the property is leased, property used by a lessee shall not be considered as being used by the lessor as part of a qualified production activity. *Id.* § 168(n)(2)(A).

Although the original use and construction are to start with the taxpayer making the election, a special rule allows a taxpayer to buy existing property and still be eligible to obtain the deduction if (1) the property was acquired by the taxpayer after January 19, 2025, and before January 1, 2029; (2) the property was not used in a qualified production activity by any person at any time between January 1, 2021, and May 12, 2025; (3) such property was not used by the taxpayer at any time prior to acquisition; and (4) certain other requirements are met (e.g., property was not acquired from a related person and was acquired in a taxable purchase). *Id.* § 168(n)(2)(B).

Qualified production property does not include the portions of any non-residential real property used for offices, administrative services, lodging, parking, sales activities, software engineering activities, or other functions unrelated to manufacturing, production, or refining of tangible personal property. *Id.* § 168(n)(2)(C).

A qualified production activity is the manufacturing, production, or refining of a qualified product. Such activities of the taxpayer must result in a substantial transformation of the property constituting the product. *Id.* § 168(n)(2)(D). Production does not include activities other than agricultural production and chemical production. *Id.* § 168(n)(2)(E). A qualified product is any tangible personal property if such property is not a food or beverage prepared in the same building as a retail establishment in which such property is sold. *Id.* § 168(n)(2)(F).

Taxpayers should continue the original use of the qualified production property for at least 10 years to avoid recapture.

Upon sale of the property, depreciation recapture rules apply that can convert capital gains realized on the property to ordinary income, to the extent of depreciation taken on the same in the first year. *Id.* § 1245(a)(3) (G). A special depreciation recapture rule applies if the property ceases to be used as an integral part of a qualified production activity within 10 years after being placed in service and is instead used for a different purpose not related to the qualified production activity. *Id.* § 168(n)(5). If such a change in use occurs, the Code § 1245 depreciation recapture rules are applied by treating the taxpayer as having disposed of the property for its original cost, which results in the taxpayer recognizing ordinary income equal to 100% of the amount of depreciation originally claimed. Such an amount increases the taxpayer's basis in such property. Taxpayers should continue the original use of the property for at least 10 years to avoid recapture.

The election to claim this special deduction must be made with the taxpayer's return for the year in which the deduction is claimed. Details for making the election will be issued by the IRS. *Id.* § 168(n)(6).

The qualified production property provision was adopted in part to reverse

the trend over the last several decades of manufacturing leaving America for foreign shores where the cost of construction and labor costs are significantly lower and other benefits exist (such as reduced governmental oversight). Whether this new tax benefit will stop or reverse that trend remains to be seen, awaiting and dependent upon how American companies will react to this new benefit.

Extension and Expansion of Special Depreciation Rules

Bonus Depreciation

Pre-OBBA law allowed for a "bonus depreciation" deduction, which is an immediate deduction that was initially allowed for all of the cost to buy eligible property. *Id.* § 168(k) (the term "bonus depreciation" is not actually used in the Code but is commonly used by the IRS and others). The 2017 Tax Act amended the bonus depreciation rules by phasing it out over time. For 2025, the deduction is equal to only 40% of the cost of the property; for 2026, the deduction was to be equal to 20% of the cost; and the deduction was to be eliminated entirely in 2027. OBBA § 70301 reinstates and makes permanent the full 100% bonus depreciation deduction for all eligible property acquired or placed in service after January 19, 2015.

Bonus depreciation applies to tangible property having a recovery period of 20 years or less, which normally would not apply to real estate. Code § 168(k)(2)(A)(i)(I). A few years ago, qualified improvement property (QIP) was changed to be treated as having a recovery period of only 15 years. *Id.* § 168(e)(3)(E)(vii). After that change, QIP became eligible for bonus depreciation. QIP is generally any improvement made by the taxpayer to an interior portion of a nonresidential building that was placed in service after the date the building itself was placed in service. *Id.* § 168(e)(6). But expenditures attributable to the enlargement of the building, elevators or escalators, or the internal structural framework are excluded.



Section 179 Property

Pre-OBDD law also allowed an election to immediately deduct the cost of up to \$1 million of “section 179 property,” which includes tangible personal property and certain other property. *Id.* § 179(b)(1) (as in effect before enactment of OBDD). For the real estate sector, if an election is made, section 179 property includes the following improvements to nonresidential real property installed after the building was first placed in service: (1) roofs; (2) heating, ventilation, and air-conditioning property; (3) fire protection and alarm systems; and (4) security systems. *Id.* § 179(e)(2). QIP, discussed earlier, also may be treated as section 179 property. *Id.* § 179(e)(1). The section 179 deduction was phased out, however, once the aggregate amount of section 179 property placed in service in the year exceeds \$2,500,000, on a dollar-for-dollar basis. *Id.* § 179(b)(2) (as in effect before enactment of OBDD).

OBDD § 70306 increases the maximum amount eligible for the section

179 property deduction to \$2,500,000, Code § 179(b)(1), and also increases the phaseout threshold amount to \$4,000,000. *Id.* § 179(b)(2). These changes apply to property placed in service after December 31, 2024.

Overlap

Bonus depreciation and the Section 179 deduction are subject to different rules, so a taxpayer needs to review both to see which one it may be able to use. If property qualifies for both deductions, apply Section 179 first, and the remainder can be taken as bonus depreciation.

Qualified Business Income Deduction Made Permanent

The 2017 Tax Act adopted a deduction that allows an individual to deduct 20% of qualified business income (QBI) from a partnership, S corporation, or sole proprietorship. *Id.* § 199A (the QBI deduction also may apply to certain dividends received from a real estate investment trust or a publicly traded partnership). QBI starts with taxable

income but then excludes wages, investment income, and certain other items.

A safe harbor is available to individuals and owners of passthrough entities who seek to claim the deduction with respect to a rental real estate activity. Under the safe harbor, a rental real estate activity will be treated as a trade or business for purposes of the QBI deduction if certain criteria are met. Rev. Proc. 2019-38, 2019-42 I.R.B. 942. However, the QBI deduction was set to expire at the end of 2025.

OBDD § 70105 makes the QBI deduction permanent and retains the deduction percentage at 20%. For taxpayers with taxable income in excess of a threshold amount, the QBI deduction is limited based on (1) the wages and capital investment of each relevant business and (2) whether each relevant business is a specified service trade or business. For 2025, the threshold amount is \$394,600 for married filing jointly, and lower for other taxpayers. Both limitations phase in over a fixed range of taxable income (\$100,000 for

married filing jointly and \$50,000 for all other taxpayers) above the threshold amounts. For 2026 and later years, the OBBB increases this phase-in range to \$75,000 and \$150,000, respectively, and indexes them for inflation after 2026, which may permit more taxpayers to use the QBI. The OBBB also adopts a new, inflation-adjusted minimum QBI deduction of \$400 for taxpayers who have at least \$1,000 of QBI from one or more active trades or businesses in which the taxpayer materially participates. Code § 199A(i).

Limits on Business Interest Deductions Relaxed

The 2017 Tax Act added a limitation on the deduction of business interest, which can offset up to only 30% of a taxpayer's adjusted taxable income (ATI). *Id.* § 163(j). OBBB § 70303 did not eliminate this limitation, but it did change the definition of ATI to expand what is included in ATI and, thus, reduce, but not eliminate, its impact.

For taxable years beginning after December 31, 2024, the definition of ATI is based on EBITDA (i.e., earnings before income tax, depreciation, amortization, and depletion), *id.* § 163(j)(8)(A)(v), which is more favorable for taxpayers than EBIT (i.e., earnings before income tax) that is used under pre-OBBB law. As a result, companies with significant depreciation and amortization deductions may benefit from greater interest deductions. In addition, OBBB also expands the exclusion of interest on floor plan financing from the limit on the tax deduction for business interest expenses to include interest on floor plan financing of any camper or trailer designed to (1) provide temporary living quarters for recreational, camping, or seasonal use and (2) be towed by, or affixed to, a motor vehicle. *Id.* § 163(j)(9)(C).

Renewal and Expansion of Qualified Opportunity Zone Program

The Qualified Opportunity Zone (QOZ) program was created in 2017 to stimulate economic development in distressed communities by offering

OBBB also provides that if a qualified opportunity fund investment is held for at least 10 years and up to 30 years, no tax is imposed on gain realized when the investment is sold or exchanged.

tax incentives to investors who invest in QOZ funds. *Id.* §§ 1400Z-1, 1400Z-2. President Trump has called the QOZ program “the best economic development program ever.” OBBB § 70421 adopts a permanent QOZ program using modified eligibility requirements and additional tax return and information-reporting requirements. OBBB also adopts rolling 10-year opportunity zone designations and creates a greater focus on rural areas.

Existing QOZs cannot be used for future investments. Instead, effective as of July 1, 2026 (the initial “decennial designation date”), *id.* § 1400Z-1(c)(2)(C), governors will designate new QOZs, which will then be in effect for 10 years. The first set of designations will be in effect from January 1, 2027, through December 31, 2036. On the tenth anniversary of each successive decennial designation date, governors will designate new QOZs, which will be in effect for 10 years. *Id.* § 1400Z-1(e). For example, on or before July 1, 2036, governors will designate new QOZs, which will be in effect from January 1, 2037, through December 31, 2046.

Deferred capital gains previously invested in a qualified opportunity fund (QOF) before January 1, 2027, will be recognized on December 31, 2026. OBBB did not extend that date.

Taxation of capital gain invested in

a QOF on or after January 1, 2027, will be deferred until the earlier of: (i) the date of disposition of such investment; or (ii) five years from the date of the investment in the QOF. *Id.* § 1400Z-2(b)(1). Once the investor holds its interest in the fund for five years, the investor obtains a 10% basis increase, which will ensure that only 90% of the deferred gain is taxed if the investment is held for at least five years. For investments in newly created qualified rural opportunity funds, 30% of the deferred gain is added to the basis. *Id.* § 1400Z-2(b)(2).

OBBB also provides that if a QOF investment is held for at least 10 years and up to 30 years, no tax is imposed on gain realized when the investment is sold or exchanged. *Id.* § 1400Z-2(b)(3).

OBBB imposes comprehensive reporting and tax return requirements on new and existing QOFs and businesses. *Id.* §§ 1400Z-2(d), 6039K, 6039L. Increased penalties are added to ensure compliance. *Id.* § 6726.

Expanded Availability of Low-Income Housing Tax Credits

A taxpayer can claim a low-income housing tax credit (LIHTC) for the cost of building certain low-income housing. *Id.* § 42. The LIHTC was adopted to incentivize the construction and rehabilitation of affordable rental housing for low-income families. The federal government allocates tax credits to state housing agencies, which then award credits to private developers for construction of affordable rental housing projects. Under pre-OBBB law, to receive the credit, a building must either receive a credit allocation from the state housing finance authority (the 9% LIHTC) or be bond-financed (the 4% LIHTC).

OBBB § 70422 includes provisions to reform the credit and its eligibility requirements, which expand the tax credits that can be issued. Beginning in 2026, the portion of the federal allocation to each state for the LIHTC that is based on the state's population is increased by 12%, which will increase the availability of the 9% LIHTC. Code § 42(h)(3)(I).

OBBB also allows additional

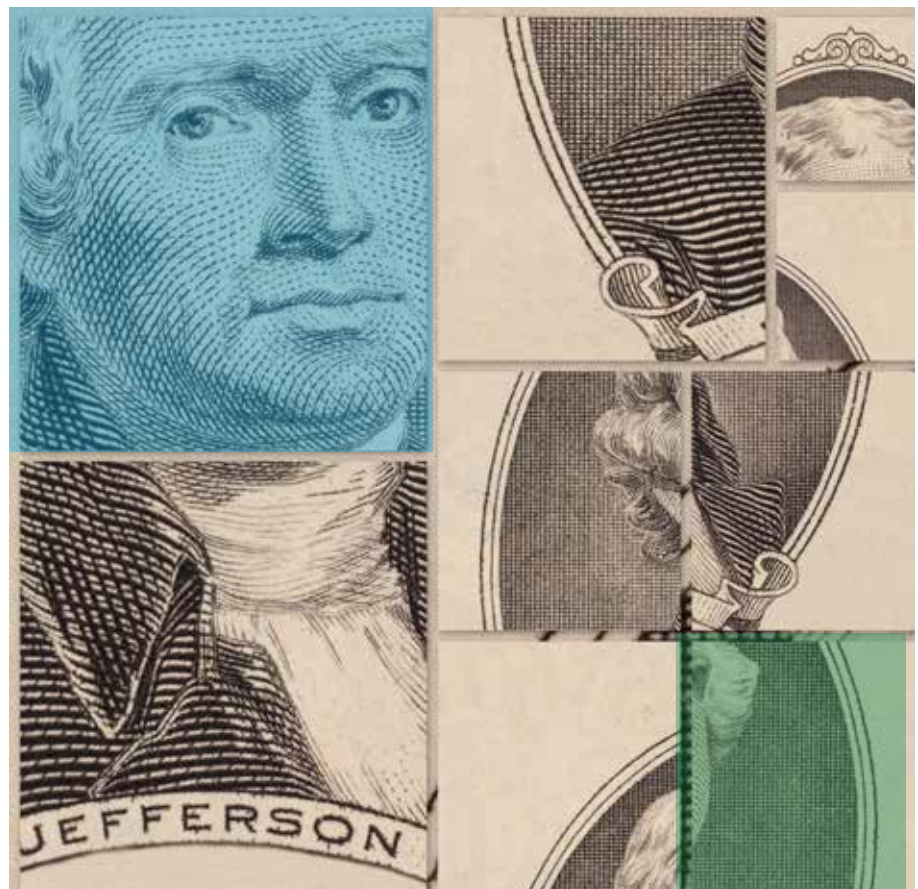
buildings financed with tax-exempt bonds to qualify for housing credits without receiving a credit allocation from the state housing credit ceiling, which will increase the availability of the 4% LIHTC. *Id.* § 42(h)(4). OBBB lowers to 25% (from 50%) the tax-exempt bond threshold. Thus, under this section, if 25% or more of the aggregate basis (i.e., generally, the costs) of the building and the land on which the building is located is financed with tax-exempt bonds, then the taxpayer is eligible for the LIHTC for the entire eligible basis of the project without an LIHTC allocation from the state. (If less than 25% of such basis is financed with tax-exempt bonds, then only the basis of the project that is financed with the tax-exempt bonds is eligible for the LIHTC.)

The credit can make low-income housing a financially worthwhile investment. By expanding availability, OBBB assists in making housing and real estate construction affordable.

Permanent Extension of New Markets Tax Credit

Current law includes a new markets tax credit (NMTC). *Id.* § 45D. The NMTC permits individual and corporate investors to receive a credit against their federal income taxes for making certain equity investments in qualified community development entities (CDEs). CDEs serve or provide investment capital for low-income communities or low-income persons and often invest in real estate to create new businesses. The NMTC was set to expire at the end of 2025. OBBB § 70423 makes the new market tax credit permanent. Code § 45D(f)(1)(H).

The NMTC program is flexible regarding project type and purpose. Investments can be used to finance real estate, equipment, or operations. Real estate financing can purchase or rehabilitate retail, manufacturing, agriculture, community facilities (e.g., health services, museums, or charter schools), rental or for-sale housing, or combinations of these. According to the Urban Institute, the most prevalent were manufacturing and food



processing, retail, health care, schools and child care, and office and professional services.

Exclusion of Interest on Loans Secured by Rural or Agricultural Real Property

Financing farming operations is often a survival necessity, but the availability of financing can be difficult and expensive. To allow the American farmer easier access to financing, OBBB § 70435 adopts new Code § 139L, which provides for an exclusion from gross income of 25% of interest income from qualified real estate loans made by FDIC-insured banks, domestic entities owned by a bank holding company, state or federally regulated insurance companies, domestic subsidiaries of insurance holding companies, or the Federal Agricultural Mortgage Corporation (often referred to as Farmer Mac).

The partial exclusion applies to loans secured by (1) domestic farms and ranches substantially used to produce agricultural products, (2) domestic

land substantially used for fishing or seafood processing, (3) any domestic aquaculture facility, or (4) any leasehold mortgage for such property. These changes may make loans that assist the American farm, fish, and seafood industry easier to obtain and less costly. These changes apply to original debt incurred in taxable years ending after the date of enactment (July 4, 2025).

Taxable REIT Subsidiary Rules Relaxed

Real estate investment trusts (REITs) can be used to invest in real estate or real estate mortgages in a tax-efficient way that, if properly structured, ensures that only the owners of the REIT pay tax on its income. Code §§ 856–858. Use of a taxable REIT subsidiary can be very helpful to ensure a REIT can expand its operations through use of the taxable REIT subsidiary while ensuring the REIT itself does not engage in prohibited activities or otherwise jeopardize its continued tax status. *Id.* § 856(l). For example, services that a REIT may not



be able to offer can be provided by a taxable REIT subsidiary.

Under pre-OBDD law, a REIT can hold up to only 20% of its assets in taxable REIT subsidiaries. *Id.* § 856. OBDD § 70439 increases this limit and allows a REIT to own up to 25% of its assets in taxable REIT subsidiaries. Code § 856(c)(4)(B)(ii).

Expanded Exclusion from Estate and Gift Taxes

Real estate sometimes can be a significant asset that can lead to estate or gift tax concerns upon transfer at death or by gifts, or it may cause adoption of complicated planning to reduce or eliminate substantial estate, gift, and generation-skipping transfer tax (GST) liability. For 2025, the federal estate, gift, and GST exemption is \$13.99 million per individual (\$27.98 million for married couples). For 2026 and later years, these exemptions were set to be dramatically reduced to the much lower

exemptions provided under pre-2017 Tax Act law (approximately \$7 million).

Starting in 2026, OBDD § 70106 provides that the federal estate, gift, and GST exemption will increase to \$15 million per individual (\$30 million for married couples), indexed for inflation. Code § 2010(c)(3). These changes may make it easier to pass on wealth to the next generation or by lifetime gifts without incurring major estate or gift tax exposure.

Adverse Changes

Although the foregoing changes are helpful to the real estate sector, there are a few changes that may be adverse to holders or investors in real estate.

Limitation on Excess Business Losses

The 2017 Tax Act added a limitation on the ability of noncorporate taxpayers to use excess business losses, which limitation was set to expire at the end of 2025. *Id.* § 461(l). Many real estate

deals result in an excess business loss that may be subject to this limitation. OBDD § 70601 makes this limitation permanent.

An excess business loss for any taxable year is the aggregate deductions of the taxpayer attributable to trades or businesses of the taxpayer in excess of the sum of aggregate gross income or gain attributable to trades or businesses of the taxpayer plus a threshold amount. The threshold amount for a taxable year beginning in 2025 is \$313,000, as indexed for inflation. An excess business loss is not allowed as a current deduction. Instead, the excess business loss is treated as a net operating loss (NOL) for the taxable year that is carried over to subsequent taxable years under the applicable NOL carry-over rules.

Elimination of Tax Benefits for Energy-Efficient Behavior

The OBDD took a harsh stance at

retaining tax incentives intent on reducing energy consumption and helping the environment. Among the changes made by OBBB, the following tax incentives that affect the real estate sector are eliminated on a prospective basis: (1) the energy-efficient home improvement credit terminates with respect to property placed in service after December 31, 2025 (Code § 25C(h), as amended by OBBB § 70505); (2) the residential clean energy credit terminates with respect to any expenditure made after December 31, 2025 (Code § 25D(h), as amended by OBBB § 70506); (3) the energy-efficient commercial buildings deduction will not apply to property the construction of which begins after June 30, 2026 (Code § 179D(i), as amended by OBBB § 70507); and (4) the new energy-efficient home credit will not apply to any home acquired after June 30, 2026. Code § 45L(h), as amended by OBBB § 70508. There is a limited time before these changes take effect, so action needs to be taken quickly to take advantage of this limited window of opportunity.

Disguised Sales of Partnership Interests

In a little-publicized provision of the OBBB is a small change to the tax rules relating to disguised sales of partnership interests, which may limit possible planning opportunities relating to sales of partnership interests. OBBB § 70602, amending Code § 707(a)(2).

As background, a sale by one partner of its partnership interest to a new person for cash is taxable. Code § 1001. By contrast, a contribution of property by a partner to a partnership is generally tax-free, *id.* § 721, and a distribution of property from a partnership to a partner is generally tax-free to the extent of the partner's basis in its partnership interest. *Id.* § 731. Before 1984, two cases—*Communications Satellite Corp.* and *Jupiter Corp.*—addressed transactions involving a contribution by one or more new partners for newly issued partnership interests followed by a distribution to one or more existing partners of cash. Both cases respected the form of the transaction as a tax-free

contribution followed by a tax-free distribution and declined to recast the transactions as taxable sales of partnership interests. *Jupiter Corp. v. United States*, 2 Ct. Cl. 58 (1983); *Comm'ns Satellite Corp. v. United States*, 223 Ct. Cl. 253 (1980). See also *Otey v. Comm'r*, 70 T.C. 312 (1978), *aff'd per curiam*, 634 F.2d 1046 (6th Cir. 1980). This case relied on technical tax rules to prevent a contribution of property to a partnership followed by a distribution of cash to that partner from being recast as a taxable sale of property to the partnership.

In 1984, Code § 707(a)(2) was adopted, which authorized the IRS to issue regulations to prevent partnership rules being used to treat sales of property and partnership interests from being taxable. Treasury first adopted detailed regulations (the disguised sale of property regulations) addressing contributions of property to a partnership followed by distributions of cash to that partner being recast as a taxable sale of property to a partnership. Treas. Reg. §§ 1.707-3, -4, -5, -6.

On November 26, 2004, Treasury issued proposed regulations (the disguised sale of partnership interests regulations) addressing when an acquisition of a partnership interest from a partnership followed by a distribution of cash with other partners may be recast as a disguised taxable sale of a partnership interest. See B. Rubin & A. Whiteway, *Disguised Sales of Partnership Interests: An Analysis of the Proposed Regulations*, Tax Notes (May 30, 2005). On February 20, 2009, Treasury withdrew those regulations.

In the absence of regulations, some taxpayers may have taken the position that Code § 707(a)(1) gives the IRS the power to recharacterize a series of transactions as a disguised taxable sale of a partnership interest only by issuance of regulations. Without regulations, some taxpayers believed the IRS lacked power to challenge a purchase of a partnership interest followed by a cash distribution to the other partners, even when that distribution occurred shortly after the purchase and as part of a pre-arranged plan.

To address these concerns, OBBB changes the wording of Code § 707 so that it specifically allows the IRS to challenge a series of transactions by asserting that they constitute a disguised sale of a partnership except as provided in regulations. Code § 707(a)(2). As a result, the IRS can use this section to challenge a transaction even though no regulations have been issued. Although the IRS always had the power to challenge those transactions by use of the step transaction doctrine, this change gives the IRS another tool to combat planning to eliminate tax on a partnership interest sale.

Limits on Home Mortgage Deduction Made Permanent

OBBB § 70108 permanently extends the 2017 Tax Act's provision limiting the deduction for "qualified residence interest" to the first \$750,000 in home mortgage acquisition debt. Code § 163(h)(3)(F). Qualified residence interest is interest paid on debt incurred to buy a home used as the principal residence of the taxpayer or one other home used by the taxpayer as a residence (such as a vacation home). OBBB also makes permanent the exclusion of interest on home-equity indebtedness from the definition of qualified residence interest.

Conclusion

John Keats once said a "thing of beauty is a joy forever." For the real estate investor, the OBBB may be a financial joy forever by adding many tax incentives for investment in real estate. Several provisions await further guidance, such as the QOZ rules, so care should be exercised before jumping in to invest. Also, the OBBB may increase the federal budget deficit. If the budget deficit climbs too high, Congress may revisit the changes adopted by OBBB and consider reducing or eliminating some of the benefits to reduce the federal budget deficit. In the meantime, the OBBB adopts numerous tax benefits affecting real estate. Investors should consult with their advisors to obtain the maximum benefits and advantages of these changes. ■

KEEPING CURRENT PROPERTY

CASES

ADVERSE POSSESSION: Claimant with color of title must take actual possession of at least some of the land. Brownphil and Cudjoe had competing claims to an undeveloped lot located in Bibb County. Each party had a deed to the land, although Cudjoe conceded that his deed was not supported by a continuous chain of title. Brownphil brought a quiet title action against Cudjoe, who, recognizing his title deficiencies, asserted adverse possession under color of title. Brownphil contested Cudjoe's claim, arguing that Cudjoe's involvement with the land was insufficient and that Brownphil had the superior claim to the lot by virtue of an unbroken chain of title. Both parties filed motions for summary judgment. The trial court granted Cudjoe's motion, and Brownphil appealed. The appellate court affirmed, and Brownphil appealed to the supreme court, which vacated and remanded. The court recognized that the relevant statutes allowed for title by "prescription" after a period of twenty years, Ga. Stat. § 44-5-163, or as little as seven years when a claimant possessed the property "under written evidence of title." Ga. Stat. § 44-5-164. The phrase "written evidence of title" means color of title under a document professing to pass title but failing to do so because of some defect in the document or the grantor's lack of title. The court stated, however, that it is axiomatic that there can be no adverse possession without "possession" of the disputed land. Possession can be actual or constructive, but the latter exists only when a person who has color of title to a tract of land is in actual possession of

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part of the land. Thus, there can be no adverse possession under color of title without at least some actual possession of property within the bounds of the deed. The supreme court held that it was error for the court to find Cudjoe constructively possessed the lot without analyzing whether he actually possessed any part of it. A recorded deed by itself cannot establish both the notice and land possession requirements for adverse possession by color of title. *Brownphil v. Cudjoe*, 915 S.E.2d 860 (Ga. 2025).



The lot in *Brownphil v. Cudjoe*. Photos courtesy of Kim Stroup, James Bates Brannan Grover, Macon, GA.

BROKERS: Listing agent has no duty to inspect or investigate the physical condition of property to verify statements made by sellers in disclosure statement. The Isaacs bought a house from the Onionses and, after closing, filed suit against them and their real estate agent Kopchynski, making multiple claims including failure to disclose, mischaracterization of various inspection reports, fraud, negligent misrepresentation, civil conspiracy, and violation of the South Carolina Residential Property Disclosure Act (RPDA), S.C. Code. §§ 27-50-10 to -110. The trial court granted Kopchynski's motion for summary judgment on all counts, and the Isaacs appealed. The appellate court reversed on the negligent misrepresentation and RPDA claims. Kopchynski appealed, and the supreme court reversed. The Isaacs' complaint stemmed from various reports regarding moisture levels, wood-destroying fungi, and wood-destroying insects in the property's crawlspace. At the time of the listing, Kopchynski provided the Onionses with an RPDA disclosure form, which they completed, stating there were no present wood decaying problems. Before the Isaacs became interested in the house, the Onionses contracted to sell to other prospective buyers, who hired an inspector who generated a report indicating problems in the crawlspace. Kopchynski recommended another inspector who also found issues and suggested repairs, which the Onionses had completed in part. The other prospective buyers terminated the transaction because the property failed to satisfy a mortgage appraisal contingency. Only days later, the Isaacs contracted to buy the house. The Isaacs hired one of the inspectors who had previously prepared a report on the home for the earlier prospective buyers. He issued a new report for the Isaacs that seemed to indicate the earlier concerns had been alleviated. Two

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days after closing, however, heavy rains inundated the area, leading to flooding in the crawlspace. A subsequent inspection found water and moisture issues, as well as wood decay from fungi and other sources. The supreme court listed the six elements necessary for negligent misrepresentation and found that the Isaacs failed to create a genuine issue of material fact that they relied on any representation by Kopchynski regarding the condition of the property. The court stated that although a real estate agent owes prospective buyers a duty to be truthful, he is not obligated to discover latent defects or to advise parties on matters outside the scope of his real estate expertise. Instead, the legislature places the duty of performing inspections or investigations squarely on the shoulders of the buyer. Even as Kopchynski provided the inspection reports to the Isaacs, the Isaacs' own agent testified that there was no reliance on those reports to determine that the condition of the property was good, such that the Isaacs' claim failed as a matter of law. The court also noted that the RPDA provides for immunity for real estate licensees when they did not know or have reason to know about issues and does not provide for a cause of action against them. The RPDA does recognize that other causes of action outside of the statute may be brought against them when appropriate. *Isaac v. Onions*, 915 S.E.2d 492 (S.C. 2025).

CONVERSION OF GOODS: Estoppel extends three-year statute of limitations when defendant actively conceals his identity and whereabouts of converted property. In 2002, Yeh Yeo Hwang (Yeh) purchased an ancient Chinese ritual wine vessel known as the Zhou Zha Hu for \$600,000. Thereafter, he borrowed \$200,000 from Zhang in an agreement that consigned the vessel for auction to the Chongyuan Art Auction Company. When the auction failed in 2006, Chongyuan refused to return the vessel to Yeh on the basis of another agreement purportedly signed by Yeh requiring delivery of the vessel to Zhang. Yeh claimed that his signature was forged and sued Zhang in the

Shanghai Higher People's Court, which in 2007 held that Yeh and Zhang were co-owners of the vessel, each with a 50% interest, and that Zhang had the right to possess the vessel. What happened next might be described as an odyssey of travel. Zhang sold his interest in the vessel to Su for approximately \$660,000 without Yeh's knowledge or consent, although Su knew of Yeh's interest when he purchased it. Su tried to sell the entire interest on several occasions, consigning the vessel to Sotheby's in New York City for an auction sale, which Sotheby's called off when Yeh asserted ownership; all the while, Su refused to allow Sotheby's to give Yeh his contact information. In 2015, Su brought an action in Chinese court to quiet title, without naming Yeh or mentioning the earlier Shanghai judicial action. In 2017, Su commenced an action in federal district court in New York against Sotheby's for return of the vessel. Sotheby's filed an interpleader action, naming Yeh and Su, and Yeh asserted a crossclaim for conversion against Su. The district court determined that Su had converted Yeh's 50% interest and rejected Su's defense that the New York three-year statute of limitations barred the conversion claim on the basis that Su was equitably estopped due to his participation in an "elaborate scheme to conceal" the conversion. The Court of Appeals for the Second Circuit affirmed on all counts. First, it explained that a cause of action for conversion exists when one intentionally and without authority assumes or exercises control over personal property belonging to another, interfering with that person's right of possession. The action requires a showing of (i) plaintiff's possessory right or interest in the property and (ii) defendant's dominion over the property or interference with it in derogation of plaintiff's rights. As to the first element, the facts were eminently clear that Yeh had a possessory right in the vessel, as the Shanghai court recognized Zhang's right of possession only so long as the property was being auctioned, and thereafter Yeh's full ownership right and right to possession would be restored.

On the second element, the facts showed that Su was not a bona fide purchaser and tried on numerous occasions to sell full ownership of the vessel without acknowledging Yeh's interest. Being a co-owner did not entitle Su to sell the entire interest in the vessel. The court also upheld the finding on estoppel. By refusing to communicate with Yeh, concealing his identity and bringing suit without naming Yeh, Su engaged in an elaborate scheme of concealment, which operated to toll the running of the three-year statute of limitations on the conversion action. *Su v. Hwang*, 2025 U.S. App. LEXIS 17680, 2025 WL 1983182 (2d Cir. July 17, 2025). Aftermath: In September 2024, Sotheby's sold the Zhou Zha Hu to the Huaihaitang Collection, which will exhibit the vessel at the Hong Kong Museum of Art in 2026. *See Kayan Wong, Zhou Zha Hu, a 3000-year-old Chinese imperial relic, goes to Hong Kong collection for US \$5.4 million*, The Value (Sep. 24, 2024), <https://tinyurl.com/425eey2m>. Before the auction, Sotheby's prepared a video describing the masterpiece. *See* <https://tinyurl.com/3djvnm22>.

FORECLOSURE: Mortgagor's failure to raise lack of case jurisdiction before trial amounts to waiver. A lender initiated a foreclosure action, and in 2015 the circuit court entered a final order denying judgment of foreclosure. The lender appealed, and the appellate court affirmed. More than two years later the lender sought and was granted leave to amend its foreclosure complaint based on new and separate defaults. The mortgagor moved to dismiss but failed to argue that the trial court lacked case jurisdiction. The court denied his motion, after which he filed an answer, affirmative defenses, and a counterclaim, with no pleadings addressing lack of case jurisdiction. In 2021, the trial court entered a final judgment of foreclosure against the mortgagor. After denial of his motion for rehearing, it was on appeal that he first asserted that the trial court lacked subject matter jurisdiction. The appellate court agreed and reversed. The supreme court

granted the lender's petition for discretionary review. The supreme court reversed, explaining that subject matter jurisdiction and case jurisdiction are not interchangeable terms and that only the latter was at issue. Subject matter jurisdiction is unwaivable because it concerns a court's constitutional or statutory authority to hear a certain type of case, and the parties cannot confer such authority on a court. Case jurisdiction refers to a trial court's jurisdiction to act in a case over which it has subject matter jurisdiction. Case jurisdiction may end when a trial court enters judgment, as here with the 2015 final judgment denying foreclosure. When the lender sought leave to amend, the mortgagor was on notice that the case jurisdiction was lacking but failed to raise any objection. Instead, he willingly submitted and acknowledged the court's jurisdiction in its pleadings and engaged in the litigation. The failure to timely raise the issue of the trial court's lack of case jurisdiction resulted in a waiver of the objection. *JJTB, Inc. v. Schmidt*, 415 So.3d 129 (Fla. 2025).

FORECLOSURE: Purchaser at condominium association's foreclosure sale is not in privity with former unit owner or association so as to preclude purchaser's right to object to subsequent foreclosure by holder of first mortgage. Chavez defaulted on a mortgage loan for his condominium unit, and in 2008 the bank initiated foreclosure. While that action was pending, the condominium association initiated foreclosure to collect unpaid dues, naming Chavez and the bank as defendants. The association obtained a judgment of foreclosure in 2011, pursuant to which Plotch purchased the unit in 2016, subject to the mortgage. The bank's 2008 foreclosure action was dismissed in 2017 without prejudice when the bank failed to appear at the last trial status conference or to move for judgment. But the next year, the court restored the 2008 foreclosure action to its docket, at which time the bank moved to substitute Plotch for Chavez as the current owner. The trial court denied the motion because Chavez

did not directly transfer any interest to Plotch. In 2021, Plotch filed a quiet title action in federal district court, alleging that the bank's action to foreclose was time-barred. While Plotch's action was pending, the state court entered judgment of foreclosure in the 2008 action pursuant to which the bank bought the property at an auction in 2023. In 2024, the district court granted summary judgment to the bank on Plotch's quiet title claim, ruling that the judgment in the 2008 action was preclusive, even though Plotch was not a party, reasoning that he failed to intervene and was in privity with the condominium association. Also, the district court ruled that because the bank had the ability to reforeclose under N.Y. Real Prop. Actions & Proc. L. § 1503, an order quieting title in Plotch would be premature. After Plotch appealed to the U.S. Court of Appeals for the Second Circuit, the bank brought an action to reforeclose. The Second Circuit reversed and remanded. First, the court explained that when a necessary party is omitted from a foreclosure action, the rights of that party are unaffected by the judgment and sale; the sale is deemed void as to that party. Here, Plotch was undisputedly not a party to the 2008 action, and he was not in privity with the condominium association. He acquired his interest in the property not from the association, but from a court-appointed referee. The association held only a lien on the property for unpaid dues, whereas Plotch obtained a fee simple interest. Because the association had vindicated its interests through its own foreclosure action, their respective interests were not aligned. Moreover, because the state court declined to substitute Plotch as a party in the 2008 action, it would just be unfair to treat him as in privity with the association for purposes of preclusion. Finally, the court ruled the district court erred by denying Plotch's quiet title claim on the basis that the bank might commence a reforeclosure action. Such a position would allow mortgagees to game the system—threatening to reforeclose to block the quiet title action, but never filing such an action, thereby depriving

parties like Plotch of the chance to raise defenses like fraud or willful neglect. On remand, it will be for the district court to assess the impact of the bank's having filed for reforeclosure, including whether to stay or hold the quiet title action in abeyance during the pendency of the same issues in the state court. *Plotch v. U.S. Bank N.A.*, 2025 U.S. App. LEXIS 17556, 2025 WL 1949987 (2d Cir. July 16, 2025).

LANDLORD-TENANT: Termination of lease for non-payment does not entitle landlord to evict under "tenant holding over" statute. North Market leased space to Copinol for a restaurant for a 10-year term to expire on March 31, 2023, unless sooner terminated. After Copinol failed to pay rent as required by the lease, North Market terminated the lease and gave notice to vacate. After Copinol failed to vacate, North Market commenced a "tenant holding over" action under Md. R.P. § 8-402, which applies to a "tenant ... who shall unlawfully hold over beyond the expiration of the lease or termination of the tenancy" Copinol opposed the action, arguing that the action is not available if the tenant is in possession under a lease that had not expired. The trial court entered a judgment of possession in favor of North Market. The intermediate appellate court affirmed, but the supreme court reversed. It began with a history of landlord-tenant law, starting with its English common law origins, and then to a discussion of the codification of expedited remedies available to landlords for the recovery of possession: Md. R.P. § 8-402 (tenant holding over); § 8-401 (summary ejectment for non-payment); and § 8-402.1 (actions for other breaches of lease). The two questions to be decided were (1) whether the "tenant holding over" action applies when the tenant is occupying property pursuant to a lease that had not expired by lapse of time but was terminated early by the landlord, and (2) whether the parties are free to alter by contract the statutory requirements for this action. In answering "no" to the first question, the court noted that the term

“expiration” was not synonymous with termination, although expiration may be a type of termination. The form of action mattered because rights and protections to tenants differed under the particular forms of action. In neither of the two other forms of expedited remedies is a landlord entitled to possession simply by giving “notice” to the tenant. Instead, there are built-in protections for the tenant’s possessory interest—namely, the right of redemption as to summary ejectment proceedings under Md. R.P. § 8-401 and a judicial determination that the tenant’s breach is “substantial” in the case of other breaches of lease under Md. R.P. § 8-402.1. To allow a landlord to resort to the “tenant holding over” proceeding by a unilateral determination that the tenant is in breach and terminating the lease by simply giving “notice to quit” would be wholly inconsistent with the comprehensive expedited statutory remedies framework enacted by the legislature. In answering the second question, the court ruled that the terms of the lease that purported to give North Market the right to terminate before the natural termination did not operate to redefine “expiration” or give North Market the right to declare the lease “expired.” And, even if the lease terms could be read this way, they would be unenforceable, as parties cannot contractually modify statutory terms in a manner inconsistent with the rights given to tenants. *Copinol Restaurant, Inc. v. 26 North Mkt. LLC*, 339 A.3d 873 (Md. 2025).

PREMISES LIABILITY: Landlord who fails to preserve evidence of methamphetamine contamination in rental unit may have liability for spoliation of evidence in suit for damages. For more than two decades, the Keatens lived in Apartment 303E in a complex owned and managed by the defendant. When they began noticing unusual chemical odors in the apartment, which they suspected to be from a meth lab operated by the tenant in apartment 203E, directly below them, they reported the matter to the defendant. The defendant’s on-site property

manager did a walk-through of the downstairs unit but found nothing unusual. Thereafter, Ms. Keaten sent a letter to the defendant’s regional manager and regional compliance officer, detailing an array of symptoms usually associated with exposure to meth, including stinging, itchy, watery eyes; burning sensations in the nose and throat; nosebleeds; heart palpitations; respiratory issues; dizziness; and headaches. The tenant in 203E was later evicted for non-payment of rent, but the defendant did not preserve any items in the apartment that might have been used for a meth lab, nor take photos during the eviction. Instead, the defendant replaced the carpet, sealed up the floor, and painted. The Keatens brought suit under the Colorado Premises Liability Act (Colo. Rev. Stat. § 13-21-115) for injuries resulting from exposure to meth fumes. It was only then that the defendant hired a company to collect a sampling of materials for testing outside the Keatens’ apartment and in the hallways. The inspector found marginal amounts of meth contamination in the Keatens’ bathroom air duct that exceeded the regulatory limits. During the pre-trial, the Keatens hired their own inspector, who found the area around the air duct was 44 times above regulatory limits. The trial court entered judgment for the Keatens, awarding \$10.5 million, including \$2.5 million in exemplary damages, for permanent brain injury. The court imposed a sanction of an adverse inference on account of the defendant’s failure to preserve evidence from apartment 203E. Despite the Keatens’ report of noxious fumes, the defendant took no remedial, proper investigative, or corrective action. On appeal, the defendant challenged the trial court’s adverse inference sanction for spoliation of evidence. The intermediate appellate court affirmed. The supreme court affirmed, but on different grounds. It first took the opportunity to clarify the rules on sanctions for spoliation of evidence. A court may sanction a party for the destruction of relevant evidence if the party knew or should have known that litigation was pending or reasonably

foreseeable and the destroyed evidence was relevant to an issue at trial. Although the trial court concluded that the destruction of evidence warranted a negative inference against the defendant, it did not identify what precisely the missing evidence would have established or how the inference factored into its causation finding. Thus, the trial court had not complied with the new standard announced by the supreme court in this case. But this was harmless error as the trial court did not rely solely on the negative inference to infer causation. Rather, the expert testimony and the results of testing showed the relative concentrations of meth found in Unit 203E and Unit 303E, as well as the low probability that both Keatens would develop the same symptoms at the same time in the absence of toxic exposure. *Terra Mgmt. Grp., LLC v. Keaten*, 572 P.3d 126 (Colo. 2025).

RESTRICTIVE COVENANTS:

Selective harvest of trees to improve the lot and receiving payment for the timber does not violate restriction against commercial activities. In 2013, Norman and Patricia Davis subdivided their land, creating three lots and recording a declaration of covenants that prohibited “commercial, industrial, or manufacturing activity of any kind or character, or agricultural activity for profit.” The covenants also stated that “to preserve the beauty of the area, no lot shall be stripped of trees.” The Davises conveyed one lot to the plaintiff in 2016. Shortly after the defendant bought the other two lots in 2021, he filed with the town a notice of intent to cut trees on 64 of his 78 acres. The defendant contracted with a timber company to harvest trees on his property, as a one-time activity, for which he would be paid \$80,311. The defendant asserted that the purpose of the timber harvest was to remove specific trees to encourage tree growth and open space for a home to be built on the property. The defendant’s forester described the defendant’s objectives as preserving open space and improving the forest health by removing overmature and diseased timber. After the timber

harvest began, the plaintiff brought suit to enjoin the activity, arguing that it violated the restrictive covenants. The trial court granted relief, finding the timber harvest to be clearly a commercial activity as it is generally defined. On appeal, the supreme court found that, although the language of the covenant unambiguously prohibited commercial activity for profit on the land, it did not prohibit an isolated exchange of money for goods that occurs on the land, like the defendant's timber harvest. The covenants also contained an express exclusion for certain home office businesses operated in a single-family residence; thus, it was not the case that all non-residential activities were prohibited. The provision against "tree stripping" was also informative as it suggested the permissibility of a selective timber harvest that did not amount to clear-cutting. In the court's assessment, it would be anomalous to permit limited timber harvests calculated "to preserve the beauty of the area," promote the health of the forest, and maintain the property, and yet prohibit the same conduct as "commercial activity." *Wolf v. Brown*, 2025 N.H. LEXIS 171, 2025 WL 1806507 (N.H. July 1, 2025).

SPECIFIC PERFORMANCE: Party who obtains specific performance may also recover damages for expenses to make the non-breaching party whole. *White Knight Development, LLC*, purchased land that was subject to restrictions on development from Dick and Julie Simmons for \$400,000. The contract required the Simmons to buy back the land if the restrictions were extended. When that event happened, White Knight gave notice to the Simmons that it was invoking the buy-back provision, but the Simmons refused to repurchase the land. Without those funds, White Knight's financial status went into a tailspin, its losses including fees for foreclosure forbearance on the property, refinancing, property taxes, a deed in lieu of foreclosure to a second mortgagee, and ruined credit. In an action for breach of contract, White Knight sought specific performance in addition to damages

totaling \$308,136. The trial court granted all the relief demanded, but the appellate court vacated the award for monetary damages because the trial court did not find that such an award was equitable in nature. The supreme court reversed. It explained that the equitable remedy of specific performance is usually preclusive of an action for damages, a claim at law. Because the goal of specific performance is to put the plaintiff back to the position it would have been in had there been no breach, a court, in narrow circumstances, may order payment of expenses incurred by the plaintiff as a result of the defendant's breach in addition to specific performance. Specific performance alone is nearly always a decree for less than exact and complete performance because it does not bring performance within the time the contract required. The court cautioned that expenses recoverable should not be viewed as co-extensive with damages available at law; instead, the party seeking specific performance may recover only those expenses that are directly traceable to the delay, foreseeable, and commercially reasonable. The court reserved for another day the determination of the precise contours of this rule but remanded the case for the lower court to apply the principles stated in the case. *White Knight Dev., LLC. Simmons*, 718 S.W. 3d 203 (Tex. 2025).

TAKINGS: County is not obligated to maintain drainage pipe within easement shown on subdivision plat. A subdivision created in 1989 included easements for road widening, water line extensions, water treatment, and drainage. The plat expressly dedicated "all streets, alleys, walks, parks, and other open spaces to public use" for the benefit of the owners of the lots in the subdivision. The Fernaays bought their lot and home in 1998, subject to the plat and Declaration of Covenants and Restrictions. Twenty years later, they began noticing erosion within the drainage easement on their lot and the adjoining lot; the erosion had increased ever since. It turned out

that the erosion was caused by a break in the concrete drainage pipe, which would cost \$150,000 to repair. They asked the county to repair, and when the county refused, the Fernaays commenced an action seeking compensation for violations of the takings clauses of the Virginia Constitution, Art. 1, § 11, and the federal Constitution. The trial court granted summary judgment to the county, finding no dedication of the drainage pipe and therefore no taking under either Constitution. The U.S. Court of Appeals for the Fourth Circuit affirmed. It explained that at common law, "dedication" referred to a landowner's grant to the public of a limited right to use his property. Dedication requires unequivocal evidence of an intention to dedicate to the public and an acceptance by the public entity, which could occur by an express act, such as a formal resolution, or by long public use with acts of dominion. Dedication might also occur under statute, typically when a developer records a plat describing the dedicated land. With an effective dedication of an interest in property, the public entity becomes the owner with the obligation to maintain the property in the manner necessary to protect the servient estates. The failure of the public entity to maintain the dedicated interest might subject it to liability under the state constitution for any resulting damage to the servient estate in an inverse condemnation proceeding. Similarly, for the same conduct, the public entity might be subject to a federal takings claim. Applying these principles to the circumstances here, the court held that the language in the plat did not manifest an intent to dedicate easements or underground pipes. The depiction of the drainage easement on the plat only showed the existence of the drainage easement. To the contrary, it appeared to suggest that the easements were retained by the developer or granted to the lot owners, with the county having only permission to use the easements. Furthermore, nothing in the Declaration of Covenants and Restrictions made any mention of the drainage pipe. The court thought that to imply a transfer of title to drainage lines installed by the developer to the county "would distort long-cherished principles of private ownership of

property.” *Fernaays v. Isle of Wight Cnty.*, 143 F.4th 550 (4th Cir. 2025).

LITERATURE

CONCURRENT OWNERSHIP:

Liam Edward Cronan, in *Dismissed at Death: Reassessing the Intersection of Joint Tenants’ Rights of Survivorship and Partition at Death in Battle v. Howard*, 17 Tex. Tech. Est. Plan. & Community Prop. L. J. 235 (2025), offers an insightful analysis of the question of what happens to a joint tenancy when one tenant dies during the pendency of a partition action. Can the action continue after the death of the tenant seeking it? The article begins with the recent decision from the Massachusetts Supreme Judicial Court, in *Battle v. Howard*, 185 N.E.3d 1 (Mass. 2022), holding that the death of a joint tenant who sought partition before judgment did not sever

the joint tenancy, but left the surviving co-tenant the sole owner. The author believes the court might have gotten it wrong. The article offers an interesting history of joint tenancy and shows how the right to partition has evolved over time and is often governed by statute. Although the case law from this and other jurisdictions seems to support the court’s ruling, the author believes that a focus on the statutory provision stating that a partition action does not abate by reason of the death of any joint tenant may justify a different result.

ENERGY: In *Who Owns Heat? Property Rights in Geothermal Energy*, 2025 U. Ill. Law Rev. 491 (2025), Prof. Gabriel Eckstein ponders the issue of who owns the thermal energy underneath private land. The issue is an important one to tackle, given that geothermal energy is becoming an important source of

clean, renewable energy as we confront the climate effects from the use of fossil fuels. Although the answer might on the surface seem intuitive, he suggests that the existing property rights regime does not give a clear answer on ownership of geothermal resources. He frames the issue by conceiving geothermal energy as an incorporeal, uncontainable natural resource that is better defined as a characteristic of underground formations rather than as a physical or tangible thing. After a detailed description of the science of geothermal energy, he goes on to examine the various federal and state rules regulating claims and ownership to geothermal resources, including water and minerals, finding substantial variations due to historical notions of property rights and the practical limitations in marking the contours of those rights. He asserts that property-based,

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common-law torts may be incapable of mediating between societal needs for geothermal resources and the landowners' private interest in realizing their value. Prof. Eckstein believes that getting to some common understanding of these rights is important for the commercial development of and public investment in geothermal energy, as well as for decarbonizing the economy. Effective use of this distinct energy source must resolve competing claims at the stages of exploration, harvesting, conversion, and transfer.

HOUSING: Prof. Nadiyah J. Humber, in *Corporate-Tech Landlordism—The New Era*, 28 Stan. Tech. L. Rev. 233 (2025), writes about the concerning phenomenon of corporate landlords buying increasing numbers of single-family homes, depleting housing stock that otherwise might be purchased by human families. This phenomenon is fueled by what she calls “corporate-tech landlordism,” the use of property technology for the mass acquisition and rental of single-family homes. In her view, it is changing the nature of the landlord-tenant relationships and not for the better. The technology being employed includes automated property management and tenant communication systems that make it difficult for tenants to obtain responses to complaints about conditions on the premises. At the same time, corporate profit motives push corporate-tech landlords to disregard maintenance requests and other landlord responsibilities. Other technologies include rent-pricing mechanisms that identify ideal conditions for coordinated rent hikes, fee extractions, and bulk evictions. Along with a detailed catalog of the various technologies, Prof. Humber lays bare the impacts that corporate-tech landlords have on housing markets, landlord-tenant relations, and housing insecurity. Believing the local and state laws are ill-equipped to halt the growing presence of corporate-tech homeowners, she argues for federal intervention under the Commerce Clause, making the case that corporate-tech landlords' activities undoubtedly

touch interstate commerce, the predicate for federal regulation. It remains to consider whether Congress cares enough to intervene.

LEGISLATION

CALIFORNIA amends environmental quality act to accelerate housing development. The amendments exempt from environmental review qualifying infill housing developments that meet local planning and zoning standards and are not located on hazardous or environmentally sensitive sites. The act also provides for streamlined review for qualifying housing projects. 2025 Cal. Stats. ch. 22.

CONNECTICUT amends property disclosure requirement. The amendment adds a question entitled “Flood Risk Awareness,” for which the sellers of residential property must describe their knowledge of flooding. 2025 Ct. P.A. 33.

DELAWARE adopts requirements for lead paint removal in rentals of dwelling units. Small property owners must obtain a certification from a lead inspector that each of the owner's rental units constructed before January 1, 1978, is “lead free” or “lead safe.” The certificate must be obtained and filed with the Department of Health and Social Services before the commencement of a rental agreement with a new tenant. Penalties are prescribed for failure to comply. 85 Del. Laws 98.

FLORIDA adopts provisions for limited remedy to remove persons wrongfully in possession of commercial property. The sheriff is empowered to remove such persons upon a complaint if certain conditions are met, including that (i) the requesting person is the property owner, (ii) the unauthorized person has unlawfully entered and remains on the property, (iii) the property was not open to members of the public at the time of the unlawful entry, (iv) the owner has directed the unauthorized person to leave the commercial real property, (v) the unauthorized person is not a current or former tenant,

and (vi) there is no litigation related to the property pending between the property owner and any known unauthorized person. 2025 Fla. Laws ch. 112.

FLORIDA requires disclosures about flood risk. For rentals of residential property for a term of one year or greater, a landlord must state that the renter's insurance does cover flood damage and disclose knowledge of flooding. Similar advice and disclosures are required in the case of condominium sales and rentals in mobile home parks. 2025 Fla. Laws ch. 166.

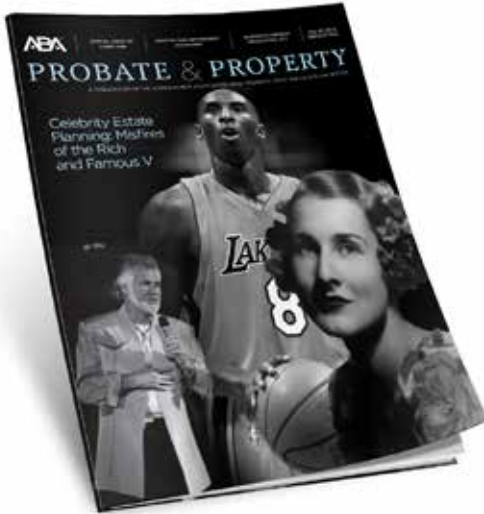
MISSOURI adopts rules on source of income rental discrimination. The amendments forbid county or city governments from prohibiting landlords from deciding to rent on the basis of source of income, income-qualifying methods, credit scores, credit reports, history of eviction or property damage, or criminal history. The prohibition covers privately owned, single-family, or multiple-unit residential or commercial rental property. 2025 Mo. HB 595.

NEVADA requires landlords of residential property to comply with building codes. The act extends the existing statute that requires maintaining the premises in a habitable condition as measured by housing codes and health codes to include building codes as well. 2025 Nev. Stat. 237.

NEW HAMPSHIRE establishes automatic discharge periods for undischarged mortgages. Beginning January 1, 2028, all undischarged mortgages in which the term or maturity date is not stated shall be deemed discharged 35 years from the date of recording of the mortgage, unless an extension of the mortgage or an acknowledgment or affidavit that the mortgage is not satisfied is recorded before the expiration of the 35-year period. For mortgages stating a term or maturity date, the discharge occurs five years from the expiration of the term or the maturity date, with the same provisos on extensions. 2025 NH Ch. 157. ■

PROBATE & PROPERTY

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FOR THE FUTURE

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How the OBBBA Will Affect Charitable Planning and Tax-Exempt Organizations

By Carly Doshi and Helen S. Cheng

The signing of the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, on July 4, 2025, has ushered in a wave of policy updates and prognostications about the future of estate planning. To be sure, updates such as further increasing the federal unified credit will continue to shift estate planners' focus toward income tax planning. Although the 2017 elimination of many itemized deductions is now permanent, the charitable deduction once again survived.

Unlike in 2017, however, it appears charitable giving may not have emerged completely unscathed. New restrictions on charitable giving and exempt organizations will directly affect the sector. Additionally, other indirect—although potentially more potent—provisions of the OBBBA may impact giving going forward.

Below is a summary of the OBBBA changes directly affecting the charitable giving and exempt organizations practice, thoughts on other provisions of the OBBBA that may impact charitable giving indirectly, and emerging planning opportunities.

Changes to Excise Tax Rules on Tax-Exempt Organizations

Modification of Excise Tax on Investment Income of Certain Private Colleges and Universities

Private colleges and universities that meet certain criteria are subject to an excise tax on their net investment income. I.R.C. § 4968. Currently, private colleges and universities are subject to a flat 1.4% excise tax if they have at least 500 tuition-paying students and the aggregate fair market value of the assets that are not used directly in carrying out their exempt purposes is at least \$500,000 per student.

Getty Images

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For taxable years starting after December 31, 2025, section 70415 of the OBBBA implements additional rates depending on the endowment size per student, up to 8%, as follows:

Endowment Size per Student	Tax Rate on Investment Income
From \$500,000 through \$750,000	1.4%
Above \$750,000 through \$2 million	4.0%
Above \$2 million	8.0%

The new law also increases the threshold criteria from 500 to 3,000 tuition-paying students, thus likely reducing the total number of schools affected by the excise tax.

Current law generally defines net investment as gross income from interest, dividends, rents, and royalties, as well as net capital gain from the sale or disposition of assets that are not otherwise subject to unrelated business income tax and are not used by the school for its exempt purposes. I.R.C. § 4968; Treas. Reg. §53.4968-2(d)(1). The OBBBA expands the definition of net investment income to include student loan interest income and certain royalty income where federal funds were used in the development of the underlying intellectual property. These changes would potentially increase the taxable base subject to the excise tax.

In summary, the new law benefits small colleges and universities (i.e., those that have less than 3,000 students) but provides a higher tax burden for schools with larger endowments relative to student size. Colleges and universities that are subject to the excise tax will pay tax on a larger base, and schools with larger endowments per student will see a significant increase in tax due.

Expanded Excise Tax on Excess Compensation of Tax-Exempt Organizations

Applicable tax-exempt organizations (including all tax-exempt organizations under I.R.C. section 501(a)) are subject to an excise tax equal to the corporate tax rate (currently 21%) on compensation in

excess of \$1 million or excess parachute payments. I.R.C. § 4960. Compensation includes remuneration from the applicable tax-exempt organization and related parties. Currently, this excise tax is

limited to the highest five compensated employees. For taxable years starting after December 31, 2025, the OBBBA removes the cap on the number of compensated employees, such that it is applicable to every individual who is or was employed by the organization after December 31, 2016.

The expansion of this law means that every applicable tax-exempt organization should work with its related entities to identify any individuals whose collective remuneration exceeds the compensation or excess parachute payment thresholds. Moving forward, tax-exempt organizations should examine current employment agreements and develop internal processes in conjunction with related parties to ensure they are aware of any agreements that may trigger the excise tax.

Charitable Contribution Deductions

Individual Taxpayers

There were some wins and some losses for those interested in the tax benefits of charitable giving. The major win is that section 70424 of the OBBBA provides nonitemizers with an additional charitable deduction for cash contributions of up to \$1,000 per individual (or \$2,000 for joint filers). These deductions are limited to contributions to public charities (but not donor-advised funds or supporting organizations). The standard charitable deduction substantiation rules apply, so it will be important to retain records and a contemporaneous acknowledgment letter by the recipient

charity where applicable. The deduction amounts cannot be carried forward each year.

For individuals who do itemize, the good news is that charitable contributions can be deducted up to 60% of adjusted gross income (AGI) if the contributions are made in cash to public charities. However, their deduction is limited to charitable contributions in excess of 0.5% of AGI. Generally, the disallowed deduction cannot be carried forward unless the taxpayer has additional carryforward of deductions over the AGI limitation. Thus, for example, a taxpayer with AGI of \$500,000 can deduct cash contributions in excess of \$2,500 and up to \$300,000. The disallowed deduction of \$2,500 cannot be carried forward unless the total contribution was greater than \$300,000. Further, the OBBBA essentially limits the maximum benefit for a charitable contribution deduction to be calculated using a 35% marginal income tax rate—a decrease for those in the top marginal tax bracket.

For those who do itemize, the additional restrictions are effective as of January 1, 2026, so taxpayers who are contemplating a larger charitable donation may want to consider making this gift before December 31, 2025.

Corporate Taxpayers

Corporations currently can take charitable contribution deductions up to 10% of their taxable income, with a five-year carryforward. I.R.C. § 170(b)(2)(A). Starting in taxable years after December 31, 2025, charitable deductions can be taken only if they are in excess of 1% of taxable income. Generally, the amounts under the 1% floor can be carried forward only if the corporation also has a deduction carryforward (i.e., contributions in excess of 10% of taxable income).

Other OBBBA Considerations

In addition to directly affecting charitable giving and exempt organizations, the OBBBA's other income tax provisions may impact both the volume and sum of charitable contributions US taxpayers make going forward.

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SALT Increase

An increased deduction cap of \$40,000 for state and local tax (SALT) allows taxpayers in high-tax states to claim more of their taxes paid as a deduction through 2029, and the OBBBA also introduces a new income phaseout limit for high earners. For middle-income taxpayers in high-tax states, the increased SALT deduction provides a meaningful incentive to itemize and, for those who are charitably inclined, to give generously and claim a corresponding charitable deduction.

Increased Standard Deduction

The new law permanently increases the standard deduction for all taxpayers as follows:

Taxpayer Filing Status	New Base Standard Deduction (starting 2025)
Single or married filing separately	\$15,750
Head of household	\$23,625
Married filing jointly	\$31,500

These amounts will continue to be adjusted for inflation each year.

At present, only about 10% of taxpayers itemize deductions. Going forward, given the higher standard deduction and the limit on state and local tax deductions, we expect a temporary increase in itemizers in high state income tax jurisdictions, but overall the number of itemizers may decrease, as more people choose the standard deduction. The vast majority of taxpayers are expected to use the standard deduction.

This has important implications for charitable giving because taxpayers who take the standard deduction receive no additional tax benefit for their charitable donations. Following the Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054, at least one study found that the increased standard deduction not only reduced the number of itemizers overall, but also the number of taxpayers claiming a charitable deduction decreased by more than half. *How did the TCJA Affect Incentives for Charitable Giving?*, Tax Pol’y Ctr. (Jan 2024), <https://tinyurl.com/ax4k8hx6>. It remains to

be seen if the OBBBA reduces the number of taxpayers claiming charitable deductions.

Expanded Tax Incentives for Certain HNW Taxpayers

The OBBBA also includes several tax incentives for high-net-worth individuals, which also may reduce the sum of charitable gifts. Expanded Qualified Small Business Stock (QSBS) and new Qualified Opportunity Zones (QOZs) offer opportunities for select taxpayers to reduce or even eliminate their income. Such a taxpayer may previously have looked to charitable giving to help reduce tax in the year of a liquidation or sale, but the tax incentive may no longer exist or may be less meaningful.

Planning Opportunities

Though the tax incentives for giving have changed, there are clear opportunities to continue giving to charity while effectively maximizing the tax benefits.

- *Accelerate gifts to 2025.* The new charitable contribution deduction rules are effective beginning in 2026. For donors contemplating large charitable gifts in the future, it may be wise to make these gifts on or before December 31, 2025, before the new deduction limitations apply. Funding a donor-advised fund this calendar year would also provide the same benefit.
- *Gift bunching.* For those who give modestly or infrequently, consolidating several years’ worth of gifts to charity in a single tax year (rather than giving a smaller amount to charity annually) may be useful to ensure charitable donations exceed the new 0.5% floor for deductibility and reduce the amount of disallowed deductions.

- *IRA QCDs.* Another option for avoiding the new 0.5% floor is to use qualified charitable distributions (QCDs) from an IRA. Taxpayers age 70½ and older may make QCD directly from an IRA to a qualified charity as a tax-free transfer. While QCDs do not offer a charitable deduction, they help satisfy required minimum distributions (RMDs) without causing income tax liability and provide an avenue for supporting charitable causes.
- *Use non-grantor trusts.* New tax incentives such as the increased SALT cap deduction and expanded QSBS may be multiplied through the use of non-grantor trusts and the thoughtful limiting of income per trust. Similarly thoughtful analysis may be useful for charitable gifts as well, to match income and entity to ensure maximum deductibility.

Conclusion

In our experience, the best counsel an estate planner can offer to charitably minded clients is to encourage them to give from the heart. A truly thoughtful giving plan begins with one’s values and extends from there—we do not recommend philanthropists take a “tax first” approach to their giving.

Although the new OBBBA rules require some additional consideration and thought to maximize the tax benefits of charitable giving, the most important tenets of philanthropy remain intact. We expect many donors and organizations will want to proceed without pause, giving generously in furtherance of their values. Accordingly, assisting clients to implement charitable planning will truly be an art and a science going forward. The best estate planners will demonstrate finesse and nuance, understanding both the limitations on tax deductibility and their client’s desire to give anyway. ■

KEEPING CURRENT PROBATE

CASES

ALIMONY: Estate of an ex-spouse has a valid claim against the estate of the other ex-spouse for unpaid alimony.

In *In re Estate of Brent*, No. 2023-CA-00423-SCT, 2025 WL 1586345 (Miss. June 5, 2025), the Mississippi Supreme Court held as a matter of first impression that the estate of one ex-spouse could make a claim on the estate of the other ex-spouse for alimony unpaid by the other ex-spouse even though the ex-spouse to whom the alimony was owed never attempted to enforce the other ex-spouse's obligation while both were alive.

DISCLAIMERS: A disclaimer need not state value of the disclaimed property. In *In re Estate of Bogren*, 22 N.W.3d 189 (Minn. Ct. App. 2025), the Minnesota intermediate appellate court held as a matter of first impression that the statutory disclaimer provision, Minn. Stat. § 524.2-1107(c), which sets forth the requirements for an effective disclaimer and which among other things requires that the disclaimer "describe the interest or power disclaimed" (identical to UPC § 2-1105(c)), does not require that the disclaimer state the value of the disclaimed power or interest. Accordingly, the court reversed the district court's order invalidating a disclaimer on that ground.

FIDUCIARY DUTY BREACH: Self-dealing surcharge may be based on benefit to the trustee's family. A trustee engaged in self-dealing by using funds from a credit line secured by trust property to benefit the trustee and members

Keeping Current—Probate

offers a look at selected recent cases, tax rulings and regulations, literature, and legislation. The editors of *Probate & Property* welcome suggestions and contributions from readers.

of the trustee's family. The trial court determined that it could award a surcharge measured by the total benefit received by the trustee and the trustee's family. The court in *In re Credit Trust under Will of Cameron*, 335 A.3d 760 (Pa. Super. Ct. 2025), affirmed based on the list of remedies for a breach of trust in 20 Pa. Con. Stat. Ann. § 7781(b), the official comments to the UTC § 1001, and the *Restatement (Third) of Trusts* § 100, which states that a faithless trustee can be charged with the amount of benefit to the trustee personally.

POUOVER PROVISION: Poulover to terminated trusts fails, resulting in intestacy. In *Estate of Long*, No. 06-24-00064-CV, 2025 WL 1233212 (Tex. App. Apr. 29, 2025), a father's will left property to various trusts for his children, one of which is the testator in this case. The testator's will left his estate to the trusts for his siblings, but if a sibling did not survive the testator, the property would pass to the testator's mother, and if she were also deceased, to the trusts for his siblings who did survive. All of the trusts terminated according to their terms before the testator's death. In addition, the testator's mother predeceased. Both the trial and appellate courts held that the testator's property passed by intestacy to the testator's daughter, the testator's only heir. The testator's will was clear that the property was to pass to the trusts for his siblings, which were already in existence when he executed

the will. Those trusts had all terminated. The alternative beneficiary, the father's mother, had also died. Thus, the residuary clause had no effective beneficiary, resulting in a complete lapse of the estate, so that all of the testator's property passed by intestacy to the testator's only child.

SPOUSAL RIGHTS: Abandonment requires physical separation and is an objective test. Ind. Code § 29-1-2-15 disqualifies the decedent's surviving spouse from taking any part of the decedent's estate or trust if the survivor abandoned the decedent "without just cause." A surviving spouse appealed the probate court's denial of the spousal allowance, finding that the survivor had abandoned the decedent because, even though the parties lived together for the last three years of the decedent's life, the survivor "had relinquished duties customarily present in a marriage relationship." The Indiana intermediate appellate court reversed in *Tidd v. Estate of Tidd*, 257 N.E.3d 846 (Ind. Ct. App. 2025), holding that abandonment under the statute means physical separation without mutual consent and is, in that sense, an objective test.

STANDING: Beneficiary lacked standing to challenge a trust incorporated by reference into a will. The beneficiary challenged the validity of the trust created by the beneficiary's parent, alleging undue influence and lack of capacity. The Missouri intermediate appellate court in *Shippert v. Shippert*, 717 S.W.3d 609 (Mo. Ct. App. 2025), upheld the trial court's grant of summary judgment for the trustee, agreeing that because the trust was incorporated by reference into the settlor's poulover will, the beneficiary lacked standing. Invalidation of the trust would bring no advantage to the beneficiary because under the terms of the will, the trust would be the terms of a testamentary trust.

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TORTS: Vermont recognizes the tort of intentional interference with expectation of inheritance. In *Dewdney v. Duncan*, No. 24-AP-066, 2025 WL 1479261 (Vt. May 23, 2025), the Vermont Supreme Court held that the law of Vermont recognizes the tort of intentional interference with expectation of inheritance, adopting the definition in *Restatement (Third) of Torts: Liability for Economic Harm* § 19(1), including the requirement that the plaintiff cannot pursue an action unless probate remedies have been exhausted. The court affirmed dismissal of the action, however, because the plaintiffs had not exhausted their remedies in the probate division.

TAX CASES, RULINGS, AND REGULATIONS

CLAIMS AGAINST ESTATES:

Payments to stepchildren under a prenuptial agreement are not deductible claims against the payor's estate. The decedent and the decedent's fourth spouse entered into a prenuptial agreement requiring that the decedent's will provide payments on the decedent's death to the spouse and to the spouse's children, but the will did not do so. After the decedent's death, the stepchildren filed claims against the estate for the amounts promised them, which were then paid with interest. The estate eventually deducted those payments on the estate tax return as claims against the estate under IRC § 2053. The Commissioner disallowed the deductions, issued a notice of deficiency, and the estate petitioned the tax court for review, which upheld the deficiency notice. On appeal in *Estate of Spizzirri v. Commissioner*, 136 F.4th 1336 (11th Cir. 2025), the court affirmed, agreeing with the Tax Court that the estate failed to present evidence that would shift the burden to the Commissioner and that the payments were not contracted for bona fide, that is, they did not occur in the ordinary course of business and were not free of donative intent but rather were the product of the decedent's desire to preserve the marriage. The payments were also related to the spouse's expectations or claims to

inheritance, another indicia of not being contracted for bona fide.

LITERATURE

ALGORITHMIC DEAD HANDS: In *Algorithmic Dead Hands: What Is Dead May Never Die*, 35 Fordham Intell. Prop. Media & Ent. L.J. 83 (2024), Zachary Catanzo warns of a new kind of digital immortality. By harnessing large language models, AI systems now offer testators posthumous control over their property and heirs. Without any limits, this could lead to never-ending control from the grave.

BUSINESS SUCCESSION PLAN-

NING: In *Succession Planning and Litigation Between Owners*, 81 J. Mo. B. 116 (2025), Gerard Mantese, Theresa-marie Mantese, and Paul Tahana explain that many business owners delay succession planning despite its importance. The authors emphasize that with over \$84 trillion expected to transfer through estates by 2045—including ownership in private businesses—lawyers must take a proactive role in helping clients plan effectively to avoid future conflicts and litigation.

CONTAMINATED PROPERTY: In *A Toxic Inheritance: Addressing the Legal Implications of Inheriting Hazardous Waste Land*, 16 San Diego J. Climate & Energy L. 113 (2024-2025), Ashley Pyle examines how inheritance law deals with hazardous waste. She shares Sarah's story, a beneficiary who inherited toxic land and was later sued for damage she didn't cause. This article examines the challenges of inheriting property and argues that responsibility for environmental cleanup should fall on the testator's estate to protect beneficiaries and help reduce environmental harm.

DEBTS: In *Death and Debts*, 50 ACTEC L.J. 139 (2025), Kevin Bennardo examines what happens when someone dies while still being owed money. Typically, that right to collect the debt becomes part of the estate and passes to the residuary beneficiary. Bennardo argues that if the debt is tied to a sold, specifically

devised asset, the beneficiary should receive only the remaining payments if the decedent retained a security interest in it.

DEMENTIA: In his Comment, *The Not-So Golden Years: Addressing the Shortcomings of the Criminal Justice System with Regard to Individuals with Dementia*, 17 Est. Plan. & Cmty Prop. L.J. 381 (2025), Ryder Needham examines the issue of dementia-related criminal behavior among the elderly. Although Texas has legal proceedings for defendants with mental illness or intellectual disabilities, there is no clear guidance for individuals with dementia who are incompetent to stand trial. Deedham proposes steps to provide proper care and protection for these individuals.

EMPOWERING FAMILIES: In her Comment, *Empowering Families: Proposing Legislative Enhancement for Third-Party Special Needs Trusts in Texas*, 17 Est. Plan. & Cmty Prop. L.J. 345 (2025), Melanie Gatica recommends that practitioners use stricter language in third-party special needs trusts to better protect beneficiaries with disabilities.

END OF LIFE EXPENSES: In *Tax Sheltering Death Care*, Wis. L. Rev. 623 (2025), Victoria Haneman highlights the challenges that many Americans face in covering end-of-life costs for loved ones. She suggests adapting a 529 savings plan framework to create tax-advantaged accounts for end-of-life expenses, making death benefits more accessible to low- and middle-income families.

ESG INVESTING: In her Note, *Sole Interest vs. Best Interest: Modeling Future Anti-ESG Legislation Off of Indiana Code § 5-10.2-14-2 to Protect the Fiduciary Duties Owed by Trustees by Requiring Sole Interest Ideology*, 58 Ind. L. Rev. 475-501 (2024), Kristen Parrish explains that ESG investing, which focuses on environmental, social, and governance issues, is starting to influence some fiduciary investment decisions. This has raised concerns that fiduciaries may be prioritizing personal or political beliefs over their legal duty to act in the best interests

of beneficiaries. In response, states like Indiana have passed legislation aimed at anti-ESG-focused investing.

FLORIDA—DIGITAL PROPERTY:

In *Properly Securing Digital Legacies: A Proposal to Amend the Florida Fiduciary Access to Digital Assets Act to Enhance Fiduciary Access and Adhere to Traditional Principles of the Florida Probate Code*, 53 Stetson L. Rev. 741 (2024), Kylie Riordan explains how digital assets can carry significant sentimental value and can be lost without proper planning. She argues that the Florida Fiduciary Access to Digital Assets Act, though well-intentioned, creates confusion and conflicts with probate law. She calls for the Act to be updated to align with evolving technology and estate planning principles.

GRANTOR TRUSTS: In *Reform the Grantor Trust Rules*, 50 ACTEC L.J. 249 (2025), Jay Soled argues that Congress should limit the use of grantor trust status to make the tax system fairer.

HARD OF HEARING CLIENTS: In her Comment, *Silent Voices, Loud Justice: Ensuring Equal Access to Legal Services for Deaf, and Hard of Hearing Individuals*, 17 Est. Plan. & Cmty Prop. L.J. 415 (2025), Autumn Watterson explains how many deaf and hard-of-hearing individuals do not receive the communication aids required by the ADA to fully participate in the legal system. She proposes new Texas legislation requiring legal professionals who fail to provide these accommodations to complete continuing legal education to increase awareness and compliance with existing laws.

NON-GRANTOR TRUSTS: In *Unleashed Non-Grantor Trust Potential*, 50 ACTEC L.J. 161 (2025), Brent Nelson outlines four key strategies to improve Non-Grantor Trusts (NGTs): GST tax and basis planning, income tax efficiency at the beneficiary level, engaging in business with the NGT, and using loans and sales involving the NGT.

NURSING HOMES: In *Protecting Access to Nursing Home Care for Family Farmers*, 60 Gonz. L. Rev. 339, Natalie

Temple discusses how Medicaid rules unfairly burden elderly rural farmers who are “land rich, cash poor.” She proposes a Medicaid exemption for family farmland to safeguard their assets and ensure access to nursing home care without threatening their family legacy.

PERSONAL REPRESENTATIVE

DUTIES: In *Coaching an Olympic Sprinter: Guiding a Personal Representative in Distributing a Decedent’s Estate*, 17 Est. Plan. & Cmty Prop. L.J. 305 (2025), Pamela Orsak compares training personal representatives to coaching an athlete. Although they may be eager to act quickly, they often need proper guidance to succeed. She outlines key steps to guide personal representatives through estate administration with the goal of helping them uphold their fiduciary duties.

RIGHTS OF SURVIVORSHIP:

In *Dismissed at Death: Reassessing the Intersection of Joint Tenants’ Rights of Survivorship and Partition at Death in Battle v. Howard*, 17 Est. Plan. & Cmty Prop. L.J. 235 (2025), Liam Cronan explores the legal conflict that arises when a joint tenant files a partition suit but dies before it is resolved. This situation creates an inherent conflict between the right of survivorship and the right to partition. Cronan criticizes cases like *Battle v. Howard* for prioritizing the right of survivorship and argues that courts should follow long-standing statutes that let heirs continue partition actions after the death of a joint tenant.

SILENT TRUSTS: In *Silent Trusts and the Conflict of Laws*, 50 ACTEC L.J. 187 (2025), Jeffrey Schoenblum discusses why some settlors choose to keep trusts hidden from beneficiaries to avoid family conflict. He explores how “silent trusts” challenge traditional trust principles by limiting beneficiary rights, and how some states are using legal strategies to increase settlor control by enabling the “nonfiduciary trust.”

STRANGER OWNED LIFE

INSURANCE: In *Profiteers of Death*, 17 Drexel L. Rev. 697 (2025), Match Dawson

examines how unethical investors and insurance agents exploit elderly individuals through deceptive STOLI schemes. Dawson recommends stronger, uniform laws to prevent abuse and protect vulnerable seniors.

TEXAS—ATTORNEY-CLIENT

PRIVILEGE: In *Issues Involving the Attorney-Client Privilege and Trustees in Texas*, 17 Est. Plan. & Cmty Prop. L.J. 269 (2025), David Johnson explores how many trustees often need to hire attorneys during trust administration, which raises important questions about attorney-client privilege. This article addresses how Texas approaches some of these questions.

LEGISLATION

ALABAMA modernizes its Small Estates Act. 2025 Ala. Laws Act 2025.

HAWAII adopts the Uniform Parentage Act. 2025 Haw. Laws Act 298.

MISSOURI adopts the Uniform Electronic Estate Planning Documents Act. 2025 Mo. Legis. Serv. H.B. 754.

MONTANA regulates property rights in the use of names, voices, and visual likenesses. 2025 Mont. Laws Ch. 685.

OKLAHOMA enacts the Uniform Trust Code. 2025 Okla. Sess. Law Serv. Ch. 254.

RHODE ISLAND abolishes the fiduciary exception to the attorney-client privilege. Thus, the attorney represents a fiduciary in the fiduciary’s individual capacity. 2025 R.I. Laws Ch. 25-57.

RHODE ISLAND creates an act addressing the selling of pet insurance. 2025 R.I. Laws Ch. 25.

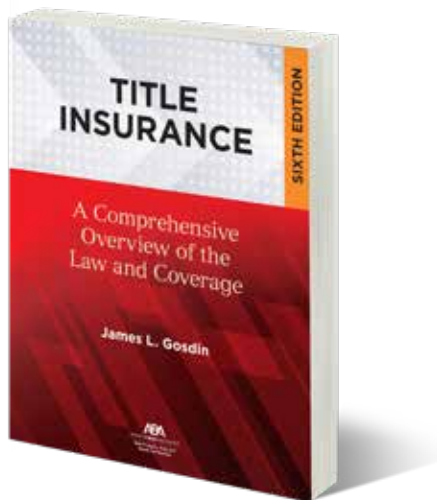
TEXAS authorizes survivorship rights and transfer-on-death provisions for manufactured homes. 2025 Tex. Sess. Law Serv. Ch. 865. ■

RPTE PUBLICATIONS

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This World Is Bigger Than U.S.

Considerations in Investment Diversification

By Bianca Ko and Evelyn Vigistain

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The United States hosts the largest and most consolidated capital markets in the world, making it a prime destination for investors seeking stability and growth. U.S. companies operate in the world's largest economy, driven by a culture of innovation that keeps them at the forefront of major technological advancements. The country is home to global technology giants that deliver profitable growth with minimal cyclicality. Additionally, U.S. management teams broadly prioritize profitability and shareholder returns. The U.S. dollar's (USD) reserve currency status further attracts investment flows to U.S. assets. These qualities have made the United States an exceptional market for investors.

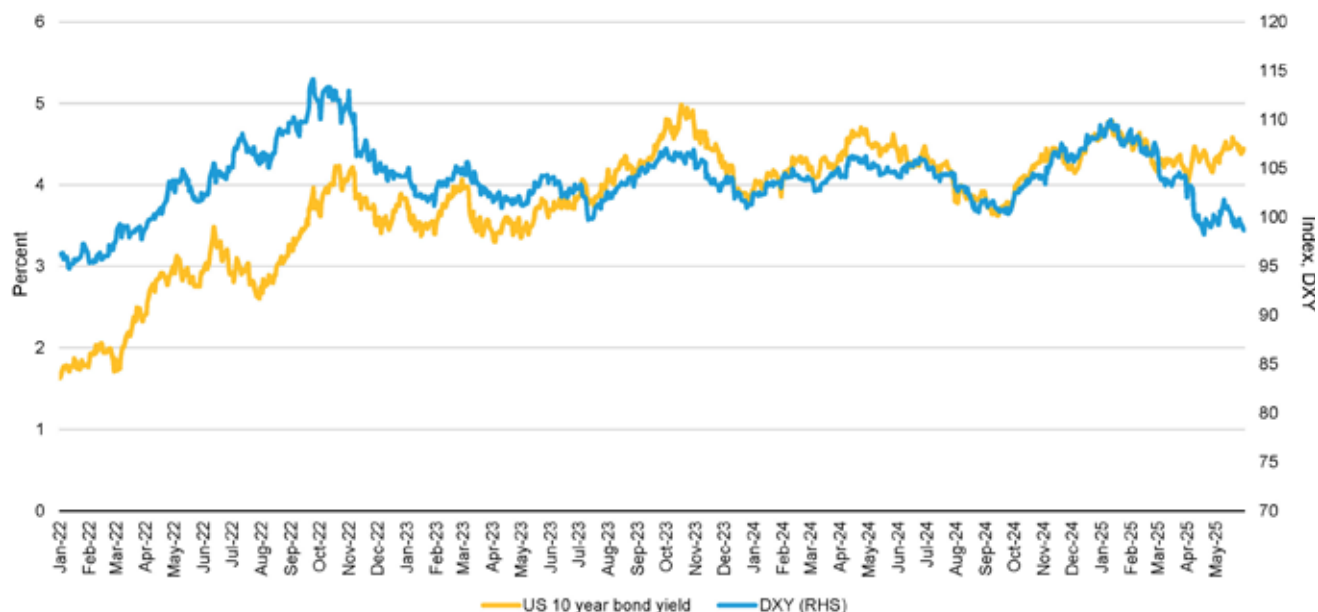
Some U.S. investors have recently questioned U.S. exceptionalism and are considering moving at least a part of their assets abroad. This sentiment shift follows notable volatility in U.S. safe-haven assets during April and May of 2025. Since 2022, the U.S. dollar and the U.S. treasury yields have moved largely in lockstep. But after "Liberation Day," when President Donald Trump announced widespread tariffs, the dynamic shifted, with investors selling treasuries and dollars in tandem. Days when the dollar weakened coincided with an increase in U.S. bond yields (Display 1). The breakdown in this relationship appears to signal declining confidence in the USD as a safe-haven asset, at least in the short term.

Several other factors are also at play, including geopolitical tensions, elevated U.S. equity valuations, and slower economic growth prospects. Amid the prospect of waning U.S. dominance, such investors worry that their portfolios may be overly concentrated. Identifying the source of concern is key. Although the authors believe there is a

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Display 1: The Dollar-Bond Yield Relationship Suggests a Change of Risk Perception



Past performance and current analysis do not guarantee future results.

As of June 30, 2025

Source: LSEG Data & Analytics and AllianceBernstein (AB)



case for ongoing U.S. economic strength and continued global appeal, it's important to address and separate three main perceived risks: currency, geography, and jurisdiction. Isolating these risks can provide investors with a clearer framework for decision-making—especially during periods of heightened uncertainty.

Currency Risk

To navigate uncertainty, investors first must understand specific risks, starting with currency, which raises concerns about protecting purchasing power in the event of a depreciating USD. Recent fluctuations in the dollar have highlighted this risk, bringing hedging into focus for U.S. investors. There are two main scenarios to consider. The first involves individuals, families, or entities firmly anchored in the United States with assets, liabilities, income, spending, and overall operations in

USD. The second scenario addresses “United States persons” (U.S. persons), as defined in Internal Revenue Code (IRC) section 7701(a)(30), with sizeable liabilities and regular expenses in a different currency.

Aligning Financial Accounts and Currencies

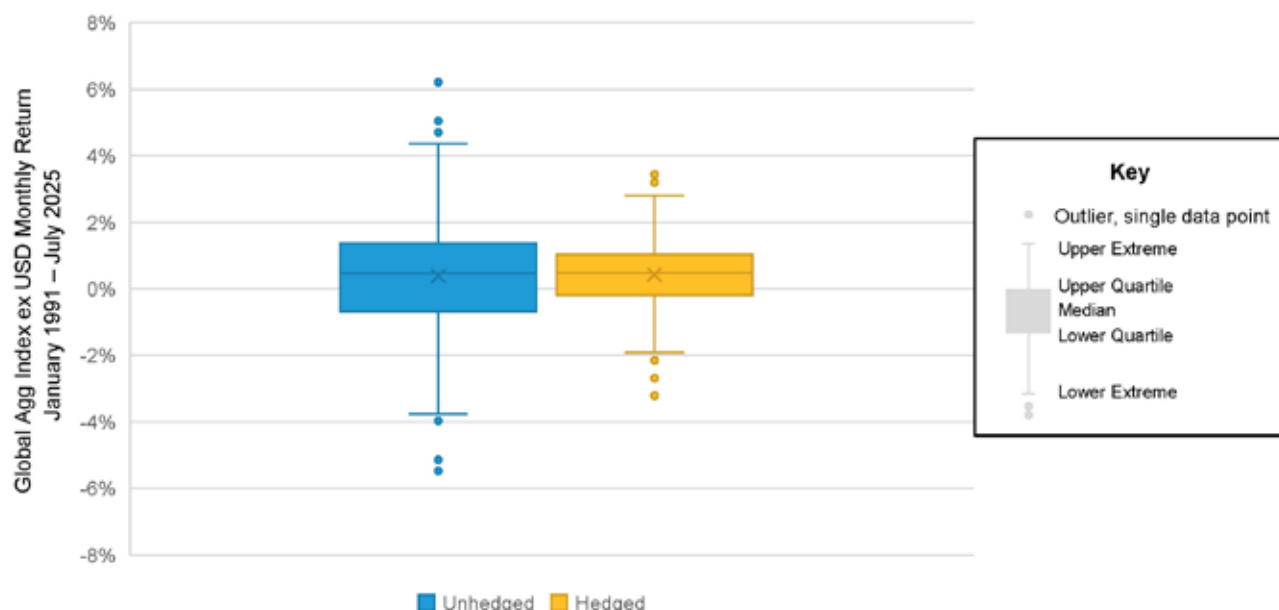
In the first scenario, the investors primarily operate in USD. While they may occasionally exchange currency for travel or purchases, their daily quality of life is not affected by foreign exchange movements. Of course, if the USD depreciates, foreign goods could become more expensive in dollar terms, and some investments' returns tend to be correlated with currency moves. But overall, they receive income and spend in USD. Generally speaking, these types of investors should maintain most of their assets in USD-denominated accounts. The focus should be on asset

and liability currency matching. Strategically, if spending and liabilities are in dollars, then assets should be managed from that point of view.

In the second scenario, the investors deal with at least two currencies in their daily lives. Maintaining all accounts in USD would subject them to foreign exchange markets whenever they need another currency for investments, lifestyle, or other expenses. They face direct currency risk. In the last 15 years, this has not been detrimental as the USD appreciated against a basket of foreign currencies. See U.S. Dollar Index (DXY). But year to date through June 30, 2025, the USD had depreciated about 10.7% against that same basket. Although the dollar is still high compared to the last 20 years, this recent trend shift makes currency a more relevant issue for truly global investors.

To minimize currency risk, aligning financial accounts with the currencies

Display 2: Hedging Significantly Decreases Risk in a Fixed Income Portfolio Without Impacting Returns



in regular use is generally advisable. This means matching account currencies with the investor's day-to-day currency exposures. In simplistic terms, persons living in the United States 60% of the year and Europe 40%, with expenses and liabilities in both regions, should roughly aim for a 60% USD and 40% Euro (EUR) split in their accounts. While various factors may shift those percentages, failing to diversify currency exposure leaves the investors vulnerable to exchange rate fluctuations—even if they believe the USD will remain strong long-term.

Currencies and Asset Allocation

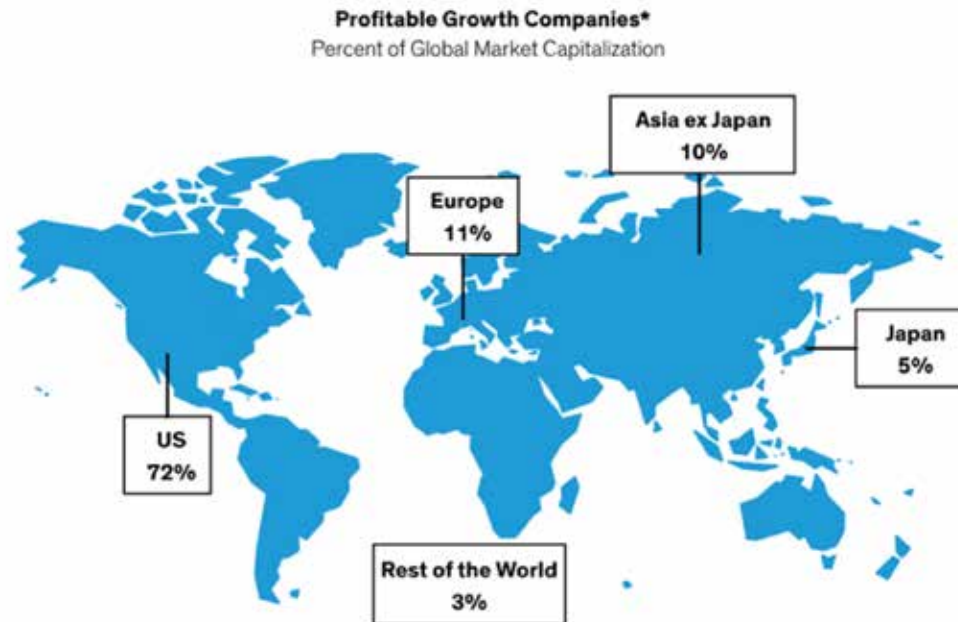
It's also important to decide when to hedge currency exposure back to the investor's base currency. Our research shows that hedging in fixed income portfolios can significantly reduce risk without impacting returns. But equities behave differently.

The difference stems from the capital preservation role bonds play in an asset allocation. Unlike stocks, bonds (particularly high-quality ones) typically deliver more modest returns with less volatility. Yet USD investors with a global fixed-income allocation—where non-U.S. bonds are denominated in local currencies—are vulnerable to underlying currency swings relative to the dollar. This means the total return in USD terms includes both the performance of the bonds in their local currency and the impact of currency exchange rates when converting back to USD. Our analysis of global bond returns, as measured by The Global Aggregate Total Return Index ex USD from 1991 to 2025, shows that currency volatility can have an undesired impact on a fixed-income portfolio's overall performance and stability. Hedging back to the investor's base currency in a global bond portfolio

moderates the overall volatility, enhancing the investment experience (Display 2). Given the stabilizing role of fixed income in an asset allocation, hedging is advisable.

In contrast, hedging in the equity portion of an allocation can have varied effects depending on the investor's base currency. For global equity investors, the strength of the USD has historically made holding USD-denominated equities beneficial. The United States is unusual in that its equity-currency correlation has been negative, which is often attributed to the dollar's safe-haven status. Therefore, exposure to the dollar can reduce overall volatility in an equity portfolio. For the portion of a global equity allocation invested in non-USD assets, the costs of hedging for USD investors often outweigh the small benefit. For EUR and British pound (GBP) investors, exposure to the USD can be advantageous. For

Display 3: The U.S. Still Leads the World in Profitable Growth Companies



Past performance does not guarantee future results.

Numbers may not sum due to rounding

*Represented by global companies with market cap over \$15 billion that fall in the top half of return on assets and asset growth

As of December 31, 2024

Source: FactSet, MSCI and AB



example, analysis of an unhedged MSCI All Country World Index (MSCI ACWI) ex Europe Index (in EUR) and an unhedged calculated global equity ex UK index (in GBP)—along with their corresponding calculated hedged indices—shows that hedging approximately 50% to 80% of foreign currency exposure back to their base currency improved risk-adjusted returns for these investors.

Geographic Risk

Geographic risk refers to the potential downsides of highly concentrating investments in the United States. Many strictly U.S. persons naturally favor domestic investments because of familiarity, security, and currency alignment. This is known as home country bias. Seeking broader geographic diversification is not abnormal but has been out of focus for U.S. investors. The concern is that this concentration may pose

a risk if the U.S. economy stumbles. Investors can address this concern by diversifying their portfolio geographically without necessarily offshoring assets.

U.S. Exceptionalism in Global Equity Markets

Before considering geographic diversification, it's important to understand why many investors have U.S.-centric allocations. Even when investing in U.S.-only equity portfolios, investors benefit from the global reach of U.S. companies. For instance, an investor in an S&P 500 index fund might see it as a purely US investment. As of June 2025, however, about 40% of the revenue from S&P 500 Index companies comes from sources outside the United States, according to FactSet data. Likewise, non-U.S. multinational companies have exposure to U.S.-sourced revenues and operations. This speaks to

the interconnected nature of the global economy.

Despite this interconnectivity, U.S. equity markets have had an outsized pull for investors. Over the last decade, U.S. companies have generally outperformed their peers in developed markets in Europe and Asia on measures like earnings growth and price appreciation. AllianceBernstein's COO of U.S. Growth Equities, John H. Fogarty, CFA, explored this in a recent publication titled *Is US Exceptionalism Over for Equity Investors?* (<https://tinyurl.com/588568v3>). He noted that by the end of 2024, 72% of the market capitalization of the world's profitable large-cap growth companies was based in the United States (Display 3).

In addition, over the past 15 years, U.S. stocks have significantly outpaced their counterparts in other developed markets on a cumulative return basis through June 30, 2025. The S&P 500

Index, which measures the broad U.S. market, beat the MSCI EAFE Index (a common measure of developed international stocks) by over 430% over that period, translating to an annualized difference of about 5.91%. This dynamic was amplified in recent years by the dominance of the Magnificent Seven (Alphabet, Amazon, Apple, Meta Platforms, Microsoft, Nvidia, and Tesla), with the S&P 500 and MSCI ACWI—a widely used benchmark of global equities—holding more than 25% in these stocks at peak concentrations.

As a result, the United States enjoys an outsized position in global equity indices, despite its GDP being a smaller portion of the global economy. Consider that U.S. stocks hold more than a 60% weighting in the MSCI ACWI, while the U.S. GDP is approximately 26% of global GDP. What's more, the U.S. market itself is fairly concentrated in a select number of stocks. The five most valuable companies in the United States account for approximately \$15 trillion in market capitalization today. Interestingly, none of these five—Nvidia, Microsoft, Apple, Amazon, Meta—were among the top five 25 years ago, and some didn't even exist a decade earlier.

Addressing Concentration Concerns

Objective-based investment advice that aligns investors' worldviews with their financial needs is an effective methodology to address geographic risk concerns in a portfolio. For example, an investor with an aggressive growth risk profile who is worried about slower U.S. growth may consider incorporating growth-oriented domestic equities, private market investments (if eligible), and exposure to non-U.S. markets (e.g., via non-U.S. stocks and bonds). The goal is to secure compelling returns while tolerating market pullbacks and expressing skepticism toward the long-term U.S. growth outlook. In this case, diversification across various asset classes, regions, sectors, and companies is key to managing risk at the asset allocation level. By doing so, investors can balance the sources of return and risk in their portfolios without needing



**To minimize currency risk,
aligning financial accounts with the
currencies in regular use is
generally advisable.**

to move assets offshore or avoid U.S. investments altogether.

Overall, geographic diversification becomes particularly salient in times of heightened uncertainty, as demonstrated by non-U.S. equities outperforming U.S. equities by 12.1% in the first half of 2025 (as measured by the gap between the MSCI AWCI ex US Index versus the Russell 3000 Index). Although diversification helps manage geographic risk, there isn't a one-size-fits-all approach to building a portfolio. Investment advisors emphasize the importance of staying invested for the long term and aligning a portfolio with a client's perspective to help them remain steadfast during volatile periods. The United States has been the best house in a seemingly middling neighborhood for a long time. But is the neighborhood changing? Markets are cyclical, and while we can't predict the future, excluding the world's largest capital markets from a portfolio isn't advisable. It is prudent, however, to be cautious of overconcentrating assets in a single country or currency, especially for investors with global financial liabilities.

Jurisdiction Risk

What Is Jurisdiction Risk?

The final piece in this framework is jurisdiction risk, namely the legal and

tax implications of holding assets in a given jurisdiction. To manage this risk, some investors choose to diversify by placing assets with custodians outside their home country. This strategy, called jurisdictional diversification, can serve various purposes. For instance, individuals contemplating a move from the United States for personal or business reasons might open a bank account in their destination country to manage their finances more easily day-to-day. Others may deposit funds in a different country for asset protection. Still others aim to shield their wealth from geopolitical risks, such as political instability or trade conflicts. When U.S. taxpayers move assets abroad, it is crucial to remain compliant with U.S. tax law and reporting requirements. Yet not all foreign financial institutions are appropriately equipped to serve U.S. persons.

Understanding the difference between jurisdictional diversification and geographic diversification is key. Investing in markets outside the United States through a domestic institution may offer geographic diversification, but it keeps the account within the U.S. legal framework. In contrast, jurisdictional diversification involves holding assets in foreign legal systems, offering greater asset protection. This is because U.S. courts may not have authority over accounts held in other countries. If a creditor wants to enforce its rights on assets held by a foreign custodian, they must navigate the laws of that foreign jurisdiction, which can be complex and burdensome. In Switzerland, for example, a creditor can request debt collection from an office, and if the debtor objects, the creditor may seek to lift the opposition through a Swiss court. Sometimes, jurisdictional diversification and geographic diversification overlap. For instance, a foreign bank account offers both.

Jurisdictional diversification also can offer reassurance in times of legal and regulatory uncertainty. A recent case study is the 2023 U.S. banking crisis, where Silicon Valley Bank, Signature Bank, and First Republic Bank collapsed in quick succession. It was a time of great uncertainty for businesses and

investors—not only for account holders at these banks, but also for those at similar-sized institutions, fearing a domino effect. The Federal Deposit Insurance Corporation has since identified supervisory and regulatory failures as contributing factors to the crisis in a speech at the Florence School of Banking and Finance. For investors worried about lax regulations, looming geopolitical crisis, or market dislocations, holding assets under multiple legal and regulatory frameworks can provide peace of mind. This strategy ensures continued access to assets, even amid uncertainty.

Investment Considerations

There are many factors to bear in mind when considering jurisdictional diversification. First, choose a destination wisely. U.S. investors should seek jurisdictions that maintain friendly relations with the United States, do not impose heavy foreign exchange controls, and have strict privacy and asset protection laws. Political and economic stability are also key considerations, as is a robust regulatory framework that prevents institutions from taking excessive risks, such as over-leveraging. Further, U.S. investors should be aware of the tax consequences in the foreign jurisdiction. Investors should understand not only the income tax ramifications but also any estate or inheritance tax implications.

Additionally, when choosing a foreign custodian, look for one that is well-versed in U.S. reporting and tax requirements. Such an institution can help U.S. investors select products that avoid complex anti-deferral tax regimes. It should also proactively prepare the rigorous documentation required by U.S. law, such as the Foreign Account Tax Compliance Act (FATCA). Keep in mind that many foreign custodians have significant deposit and fee requirements.

U.S. Tax Considerations

Of course, jurisdictional diversification can complicate U.S. tax and reporting requirements. The United States taxes its citizens and permanent residents

U.S. investors investing outside the United States are generally advised to hold shares directly rather than through foreign mutual funds, foreign exchange-traded funds, or foreign money market funds.

on their worldwide income, based on IRC section 61(a). Most other countries tax nonresidents only on income earned within their borders. This situation could result in double taxation for U.S. taxpayers who own assets in foreign jurisdictions. In general, the United States allows foreign tax credits for income taxes paid to other countries, but only if those taxes qualify as income taxes as defined under U.S. law. Tax treaties between the United States and the foreign jurisdiction also may reduce the taxes owed to one of the jurisdictions. U.S. investors should check with their tax advisors to determine if such relief is available to them.

U.S. investors looking to maximize their investments' tax efficiency must consider both U.S. and foreign tax laws. In particular, U.S. tax consequences may be onerous for certain structures. For example, investing in foreign mutual funds or money market funds may trigger the passive foreign investment company (PFIC) regime, which is particularly burdensome. A foreign corporation is a PFIC if either (a) 75% or more of its income is from nonbusiness operational activities or (b) at least 50% of its assets generate passive income.

Once classified as a PFIC, it remains so indefinitely. *See* IRC § 1298(b)(1).

U.S. investors with PFIC holdings face both increased annual reporting obligations and a punitive anti-deferral tax regime that involves deemed realization of income taxed at ordinary income rates and an interest kickback. Alternatively, they may elect to be taxed on their share of PFIC income on a current basis. *See* Treas. Reg. § 301.7701-2. Additionally, an entity considered a "partnership" for foreign purposes may be treated as a corporation for U.S. tax purposes, adding further complexity. Given these challenges, U.S. investors investing outside the United States are generally advised to hold shares directly rather than through foreign mutual funds, foreign exchange-traded funds, or foreign money market funds.

Similarly, certain foreign corporations may be classified as controlled foreign corporations (CFCs) under U.S. tax laws. A foreign corporation is considered a CFC if more than 50% of its stock is held, by vote or value, directly or indirectly by "United States shareholders." These shareholders are U.S. taxpayers who own at least 10% or more of the foreign corporation. If a foreign corporation fulfills both CFC and PFIC requirements, it is treated as a CFC, unless it was previously a PFIC. Generally, U.S. shareholders of a CFC may be taxed on their share of the corporation's income on a current basis, even if they do not receive any distributions.

Reporting Requirements

Notably, jurisdictional diversification does not offer privacy to U.S. investors, as they must comply with certain reporting requirements. Under the Bank Secrecy Act, U.S. taxpayers must annually report foreign financial accounts—including bank accounts, brokerage accounts, and mutual funds—to the Treasury Department if their overseas assets exceed \$10,000. For each account, taxpayers must provide the name and address of the foreign institution, type of account, and the highest balance for that year. This information is reported using the



Report of Foreign Bank and Financial Account (FBAR) on Financial Crimes Enforcement Network Form 114. The deadline for filing the FBAR is April 15 of the following year, which is automatically extended to October 15 when necessary. A U.S. taxpayer who fails to file the form could face civil or criminal penalties. *See* BSA §§ 5321, 5322.

Moreover, FATCA mandates that U.S. taxpayers file Form 8938 with their tax returns if their foreign assets exceed certain thresholds. The form requires similar information to the FBAR. FATCA also requires foreign financial institutions and certain nonfinancial foreign entities to report foreign assets held by US account holders. Therefore,

it is crucial for U.S. investors to work with financial institutions and tax advisors who understand these regulations and can help ensure compliance with reporting and tax laws.

Conclusions

“Diversification wins” is an oft-repeated nugget in the financial services industry. U.S. investors can achieve diversification in various ways, depending on their specific risk concerns. The proposed framework categorizes risks into three areas: currency, geography, and jurisdiction. Investors troubled by geopolitical tensions or the performance of the U.S. market may wish to branch out geographically in their asset

location or underlying investments domicile. To preserve purchasing power in the event the USD weakens, investors should carefully consider several factors before converting dollars to other currencies. Finally, concerns about asset safety under the U.S. legal and regulatory framework necessitate thoughtful navigation of tax and reporting pitfalls.

Of course, these risks are not mutually exclusive, and investors typically seek diversification on all fronts. In such cases, partnering with professional advisors who are familiar with various financial, legal, and tax issues is crucial for establishing and executing a sound investment strategy. ■

Charitable LLCs

*What's Good,
What's Not*



By Bruce A. Tannahill

What's better than making a charitable contribution to save taxes while supporting a cause you believe in? Add in the satisfaction of helping others, leaving a legacy, and even potential public recognition, and it can be a great move.

Some people want more—such as retaining control of the assets they donated without the restrictions applicable to private foundations or even public charities! Promoters of some charitable limited liability company (charitable LLC) structures would have you believe that their charitable LLC structure allows you to achieve all those benefits.

Not surprisingly, the Internal Revenue Service (IRS) disagrees.

Many people first learned about charitable LLCs when Facebook founder Mark Zuckerberg and his wife, Priscilla Chan, established the Chan Zuckerberg Initiative, LLC (CZI), in 2015 and pledged to give CZI substantially all of their Facebook (now Meta) shares or the net after-tax proceeds from the sale of those shares during their lives. However, the use (and misuse) of charitable LLCs predates CZI.

For many donors, potential tax benefits influence many aspects of their charitable contributions—including the choice of charity, the timing of the contribution, the assets contributed, and the amount contributed.

Contributing qualifying appreciated property held for more than one year to a charity that meets the requirements of Internal Revenue Code (IRC) section 170(c) is a very attractive way to save income taxes. That contribution

can generate two significant tax benefits: First, the appreciation is not subject to income tax. Second, the fair market value of the donated property (not just its basis) may qualify for the income tax charitable contribution deduction. The tax benefit received from the deduction depends on many factors, including whether the donee charity is a public charity or private foundation (discussed in detail below), the percentage limitations of IRC section 170(b), the donor's adjusted gross income and ability to itemize deductions, and compliance with the substantiation requirements of IRC section 170(f)(8).

LLCs are a very popular business entity. They generally provide liability protection for the members, business continuity, the ability to choose how they are taxed, flexibility in how they are managed, and few non-tax reporting or recordkeeping requirements.

Charitable organizations have traditionally been set up as either trusts or not-for-profit corporations. The flexibility LLCs offer has led many to explore the use of an LLC for charitable purposes instead of a charitable trust or not-for-profit corporation. In Notice 2021-56, the IRS set out specific requirements that an LLC's articles of organization and operating agreement must meet so the LLC can be recognized as tax-exempt under IRC section 501(c)(3). Because the first requirement is that all LLC members must either be tax-exempt under section 501(c)(3) or a governmental unit described in section 170(c), it's generally not possible to use an LLC in lieu of a charitable trust or not-for-profit corporation.

Basic Charitable Giving Income Tax Deduction Rules

IRC section 170 sets out the basic rules for income tax charitable contribution deductions, including percentage limitations, which vary based on whether

the donor is an individual or C corporation. An individual's charitable contributions may be subject to additional limitations based on the type of property donated and whether the donee charity is a public charity or private foundation. For example, in 2025, deductions for cash contributions to public charities are limited to 60% of an individual's contribution base (essentially their adjusted gross income), while deductions for contributing long-term capital gain property to a public charity are limited to 30% of the contribution base. Lower limits may apply to contributions to private foundations. Donors can carry any excess charitable contribution deduction forward for up to five years.

In addition, donors must comply with strict substantiation requirements set out in IRC section 170(f)(8) and Treas. Reg. §§ 1.170A-13, 1.170A-14, 1.170A-15, 1.170A-16, and 1.170A-17, which vary based on the value and type of the contribution. The IRS and courts often deny charitable contribution deductions simply for failure to follow the substantiation requirements. See, e.g., *Estate of Hoensheid*, T.C.M. (CCH) 2023-34; *Brooks v. Comm'r*, T.C.M. (CCH) 2022-122.

Typical Charitable Giving Structures

Congress has enacted requirements for an organization to qualify for tax-exempt status under IRC section 501(c)(3), which the Treasury and the IRS have amplified. The thrust of these requirements is that the organization must serve a public—not private—interest. In addition, charitable organizations are divided into public charities and private foundations. Public charities generally receive broad support from the public, including donations, grants, and government support, and usually engage directly

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Charitable LLCs are not subject to the same type of oversight and public scrutiny as tax-exempt organizations.

in activities to accomplish their charitable objectives. Private foundations generally draw their support from a small number of donors, who are often related, and often focus on making grants to other charitable organizations rather than engaging directly in charitable activities.

Individuals and entities wanting to establish a structure for personal charitable donations have traditionally used private foundations or donor advised funds. Charitable remainder trusts and charitable lead trusts are options for those wanting to retain an income interest or a remainder interest in the contributed property, respectively. For a comprehensive review of the tax considerations and different charitable giving vehicles, see Abbie M.B. Everist, *Charitable Giving Tax Considerations and Entity Structures*, 39 Prob. & Prop., no. 3, May/June 2025, at 10.

Using Charitable LLCs in Philanthropic Activities

The CZI structure is more than just an LLC—it includes a private foundation, the Chan Zuckerberg Initiative Foundation, which was established before the LLC; a donor-advised fund, the Chan Zuckerberg Initiative Donor-Advised Fund at the Silicon Valley Community Foundation; and a 501(c)(4) organization, the Chan Zuckerberg Initiative Advocacy, along with other entities established to carry out CZI's purpose.

Other examples of philanthropists

using charitable LLCs include Arnold Ventures, LLC, established by Laura and John Arnold, and the Emerson Collective, established by Laurene Powell Jobs, widow of Apple co-founder Steve Jobs. Similar to CZI, Arnold Ventures is an umbrella organization working with the Arnolds' private foundation, their 501(c)(4) organization, and their donor-advised fund.

For purposes of this article, we'll use CZI as an example of a traditional charitable LLC design. Unless otherwise indicated, this article uses CZI to refer only to the Chan Zuckerberg Initiative, LLC, and not any of its related entities. The use of CZI as an illustrative example in this article does not imply or indicate that CZI, its founders, or any related parties have engaged in any transactions described in IR 2024-304 (discussed below) or any other potentially noncompliant arrangement.

Transfers to a Charitable LLC

The donor transfers stock or other appreciated assets or the net after-tax proceeds from the sale of appreciated assets to the charitable LLC in return for LLC interests. Although the transfer is tax-free under IRC section 721, the donor receives no charitable deduction because the charitable LLC does not qualify as a Section 170(c) organization.

Charitable LLC Operations

LLCs can be managed either by one or more members (member-managed)

or by a manager, who can be but does not need to be a member (manager-managed). The Zuckerbergs are CZI's co-CEOs, but its website does not indicate if it is member- or manager-managed.

A charitable LLC such as CZI is a hybrid organization, able to use its resources to best accomplish its members' charitable and noncharitable objectives without being limited by restrictions on tax-exempt organizations, especially private foundations. In addition to making grants to charities, it can invest in for-profit organizations, make political contributions (subject to applicable federal, state, and local laws), and engage in lobbying and advocacy activities that Section 501(c)(3) organizations cannot.

Charitable LLCs are not subject to the same type of oversight and public scrutiny as tax-exempt organizations. Their tax returns are not subject to public disclosure, and they are not subject to oversight by a state attorney general. But any affiliated tax-exempt organization is subject to that oversight and scrutiny.

Charitable LLC Taxation

LLC taxation depends on the number of members and any election made by the members. By default, an LLC with a single member is treated as a disregarded entity. LLCs with two or more members are taxed as partnerships. For married taxpayers, Rev. Proc. 2009-09, 2009-1 C.B. 256, provides that an entity not treated as a corporation and owned solely by spouses as community property is considered a disregarded entity unless the spouses elect to treat it as a partnership for tax purposes.

When an LLC is taxed as a partnership, it is subject to the following income tax treatment for the establishment and operation:

- Contributions to the LLC in exchange for an LLC interest generally do not result in either the member or the LLC recognizing gain or loss.
- The LLC's income, gain, loss, deduction, and credit pass through to the members, allocated

among them pro rata, unless the LLC operating agreement provides for special allocations.

- The members then report the allocated amounts on their income tax returns. Members deduct their share of the LLC's charitable contributions on their income tax returns.

For estate tax purposes, the fair market value of a member's LLC interest is included in their estate.

Comparison to Traditional Charitable Giving Structures

Obtaining the flexibility and control of using a charitable LLC for charitable activities requires forgoing both tax-exempt status and the charitable contribution income tax deduction available to traditional charitable giving structures. In return, a charitable LLC is not subject to the numerous rules that govern organizations that qualify as tax-exempt under IRC section 501(c)(3).

Those rules include that the organization must serve a public—rather than a private—purpose; it must be organized and operated exclusively for one or more purposes specified in IRC section 501(c)(3); the organization cannot engage in prohibited political activities and lobbying; and it must comply with the prohibition against private inurement.

In addition, private foundations are subject to additional restrictions and requirements that include prohibitions on self-dealing, a 5% minimum distribution requirement, and limitations on investments. (For a thorough discussion of charitable LLCs in general, including how they benefit by not being subject to these rules, see Justin T. Miller, *Using and Abusing Charitable LLCs*, 27 Cal. Tax Law., no. 4, January 2019.)

Promoted Charitable LLCs

Charitable LLC members don't qualify for an income tax charitable deduction until the charitable LLC makes a grant or donation to a qualifying charitable organization, and they remain taxable on the charitable LLC's income. For these reasons, many potential donors find a charitable LLC unattractive, even though

it is more flexible and avoids restrictions applicable to charitable vehicles.

Long before CZI was announced, promoters had created charitable LLC strategies (a promoted charitable LLC) that try to overcome these limitations with the following strategy or variants:

- The promoter creates an LLC.
- The taxpayer transfers cash or other assets into the LLC for a 100% ownership interest in the LLC, generally consisting of a 1% voting interest and a 99% nonvoting interest.
- The taxpayer is appointed as manager of the LLC.
- The taxpayer transfers the 99% nonvoting LLC interests to a charity, retaining the voting interest, and claims an income tax deduction for the value of the donated interests—and the charity receiving the donation is often affiliated with or controlled by the promoter.
- The taxpayer, as manager of the LLC, loans some or all the charitable LLC's assets to themselves or a related entity at a favorable interest rate.
- Alternatively, the taxpayer or a related entity may have the option to repurchase the donated charitable LLC interest from the charity for less than its fair market value.
- The taxpayer claims a charitable contribution income tax deduction for the purported value of the LLC interests donated to the charity.

Common variants include using LLC funds to buy life insurance policies that benefit the taxpayer's heirs or a related party, possibly using a split-dollar arrangement, or the LLC's paying the taxpayer or a related entity an inflated management fee.

The promoter's involvement generally includes creating the documents that establish the LLC and transfer assets to the LLC and identifying charities that may accept the gift. They also may provide the appraisal and completed IRS Form 8283, Noncash Charitable Contributions, required to meet the substantiation requirements.

IRS Concerns About Promoted Charitable LLCs

A sign of the IRS's concern about charitable LLCs came in January 2017 when its annual No Rule List first included whether a deduction was allowed for donating an interest in an LLC (or a limited partnership) to a charity (Rev. Proc. 2017-3, 2017-1 I.R.B. 130, § 3.01(30)). It remains on the No Rule List as of 2025. Rev. Proc. 2025-3, 2024 IRB LEXIS 678, § 3.01(38)).

In IR-2024-304, the IRS warned taxpayers about these promoted charitable LLCs. I.R.S. News Release IR-2024-304 (Dec. 4, 2024). The IR (or generic legal advice memorandum) said that the IRS had seen hundreds of tax returns filed using what the IRS described as “an abusive charitable contribution scheme.” IR-2024-304 identified several problems with these strategies, including:

- A charitable deduction is generally not allowed for a contribution of less than an entire interest in property.
- Retaining the right to control the donated interest or repurchase assets disqualifies the transaction as a deductible charitable contribution.
- The promise that a charitable donation will provide any personal benefit other than the tax deduction.

Contributing an undivided portion of the taxpayer's interest in the property (such as all of a taxpayer's nonvoting membership interests in an LLC) is an exception to the denial of a charitable deduction for a partial interest in property. Treas. Reg. § 1.170A-7(b)(1)(i).

The IRS also listed some potential red flags that should cause taxpayers to scrutinize a transaction. Those red flags include:

- The plan requires creating one or more entities to make a charitable donation.
- The plan involves creating entities that do not engage in any business activity to facilitate a charitable donation.
- The taxpayer donates an interest in an LLC that loans cash or other

assets back to the taxpayer or a related party.

- The charity, as the LLC's majority owner, has no control over the LLC or its assets.
- The taxpayer can personally use the assets contributed to the LLC after the donation.
- The promoter requires the taxpayer to use specific appraisers, charities, or both.
- The appraisal fails to consider all facts and circumstances of the entire transaction, like the ability of the taxpayer to remove all assets from the LLC after the donation.
- The taxpayer uses LLC funds to buy life insurance policies benefiting their heirs or a related party after the donation.
- The taxpayer retains the ability to reclaim the donated LLC interests from the charity for less than fair market value.

In Notice 2004-30, the IRS had identified a comparable transaction involving S corporations as a listed transaction. Notice 2004-30, 2004-1 C.B. 828. That Notice focused on the transaction's attempt to shift the S corporation's income from taxable shareholders to an exempt organization, rather than on obtaining a charitable contribution deduction.

Classification as a listed transaction subjects participants, including the taxpayer, the exempt organization, advisors, and promoters, to tax shelter requirements. Depending on their role, those may include tax return disclosures, registration requirements, and list maintenance requirements, with potential civil and criminal penalties for violations.

Notably, in IR-2024-304, the IRS did not classify promoted charitable LLCs as listed transactions or another type of reportable transaction or indicate that it planned to issue Proposed Regulations that would classify them as reportable transactions. The IRS historically has used Notices, issued without following the Administrative Procedures Act (APA) requirements, to identify

reportable transactions. The Sixth and Eleventh Circuits and the Tax Court all have held that the IRS and Treasury must follow the APA's requirements in designating specific transactions as reportable transactions.

On December 30, 2024, the IRS released Action on Decision (AOD) 2024-52, stating it will follow those decisions in all circuits. AOD 2024-52, 2024 AOD LEXIS 1 (Dec. 30, 2024). Prior to the release of the AOD, it began identifying transactions as reportable transactions by issuing proposed and final regulations following APA requirements. The Treasury 2024-2025 Priority Guidance Plan includes "Guidance under Section 170 regarding charitable contributions" under General Tax Issues. The impact of cuts implemented by the Department of Governmental Efficiency on the IRS and Treasury staffing and budget on the IRS's efforts to curb charitable LLCs and other abusive structures remains to be seen.

IRS and Department of Justice Enforcement Actions Against Promoted Charitable LLCs

In IR-2024-304, the IRS said that it has "multiple active abusive promoter investigations underway and continues to audit donations of closely held businesses." It listed criminal cases resulting in guilty pleas of an attorney and other professionals who promoted the "Ultimate Tax Plan," a Promoted Charitable LLC whose structure was very similar to the Charitable LLC structure described in IR-2024-304, and one of their clients as well as a permanent injunction barring the attorney from promoting the Ultimate Tax Plan (discussed below).

Meyer Cases

Attorney Michael L. Meyer and two financial planners, Rao Garuda and Culin Fischel, promoted the "Ultimate Tax Plan," which used promoted charitable LLCs. In April 2019, a federal district court in Miami, Florida, issued a permanent injunction barring Meyer from promoting the Ultimate Tax Plan. And in April 2024, Meyer was sentenced to

eight years in prison and three years of supervised release, with restitution to be decided later. Garuda was sentenced to 20 months in prison and three years of supervised release and ordered to pay \$1,506,399 in restitution. Fischel was sentenced to four months in prison and three years of supervised release and ordered to pay \$268,605 in restitution. The client, Dr. Suman Jana, pled guilty and faced up to three years in prison, supervised release, restitution, and monetary penalties.

For a fuller discussion of the *Meyer* cases and the transactions involved, see Russell A. Willis, *Jack Straw Fortnightly*, Dec. 2019.

Tax Court Docketed Cases

In addition to criminal prosecutions, there were at least 11 cases on the Tax Court's docket at the time this article was written involving charitable LLCs, with two scheduled for trial in September 2025. The same 501(c)(3) organization owns 99% of the charitable LLC involved in both cases set for trial. That organization is also the partnership representative for five of the other nine cases, with its president and treasurer listed as the Tax Matters Partner for two other cases. In the two remaining cases, the captions originally listed that individual as the partnership representative but were amended shortly after the petitions were filed to remove that reference.

The pleadings and notices of final partnership adjustment in the two cases scheduled for trial and in a third case show the IRS using the same theories to attack these promoted charitable LLCs.

The government's primary theory is that the transfer of nonvoting units to the 501(c)(3) organization fails both prongs of the economic substance doctrine test of section 7701(o), causing the transaction to be disregarded for tax purposes and treated as if it never occurred. The first (objective) prong is that the transaction must change the taxpayer's economic position in a meaningful way (apart from federal income tax effects). The second (subjective) prong requires that the taxpayer

Comparison of Regular Charitable LLCs to Promoted Charitable LLCs

	Regular Charitable LLC	Promoted Charitable LLC
LLC voting/nonvoting interests	Allowed	Used
Normal form of charitable contribution	Cash or LLC assets	LLC interests
LLC usually donates some of its assets to charity	Yes	No
Donor uses LLC assets personally or borrows from LLC	No	Yes
Donor can buy LLC interests from charity for less than FMV	No	Yes
Charity controlled by promoter receives the contribution	No	Usually

must have a substantial purpose for engaging in the transaction (apart from federal income tax effects). Disregarding the transfer of the nonvoting interests to the 501(c)(3) organization means that it is not considered a member of the charitable LLC, and all its income or gains must be allocated to the donor.

The IRS asserted the following two alternative theories in one or more of these cases. The first is that the 501(c)(3) organization did not have sufficient economic or membership interests in the promoted charitable LLC to be treated as a bona fide partner and, thus, all income gains, losses, and credits of the promoted charitable LLC allocated to the 501(c)(3) organization must be reallocated to the donor and the capital accounts adjusted accordingly. The second is that the assignment of income doctrine applied because the donor never parted with dominion and control over the interest in the charitable LLC or its underlying assets and, thus, the income and profits allocated to the 501(c)(3) organization should be treated as taxable to the donor.

Regardless of which theory is used, the IRS contends that all Schedule K-1 entries should be reallocated from the 501(c)(3) organization back to the donor and the capital accounts adjusted to reflect the reallocations.

In addition, the IRS asserted various penalties in the alternative, its primary position being the 40% accuracy-related penalty under section 6662(b) (6) and (l), asserting the underpayment was attributable to a transaction lacking economic substance.

Alternatively, it asserted that the 20% negligence penalty under section 6662(b)(1) and (c), the 20% substantial understatement penalty under section 6662(d), or both applied.

The chart above compares characteristics of a regular charitable LLC to a promoted charitable LLC.

Conclusion

A charitable LLC can be an effective charitable planning tool to segregate assets intended for charitable purposes, similar to a private foundation or donor-advised fund. It is not a

tax-exempt organization, however, so contributions to it do not qualify for the charitable contribution income tax deduction and it doesn't provide any tax benefits. Forgoing the tax benefits means that the charitable LLC is not subject to the rules that apply to section 501(c)(3) organizations, including private foundations.

But using a promoted charitable LLC to create a charitable contribution deduction while retaining control of the LLC assets can result in income tax problems for the LLC and those associated with it. The IRS has attacked these arrangements with multiple enforcement efforts, including reallocating all K-1 income allocated to the 501(c)(3) organization to the donor upon audit; obtaining an injunction barring a promoter from marketing abusive strategies; prosecuting promoters and taxpayers involved; and publishing IR-2024-304 to highlight its concerns.

Attorneys, other advisors, and clients should be careful when considering a transaction similar to those described in IR-2024-304. ■

**BEST
PRACTICES
SUGGESTIONS
FOR MORE
EFFECTIVE
TRUST
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**TRY TO SEE
IT MY WAY**

By Jay E. Harker





Struggling in vain to impose his will on some inaccessible, unyielding device, my father would shake his head and say, “If the engineers who designed this had to work on it, they would have designed it differently.” Estate planners weave intricate tapestries from statutory and common-law concepts around ownership, control, valuation, liability, and taxation, in the context of a particular client’s goals and circumstances. It’s a challenging intellectual enterprise.

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Trustees are the implementers of these plans. Theirs is a decidedly practical endeavor, with rubber-meets-the-road responsibility to transmute a trust agreement’s directives into actions. Sometimes language in a trust agreement can unintentionally create confusion or practical administrative difficulties for a trustee. This can lead to disagreements among beneficiaries, or between a beneficiary and a trustee, that can incite family infighting, expose a trustee to second-guessing, or lead to costly litigation. Here are some best-practices suggestions for avoiding five sorts of drafting pitfalls.

I’m Looking Through You and You’re Nowhere: Failed Bequests

Clients often designate gifts of specific tangible or intangible property to beneficiaries upon the termination of a trust or estate. Joan’s trust says, “I give my granddaughter Rose the IBM stock in the account managed by my advisor Maxwell at Apple Asset Management Co.” and “I give my cottage on Lake Wazzapamani to my granddaughter Valerie” (all examples throughout are based on language from actual trust agreements).

If the stock or the cottage is not found in the trust estate, the gift is adeemed (extinguished). But determining whether specifically referenced property is in a trust or estate may be easier said than done. There are several ways the stock intended for Rose might fail to exist. The account at Apple Asset Management Co. may hold no IBM stock because it was sold, for example, or the account itself may have been closed and the stock transferred to an account at Boogaloo Asset Management Co., where Maxwell is now employed. Does the gift therefore fail, and is Rose out of luck?

In some jurisdictions the answer may be “yes,” but in others the success or failure of the gift may depend on other factors. For example, the gift could fail if Joan caused or was aware of the adeeming action (selling the stock, for example), but it might not fail if the

stock was sold by a guardian, agent, or trustee to provide support for Joan during her incapacity. *See In re Estate of Graham*, 533 P.2d 1318 (Kan. 1975).

In order to determine the gift’s fate, some courts have engaged in tortuous analyses to ascertain whether the potentially adeeming action changed the form or the substance of the gift. For example, selling the IBM stock and reinvesting the proceeds in Dell stock could be regarded as a mere change in form, not resulting in the gift’s extinction, but purchasing a car with the proceeds might be regarded as a change in substance, resulting in ademption. Such metaphysical tap-dancing has produced wildly inconsistent and unpredictable results across jurisdictions. *See Nichole M. Paschoal, The Problem of Replacement Property in the Law of Ademption*, 44 ACTEC L.J., no. 2, Mar. 2019, art. 3.

Further, there is less than complete consistency about what the beneficiary is entitled to receive if the lake cottage is absent, but the gift is nevertheless determined not to have failed because the trustee sold it to raise funds during Joan’s incapacity. Some courts may hold that Valerie is entitled to receive the full value of the sale proceeds, but others may say she is entitled to what remains from those proceeds. *See In re Estate of Anton*, 731 N.W.2d 19 (Iowa 2007).

Best Practices Suggestions. Perhaps it’s best to circumvent the complicated rules around ademption and their attendant uncertainties altogether by anticipating a failed gift. Planners therefore should be thoughtful about how gifts are described. For example, clients sometimes say, “Give my account at Apple Asset Management Co. to Pam and my account at Boogaloo Asset Management Co. to Sadie.” But if the trust agreement names a corporate successor trustee, it will close those accounts, bring the assets in-house, and comele them when it becomes trustee, guaranteeing that the referenced accounts will not exist when the trust distributes. So, in general, it may be best to avoid describing gifts by reference to specific accounts at specific institutions, or by

“When I use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean—neither more nor less.”

– Lewis Carroll, *Alice Through the Looking Glass* (1871)



reference to proceeds from the sale of a particular asset (“sell my house at 909 Penny Lane and distribute the proceeds to Madonna”). The best way to avoid the ademption morass is to specify what happens if the particular account, security, real estate, painting, LLC, or other property is not in the trust or estate because it has been sold, substituted, spent, given away, stolen, or destroyed, or has otherwise disappeared.

You Say Goodbye and I Say Hello: Contradictory Clauses

Sometimes clauses in a trust agreement don’t play well together because one contradicts another. This can happen if custom-drafted language conflicts with boilerplate. Rocky’s trust agreement calls for the creation of separate trusts for his children. Article III says that “the separate trust for a child of the grantor shall terminate when the beneficiary attains age 35,” but Article VI says that “each beneficiary of a separate trust created hereunder shall receive full distribution of their share at age 50.” Rocky’s daughter Nancy, 37 years old at the time of his death, will surely have an opinion about which article reflects her father’s intent.

Article III of Rocky’s trust provides that a deceased child’s share passes to

his or her issue, but a provision under Article VI says that a deceased child’s share shall be allocated equally among the shares for Rocky’s then-living children. Nancy also has an opinion about this because her older sister Lil predeceased Rocky, survived by children who likely hold an opposing opinion.

A contradiction that is evident simply from reading the document is a patent ambiguity. One way to resolve the ambiguity is to seek a judicial determination, which takes time and costs money. The court may entertain extrinsic evidence or invoke applicable “rules of construction” to determine the trust creator’s intent. *See McGlothlin v McElvain*, 95 N.E.2d 68, 70 (Ill. 1950).

Best Practices Suggestions. When drafting custom language about trustee succession or appointment, distributions, amendments, or other crucial matters, (i) review the rest of the document to ensure there isn’t a conflicting rule and (ii) consider introducing the newly drafted provision with language such as “Notwithstanding any provision herein to the contrary ...” if the intent is for it to prevail in case of a conflict. If a corporate successor trustee is named, ask for a review; they’re generally pretty good at spotting patent ambiguities.

You Know My Name (Look Up the Number): Imprecise or Incorrect References

Clients often refer to entities such as corporate trustees or charities in their trusts and wills, and difficulties can ensue if the designation of an entity is unclear. For example, Desmond’s trust says, “In case of the grantor’s death, resignation, or incapacity, Apple Asset Management Trust Department shall be the successor trustee,” and it later says, “all the rest, residue, and remainder shall be distributed free of trust to St. Mary’s University.”

Many post-secondary schools have “St. Mary” or “St. Mary’s” in their names. A Google search returned 16 institutions, four of which are named “St. Mary’s University.” Therefore, the direction to distribute the residue to St. Mary’s University is ambiguous. Unlike contradictory clauses, however, this ambiguity is not evident from a simple reading of the trust but is revealed in light of extrinsic facts. This is a latent ambiguity. References to individuals can be ambiguous, too. For example, Desmond’s trust says, “give \$100,000 to my grandson Chuck,” and at the time of distribution the trustee discovers two grandsons named Chuck.

References to entities or people also can go awry if they are simply incorrect. For example, Desmond has an account with Apple Asset Management Co., so he designated “Apple Asset Management Trust Department” as successor trustee, believing this indicates his investment company’s trust division. But there is no legal entity named “Apple Asset Management Trust Department.” The correct name for the affiliated trust services provider is “Apple Trust Company.” Therefore, Desmond’s successor trustee designation is ineffective.

Like latent ambiguities, incorrect references usually cannot be discerned simply from the language in the trust agreement. Desmond’s failed trustee designation could result in a vacancy in the office of trustee. Filling that vacancy could be difficult if applicable state law requires a large number of beneficiaries, or beneficiaries with competing interests, to cooperate.

Incorrect designations can cause

practical as well as legal problems. Transfer agents, banks, title companies, or insurance companies may require an exact match between the name in the trust agreement and the entity's actual legal name before paying insurance proceeds or transferring title to real estate, bank accounts, stock, and so forth.

When presented with a latent ambiguity or incorrect reference, a trustee may seek a court order for clarification. This will entail delay and expense. The court may invoke applicable rules of construction and also may consider extrinsic evidence. For example, the court may want to know whether Desmond attended one of the schools named St. Mary's University or whether one of the grandchildren named Chuck was born after his trust was executed.

Best Practices Suggestions. The best course is to strive for precision when referring to entities so that references are unambiguous and correct. Verify the names. Frankly, it is so easy to look up the correct name of a charity or fiduciary online, or to pick up the phone and call someone, that the failure to do so is inexcusable. Consider including

an address or other identifying information to help the trustee or executor resolve any uncertainty.

Say the Word I'm Thinking of: Vague Terms

Sometimes language in a will or trust poses problems for a trustee, not because it's ambiguous or incorrect, but because its meaning is too vague to be useful. Jojo's trust creates a marital trust at his death for the benefit of his spouse, Loretta. The trust terminates if Loretta "remarries or is in a committed relationship." The agreement also creates a trust for his daughter Lucy Diamonds, who is entitled to the net income as long as she's in school and "maintains acceptable progress toward graduation."

How does the trustee ascertain whether Loretta is in a committed relationship? Does that mean she and her partner Dan are dating each other exclusively? What if they do so but only see each other once a month? Or does it mean that they are cohabitating? And what does that mean? That they share the same house? All the time? Once or

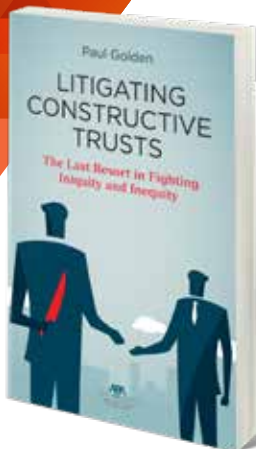
twice a week? Does it mean that Loretta keeps clothes in a closet at Dan's house, or vice versa? Or does it apply only if Loretta and Dan are formally engaged?

This is important because a trustee may be subject to criticism from Loretta for terminating the trust or suspending distributions, or to criticism from remainder beneficiaries for failing to do so. Certainly your clients do not wish to subject their successor trustees to such dilemmas. Similar issues about vagueness arise with respect to Lucy's "acceptable progress" toward graduation.

Best Practices Suggestions. The devil is in the details, and there is no substitute for clarity. Some trust agreements include definitions of key terms, which can forestall potentially contentious disagreements. Terms such as "committed relationship" or "acceptable progress" can be defined. In addition, consider including some examples that may be offered "by way of illustration and not by way of limitation," or a few words that may dispel some confusion. For example, tell the trustee and the beneficiaries whether "my cottage on

Litigating Constructive Trusts

By Paul Golden



Unlike traditional express trusts that are planned well in advance with all parties involved agreeing to roles as trustee and beneficiary, a constructive trust is one created solely by a judge as a distinct remedy—powerful, nuanced, and often complex and daunting. Whether you are litigating in their favor or defending in such a case, this book is an essential guide on the topic, covering crucial considerations a practitioner will need to know including strategies for handling pleadings, discovery, motion practice, and trials.

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**An ounce of prevention
is worth a pound
of cure.**

—Benjamin Franklin

Lake Wazzapamani” includes the jet ski, lawn mower, furniture, dishes, fishing tackle, pickup truck, stuff in the shed, or other items.

Help! Directives That Are Difficult to Administer

Eleanor’s will provides that “all the personal property that may have belonged to my sister Julia’s family goes to Julia’s daughter, Prudence.” It also says that “Mr. Kite shall receive \$50,000 if he ever provided services to my sister Rita as Agent under her Durable Power of Attorney.”

This language is not ambiguous, incorrect, or vague. It’s problematic because compliance may be difficult from a practical point of view. When gifts or distributions are conditional, it may be difficult for an executor or trustee to ascertain whether the condition is satisfied. Eleanor’s executrix, Michelle, may have no idea what items among Eleanor’s tangible personal property came from Julia’s family.

Should she ask Prudence and take her word for it? What if Prudence doesn’t know? Likewise, there may be no evidence whether Mr. Kite did anything as agent under Rita’s power of attorney. Should Michelle ask him? Should she take him at his word?

When distributions are conditional, the trustee not only has to clearly understand what the condition is, but also how to determine whether the condition is met. For example, if a beneficiary is denied distributions if she “possesses or uses illegal drugs,” the trustee should be told what to accept as conclusive evidence.

Further, the trustee needs to know whether the trustee is expected to be an active investigator. Does Jojo’s directive that Loretta loses her benefits if she’s in a committed relationship imply that the trustee needs to take steps to determine whether she is? If Jojo’s son Dave, a remainder beneficiary, tells the trustee that Loretta is in such a relationship, does that trigger a need to investigate?

What constitutes an adequate investigation? A stated or implied expectation around active inquiry may prove uncomfortable or burdensome for an individual trustee, or cause a corporate trustee to decline to serve.

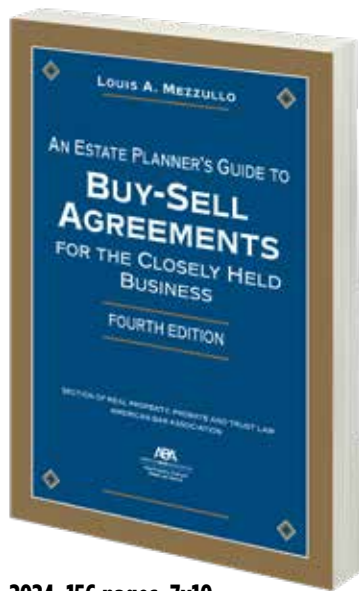
Best Practices Suggestions. When distributions are conditional, tell the trustee not only what the conditions are, but also how to determine whether the conditions have been satisfied and whether the trustee is expected to actively investigate. Also, clearly describe the consequences of the failure of the condition (a positive drug test, confirmation of a committed relationship) and whether the failure can be cured (e.g., by a subsequent clean drug test, or the termination of the relationship).

These best-practices suggestions are offered as a bit of preventative care to help reduce the likelihood of contention among beneficiaries and trustees and of potentially costly litigation. ■

AN ESTATE PLANNER'S GUIDE TO BUY-SELL AGREEMENTS FOR THE CLOSELY HELD BUSINESS

FOURTH EDITION

By Louis A. Mezzullo



2024, 156 pages, 7x10
Paperback/ebook
PC: 5431140
Price: \$139.95 (list)
\$119.95 (RPTE Members)



This book is a comprehensive guide to buy-sell agreements for estate planning attorneys and other professionals who advise closely held businesses and their owners. It includes a detailed discussion of the objectives of a buy-sell agreement, which are the reasons for having such an agreement. There is also a detailed discussion of the drafting issues, including tax and nontax issues. The focus is on accomplishing the objectives of the owners in the business and in avoiding potential conflicts.

There is a detailed discussion of establishing the value of an interest in a closely held business for estate tax purposes, and when the price under a buy-sell agreement can establish that value. The book also covers income tax consequences and includes a discussion of special considerations in connection with drafting buy-sell agreements for S-Corporations, partnerships, and professional corporations. The book also covers considerations in valuing an interest in closely held businesses and unique problems when dealing with family-owned entities.

This fourth edition reflects changes to the tax code made by the Tax Cuts and Jobs Act of 2017 and includes a discussion of the *Connelly* case, which dealt with when the price under a buy-sell agreement will establish the value for estate tax purposes and whether life insurance proceeds used to purchase the interest of a decedent owner in the business should be included in the value of the business for valuing the decedent's interest in the business for estate tax purposes.

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Real Property, Trust and
Estate Law Section

ENVIRONMENTAL LAW UPDATE

California Wildfires, Texas Floods, and Other Climate Disasters Underscore the Emerging and Critical Role of ASTM's Environmental Resilience Standard

The Property Resilience Assessment Standard

To address the growing challenges posed by escalating climate uncertainties in the real estate sector, in October 2024, ASTM International (ASTM), formerly known as American Society for Testing and Materials, published the "Standard Guide for Property Resilience Assessments," Standard E 3429-24.

This new standard assesses how properties withstand and adapt to evolving environmental threats. By way of background, for over a century, ASTM has created and published various consensus standards that guide "best practices" in industries such as construction, real estate, engineering, and environmental management. These standards are widely used in regulatory compliance, contractual agreements, and industry best practices to ensure a consistent and reliable framework for evaluating risks and assessing performance.

Real estate industry professionals and environmental and real estate attorneys have long relied on ASTM's Standard E 1527-21 for Phase I Environmental Site Assessments (ESAs) to ensure that "all appropriate inquiries" are met under environmental statutory requirements. Standard E 3429-24 is intended to constitute a forward-looking "resilience assessment" for a property and to provide a new, timely

Environmental Law Update provides information on current topics of interest in the environmental law area. The editors of *Probate & Property* welcome suggestions and contributions from readers.

tool known as "Property Resilience Assessments" (PRAs). A PRA is intended to assess potential climate-related threats, evaluate a property's vulnerabilities, and recommend strategies to enhance resilience.

Implementing the Property Resilience Assessment

In practice, a PRA may be organized into up to three distinct stages:

Stage 1—Hazard Identification.

This stage identifies potential natural hazards that may affect a property. The PRA process includes evaluating a broad range of hazards and risks that may affect the property, including, among others, (i) extreme temperature fluctuation, (ii) geologic phenomena such as earthquakes and coastal erosion, (iii) flood or drought conditions, (iv) wildfires, and (v) wind-related threats, including tropical cyclones, tornadoes, and hurricanes. The findings are intended to provide a qualitative assessment of risk levels associated with each applicable hazard, indicating both the severity and the relative frequency of each identified hazard.

Stage 2—Risk Evaluation. This stage evaluates the risks posed by the hazards

identified in Stage 1. It includes an assessment of potential safety concerns, structural vulnerabilities, and functional recovery time. The analysis considers the possible harm that the risks could cause by incorporating both qualitative assessments (e.g., damage risks can be expressed on a multi-level system of "high, medium, or low") and quantitative assessments (e.g., damage risks can be expressed as the estimated monetary cost of repair or the ratio of damage to the overall property).

Stage 3—Resilience Measures. This stage identifies conceptual resilience measures to enhance property-level performance and recovery. In Stage 3, information from Stages 1 and 2 is analyzed to identify potential measures to enhance a property's ability to endure the risks identified in Stages 1 and 2. The analysis recommends resilience measures that the property owner may take, broken into three distinct categories: (i) accommodate (e.g., elevate buildings and mechanical systems), (ii) protect (e.g., build seawalls around the subject property), and (iii) retreat or relocate (e.g., remove or relocate a building and related infrastructure).

Flexible, Forward-Looking Focus

Importantly, ASTM clarifies that the are intended to provide a "flexible approach" to facilitate property-level decision-making, rather than to prescribe a particular course of action concerning the subject property. Traditional due diligence tools used in real estate transactions assess pre-existing property conditions, such as a Phase I ESA or a Property Condition

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Assessment (sometimes called a Property Condition Report). In contrast, a PRA offers a forward-looking perspective that is inherently more subjective. The subjectivity of the PRAs may lead to additional negotiations among the parties involved with a property transaction (e.g., a borrower and its lender), but the PRAs will provide all parties with a more comprehensive understanding of future property risks and therefore enable more informed decision-making regarding investments in the property.

Although PRAs and Standard E 3429-24 have not yet been widely adopted by the real estate industry as the market standard, they are receiving attention. A growing number of third-party providers are actively marketing their services to produce these reports. Some providers note that the anticipated cost for a PRA is similar to that of a Property Condition Assessment, although it varies based on the property size, the asset's complexity, and the number of hazards being considered. Standard E 3429-24 recommends that these providers possess a professional designation in architecture, engineering, or science and three to five years of experience in building performance, natural hazard mitigation, or resilience fields, applicable to the subject property.

As PRAs become more commonplace, they could provide assistance and guidance for professionals who look to participate in transactions in markets that face perceived environmental threats or hazards. They can help evaluate whether a particular property faces potential future environmental risks.

What to Look for in a PRA Consultant

A Phase I ESA is subject to the ASTM standard and the corresponding U.S. Environmental Protection Agency (EPA) regulation. The Phase I must be performed by an environmental professional who meets specific standards and complies with EPA's All Appropriate Inquiries requirements. In contrast, ASTM's PRA standard provides only non-binding recommendations for

PRA consultants, and no corresponding federal regulation exists. Thus, it is essential to select a PRA consultant with experience with the specific type of property, hazards, risk evaluations, and potential resilience measures most likely to affect the property and the transaction or operational concern at issue—e.g., reducing insurance premiums by identifying and implementing steps to limit wind damage and flooding from storms at a low-lying property. A different PRA consultant may be more suited for a different type of project—e.g., improving energy efficiency at an office park located in an area where utilities are expected to substantially increase their rates due to new, high-energy-consumption data center developments or climate-related threats to the power grid.

Takeaways

ASTM's PRA standard is becoming more relevant as climate events such as wildfires, floods, earthquakes, and other natural disasters occur more frequently and impact more areas of the United States and other countries. As illustrated by the devastating Texas floods in July 2025 and the California wildfires in January 2025, properties that have been considered safe for many decades have been the site of not only property damage but also human tragedies of injury and death.

These tragedies have demonstrated that relying on weather forecasts and increasingly underfunded Federal Emergency Management Agency is insufficient. The impact of these and similar climate-related events is creating increased caution and trepidation among property owners, operators, sellers, and buyers, as well as their lenders and insurers. All these multiple affected parties, as well as their real estate and environmental counsel, should strongly consider selecting and retaining PRA consultants with specific experience in the property and project at issue to perform a PRA. As always, the consultants should prepare their reports in draft form for client review and comment, so the final product reflects the knowledge of both the client and the consultant. ■

STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

(PS Form 3526, July 2014)

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TECHNOLOGY PROPERTY

Meeting Your Ethical Obligations When Using Generative Artificial Intelligence

In the last Technology–Property column, titled “The Verdict Is In: Your Ethical Obligations When Using Generative Artificial Intelligence” (Prob. & Prop., Jul/Aug 2025), we discussed general rules for how attorneys can use Generative Artificial Intelligence (GAI) in accordance with ABA ethics rules. As discussed, there are many different programs, and your firm will have to research each one to satisfy your Model Rules of Professional Conduct (MRPC) Rule 1.1 expectation of competency in legal tools. Lawyers already know how to do research, ask experts, read through legal documentation, and so on. But a new and rapidly shifting field like AI can still be rightfully daunting.

So, let’s start on the right path, reviewing how common GAI apps’ security claims and industry-wide standards match MRPC Rules 1.6 (Confidentiality of Information) and 5.3 (Responsibilities Regarding Nonlawyer Assistance) for everyday tasks. This should also provide an example of how you can test and research tools for reliability on your own, fulfilling your MRPC Rule 1.1 (Competency) obligation. For our purposes, we will use a set of GAI tools you will likely have already heard of: ChatGPT, the Microsoft Word Copilot Add-on, Lexis+ AI, NetDocuments’ NDMax Suite, Spellbook, Robin AI, Westlaw Precision with CoCounsel, and Ask Practical Law.

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Technology—Property provides information on current technology and microcomputer software of interest in the real property area. The editors of *Probate & Property* welcome information and suggestions from readers.

External Leaks

This article will separate data leaks from data breaches by intent. If computer data reaches unauthorized parties who sought it out, that’s a data breach. If data is shown to unauthorized people unintentionally, that is a data leak. The article will further distinguish between external leaks and internal leaks, discussing external leaks now and leaving internal leaks for later.

External leaks in this framing, outside of the context of AI tools, are primarily down to user error. But in the context of AI tools, the source of the problem can be much more technical. A large language model (LLM) leaks heavily to other users by default unless it is provided with strict rules on information permissions.

This problem is compounded when an LLM-based app includes a default prompt recording feature, which saves your prompts and feeds them back into the LLM as training data. This is a feature turned on by default in every ChatGPT plan below the Team and Enterprise levels, though you can still opt out through the settings page. Suppose the core model behind a tool comes from a company like Anthropic, which promises that their free consumer-focused chatbot Claude.ai does not train on your inputs or outputs

without opt-in consent. In that case, this does not mean that the company that has licensed that model for the tool is doing the same. Most tools are based on models created by a few large companies like OpenAI and Anthropic, but third-party companies licensing out these tools are not bound by any rule to copy the data usage policy of the tools put out by the original companies.

Hackers and Data Breaches

Data breaches are intentional actions that result in private or confidential data reaching unauthorized people. Hackers are not the only source of data breaches but are the primary concern when using new digital and web-hosted technology. There are many ways to gain illicit access to digital data. Much of it requires social engineering, a fancy term for tricking people into giving away their passwords and access codes. GAI can also be used in social engineering to craft convincing “bespoke” spam emails or automate a massive email blast to hundreds or more accounts.

But the rise of LLM chatbots integrated into websites and databases created a new hacking method: prompt injection attacks. These attacks involve exploiting public chatbots tied to broader LLMs with access to sensitive data to gain access to said data. The more digital tasks a company ties a single model into, the more watchful it must be for these loopholes.

One common type of prompt injection attack is prompting a chatbot to translate a piece of text from another language to English, with said piece of text telling the model to ignore all prior instructions (including safeguards

added via prompt), then do an unauthorized action. Yes, it can be that simple. One way to guard against this is to keep AI integrations focused, using separate models for each task, or at least keeping separate public-facing and internal models.

These are just a selection of the ways hackers can use overreliance or a lack of safeguards to access your data through AI without breaking any encryption.

Internal Leaks

Internal leaks are defined as the unintentional discovery of data input by users within a large but select organization, by other users within that organization barred from learning or using that data by legal, ethical, or administrative walls. The governing principle behind the methods to prevent this (as well as other leaks, hacks, and human error) is called the “principle of least privilege.” Essentially, this means that both software and users should be given access to the least amount of data and software functions that will allow them to do their assigned jobs or tasks.

Eddie Satterly, the head of development and intellectual property at Tracer Labs, an internet privacy software company, suggests creating multiple, separate data repositories. One repository would contain all the public information relevant to your firm and its matters, such as court rulings and outcomes. Then there would be a separate, marked repository for each matter containing all the privileged information related to it. Then, create a rule that only information from the public repository can be input into GAI. Whatever LLM your firm is using will be given keywords and other signals to look for in prompts that would signify they contain privileged information like attorney-client communications or pleadings and be instructed to inform users about any attempt to break this boundary. Notably, Satterly mentioned that the LLMs would not be able to prevent a user from telling the LLM to answer questions about privileged data after the warning but instead would just say that the clear warning and the

logging of the prompt would make finding and censoring those who break confidentiality easier.

“That’s what [Lexis+ AI] was built for, right?” Satterly said. “So that decisions and rulings and all that go into a common space because they’re common information, and the internal proprietary communications and specific case communications are stored in a completely separate data source, so you don’t have cross-contamination or cross-access of platforms.”

How Far Should You Trust AI Safety Certifications?

At this point, someone in your firm may ask why all this involved tech research is necessary. There are already third-party digital security audits that companies can undergo regularly to obtain and display safety accreditation. These include the SOC 2 audit of the American Institute of Certified Public Accountants (AICPA) and the European Union’s compliance requirements under the General Data Protection Regulation (GDPR). The International Organization for Standardization (ISO) also has two different information security standards: ISO/IEC 27001 for general purposes and ISO/IEC 42001, a more recently developed standard for AI systems. These are all widely used standards in the AI world.

But though it would be nice to offload the burden of research to trained field experts, multiple sources expressed their own reservations about the reliability of current security standards because of GAI models’ relative youth and lightning-quick technical progress.

“There’s no certification that’s going to help you in this space. It’s too new,” Satterly told me. “[One] of the better things to do is look at different case laws...and look at rulings that have gone against the company or the platform.”

“You mentioned SOC 2. The problem there is this is driven by CPAs. Nothing against CPAs, but they just aren’t cyber professionals,” said Terry Kurzynski, who runs the information security consulting firm HALOCK Labs and is currently building two digital security

and safety standards of his own.

“Much of the standardization out there hasn’t been fine-tuned on the latest technologies,” according to Professor Nikolas Guggenberger, an assistant law professor at the University of Houston, who is studying and consulting on online speech and regulating emerging technologies. “The GDPR ... was put in place in 2018. That was before the current generation of [LLMs] hit the market.”

Of all the security standards mentioned above, only ISO 42001 is built specifically for AI. I have yet to find another primarily AI-focused security standard, especially one that is not widely used. ISO 42001 also sees less use than the other three right now.

A Race Against Industry Trends

Perhaps the 2024 Stanford University study “Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools,” cited in the ABA’s Formal Opinion 512, best states the dilemma’s core.

“Lawyers’ ability to comply with their professional duties ... is contingent on access to specific information about empirical risks and benefits of legal AI,” the authors wrote. “Yet, so far, no legal AI company has provided this information.”

About a year after this was written, it is still largely true. Most AI companies tightly guard the secrets of their own programs, and the inner workings of even the open-source models are still under scrutiny from the research community. Technically, a firm could devote IT resources to rigorous experimental testing of the reliability of every AI product it uses, but how many firms could afford the expense and delay?

Avoiding the issue altogether is no longer an option. GAI is quickly and constantly being inserted into many industry-crucial programs and parts of the Internet we used to take for granted, like search engines. So even if you cannot do the testing yourself, you have an ethical duty to look into the most commonly used apps and programs and determine whether it’s worth looking for non-AI alternatives. ■

LAND USE UPDATE

Recent Court Decisions

Land Use Disputes About Latter-Day Saints Temples

In Cody, Wyoming, a city of 10,000, the Church of Jesus Christ of Latter-day Saints (LDS) proposed a 10,000-square-foot temple 24 feet high with a 100-foot steeple. The site is in a rural residential zone with a 30-foot height limit. The Planning, Zoning, and Adjustment Board approved a site plan with conditions and a conditional use permit. The Board inadvertently accepted the city planner's statement that the city does not have to consider the steeple when calculating the temple's height.

Local residents, organized as Preserve Our Cody Neighborhoods, appealed the site plan and the conditional use permit approvals, but the Supreme Court held that the appeal was untimely. The Board's approvals of the site plan and permit were final administrative decisions, and the time to appeal had expired. The Board issued the permit, and construction has started. *Preserve Our Cody Neighborhoods v. Church of Jesus Christ of Latter-Day Saints*, 570 P.3d 421 (Wyo. 2025). For an artist's rendering of the church, see tinyurl.com/saintem.

In Fairview, an upscale Dallas suburb of 11,000, the LDS proposed a large temple with approximately 45,000 square feet and a 174-foot steeple, far exceeding the residential zoning height limit of 35 feet. The LDS claimed that the town's refusal to approve a conditional use permit violated its rights under the Texas Religious Freedom Restoration and the federal Religious Land Use and Institutionalized Persons Acts.

Land Use Update Editor: Daniel R. Mandelker, Stamper Professor of Law Emeritus, Washington University School of Law, St. Louis, Missouri.

The LDS and the town engaged in mediation in which the LDS agreed to a 30,000-square-foot, single-story building with a 120-foot steeple. The town indicated that it still might reject the building, but ultimately approved the permit for the negotiated design because it appeared that the LDS were ready to sue if the town rejected the building. *LDS Church Wins Bitter Temple Fight But Loses Some Ground On The P.R. Front*, Salt Lake Tribune, April 30, 2025 (with artist rendering), tinyurl.com/fairlds. See also *Martin v. Church of Jesus Christ of Latter-day Saints*, 747 N.E.2d 131 (Mass. 2001) (invalidating steeple restriction).

Eighth Circuit Holds Water System Requirement and Private Well Prohibition Are Not Takings

In *Becker v. City of Hillsboro*, 125 F.4th 844 (8th Cir. 2025), a suburban county seat south of Saint Louis prohibited the use or construction of residences unless they were connected to the city water system and prohibited new private wells inside the city limits. In 2000, the city annexed a 156-acre property with the consent of its owner, a trust. In 2022, the trustees claimed that these requirements were a taking of property. The Eighth Circuit held that a taking did not occur.

The court held that a *per se* physical taking did not occur because the property had not been physically occupied. The city did not compel the trustees to do anything at all, as they could comply with the ordinances and build a residence or refuse to comply and not build one. Neither did a taking occur because the trustees could not make "any use" of the property. The property did not have to be left vacant and idle; it could still be used for recreational purposes or sold.

A categorical *per se* taking did not occur

under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). A taking occurs under *Lucas* only if there is a loss of all economically beneficial use of the land. The city's regulations did not prevent the construction of permanent habitable structures; they merely imposed water-system requirements on the use or construction of residences. The trustees' expert did not suggest that the property had no value; the property had substantial value despite the city's regulations.

A taking did not occur under the three-factor takings test adopted in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The first factor, economic impact, favored the city because the trustees did not prove that the regulations had a significant economic impact on the parcel as a whole. The city wanted only to require a water connection for that part of the property that the trustees expected to subdivide. The absence of a water connection limited the use of the property, but a taking does not occur just because a landowner is prevented from putting her property to its most beneficial use.

Reasonable investment-backed expectations are the second *Penn Central* factor. The trustees' expectation that they could develop the property without city water connections was unreasonable because it was unilateral. The city's private-well prohibition was in place in 2000 when the trustees' property joined the city, and this fact helped shape the trustees' expectations.

The third *Penn Central* factor requires a court to consider the character of the governmental action. Under this factor, a taking may be found more readily when an interference with property can be characterized as a physical invasion by the government. A taking is less likely to be found when, as here, the "interference

arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Penn Central*, 438 U.S. at 124.

New York Court Rejects Arts Fund Fee That City Requires to Convert Live Work Quarters for Artists to Unlimited Residential Use

In *Coalition for Fairness in Soho & Noho, Inc. v. City of New York*, 221 N.Y.S.3d 89 Mem. (App. Div. 2024), the city’s Special SoHo-NoHo Mixed Use District allowed current owners of joint live work quarters for artists (JLWQA) to convert their units to unlimited residential use if they contributed “\$100.00 per square foot of floor area to be converted” to an Arts Fund. Similar exactions have required the payment of a fee into an affordable housing fund when apartments were converted into condominiums.

The court held that the Arts Fund fee was a permit condition that had to meet the U.S. Supreme Court’s exaction tests modeled on the unconstitutional conditions doctrine. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court held that a permit condition is constitutional only when there is an essential nexus to the government’s land use interest. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court held that the impact of a land development on a land use interest must be roughly proportional to a permit condition.

The city did not meet the *Nollan* test because it did not identify an essential nexus between the Arts Fund Fee and the city’s land use interest. The Department of City Planning did not support JLWQA. It believed that JLWQA restrictions were outdated and preferred a broad range of interests in the district. By contrast, the city argued on appeal that the court should uphold the Arts Fund fee because it was intended to support art and local artists. The court held, however, that the condition did not have an essential nexus to the city’s land use interest. The Arts Fund did not promote the asserted legitimate end of preserving JLWQA stock for certified artists. It did not pay for JLWQA units or other artist housing or offer specific benefits for certified artists.

The city did not prove *Dolan* rough proportionality because it did not prove that JLWQA conversion harmed certified artists. During the approval process, the Department of City Planning explained that the conversion of JLWQ units did not impose increased costs on the artistic community. The number of annual artist certifications had been decreasing during previous decades, which created a “scarcity of certified artists able to purchase” these units.

The court’s decision on rough proportionality is incomplete because it did not discuss another *Dolan* requirement: that rough proportionality requires individual assessment. The court also should have considered the impact of the conversion on the entire housing market, not just on the artistic community. Compare *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (upholding an ordinance that conditioned nonresidential building permits on a fee that offset burdens associated with an influx of low-income workers expected to work on these developments).

Live-work units are a popular ingredient in mixed-use developments. In this case, the limitation on occupancy, the failure to meet the nexus test, and the decision on market analysis were factors in the adverse decision.

Idaho Court Applies Statutory Requirements for Land Use Decisions

In *Veterans Park Neighborhood Association v. City of Boise*, 564 P.3d 350 (Idaho 2025), a nonprofit organization applied for a conditional use permit to operate a “large-scale low-barrier, congregate shelter home” to provide housing and services for people experiencing homelessness. After being rejected by the Planning and Zoning Commission, the organization appealed to the city council, which approved the permit after holding extended hearings over an unprecedented five days, during which hundreds of people spoke.

A neighborhood association appealed, claiming Idaho Land Use Planning Act violations. The trial court upheld the council, but the Supreme Court reversed because the council did not provide the

“reasoned decision” that the Act requires, although the ordinance contained the “express terms” required by the Act.

The Idaho Land Use Planning Act is a detailed code for administrative land use decisions not included in most zoning enabling statutes. One important problem the Act covers is the criteria and standards that zoning ordinances include for conditional use and other administrative permits, which allow zoning agencies to make arbitrary decisions when the criteria and standards are vague and ambiguous.

The Idaho act remedies this problem by providing that “approval standards and criteria shall be set forth in express terms in land use ordinances in order that permit applicants, interested residents and decision makers alike may know the express standards that must be met in order to obtain a requested permit or approval.” Idaho Code § 67-6535(1). The court held that the ordinance had express standards and criteria. They included compatibility, public service burdens, adverse effects on property in the vicinity, and compliance with the comprehensive plan. See also Ore. Rev. Stat. § 227.173(2) (requiring “clear and objective” standards).

The Idaho act also requires a reasoned written statement that (1) explains the relevant criteria and standards applied in a decision, (2) states the relevant contested facts relied upon, the factual information that is in the record, and (3) explains the decision’s rationale based on the comprehensive plan, the ordinance, statutory provisions, and constitutional principles. Idaho Code. § 67-6535(2). The city council’s written statement did not meet the statutory requirements. It was a conclusory five-paragraph statement for a controversial, information-dense appeal that did not resolve outstanding factual disputes. See also the American Bar Association’s Model Land Use Procedures Act Ch. 10, <https://tinyurl.com/abacode>.

The Euclid Case

For an excellent PowerPoint history of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), see History of the Euclid Case, tinyurl.com/ambcas. ■

CAREER DEVELOPMENT AND WELLNESS

The Risk of Standing Still in the Age of AI

The Adoption Dilemma

Law firms today face a deceptively simple question: should we adopt artificial intelligence now, or wait until the tools are “ready”?

It’s tempting to sit back. AI improves every few months, and next year’s version will likely be better, cheaper, and easier to integrate. Why invest time and money today when tomorrow promises a more innovative solution?

But that logic hides a dangerous trap. While firms debate and deliberate, native AI law firms are emerging—practices built from the ground up with AI at their core. These firms don’t see AI as a bolt-on tool but as the operating system of their business. Meanwhile, traditional firms that wait will compete not just on legal expertise but also on speed, cost, and efficiency metrics they’ve never had to master.

The Wait Calculation in Law

Wharton professor Ethan Mollick has discussed the concept, sometimes called the “wait calculation,” and illustrated it with his Barnard’s Star thought experiment. Imagine launching a rocket to a nearby star today with current propulsion—it would take millennia. If you wait for a fusion drive to be invented, later travelers will overtake you and arrive centuries earlier. In that case, waiting is rational.

Applied to law, the analogy helps frame a critical choice. A firm can adopt today’s imperfect AI tools and begin building fluency, or it can hold back in hopes of a more advanced generation. But unlike the rocket scenario, the legal world doesn’t allow you to pause time. While you wait, competitors gain experience, clients recalibrate expectations, and a culture of adaptation takes root elsewhere. In law, the question is not simply whether tomorrow’s tools will be better, but whether you can afford to forfeit the compound benefits of learning today.

Why Waiting Looks Tempting—and Risky

The early leaps in AI were indeed breathtaking. GPT-3 stunned



with its ability to generate fluent text. GPT-4 added dramatically improved reasoning. The jump felt like a revolution.

But recent evidence suggests the era of dramatic breakthroughs may be slowing. GPT-5, released in August 2025, represents significant improvements in math, coding, and accuracy, yet early testers described the advancement as “not as large” as the leap from GPT-3 to GPT-4. As TechCrunch reported, “AI scaling laws”—the methods labs have used to increase model capabilities for five years—are now “showing signs of diminishing returns.”

OpenAI co-founder Ilya Sutskever confirmed this shift: “The 2010s were the age of scaling, now we’re back in the age of wonder and discovery once again. Everyone is looking for the next thing.”

If this plateau proves lasting, the logic of waiting will become weaker. You may wait years for a breakthrough that never comes while competitors build experience and market share.

Most critically, you’re not just competing with peer firms anymore. Companies like Sequoia-backed Crosby represent a new breed: actual law firms built around AI workflows, promising contract review in under an hour. The legal AI startup market raised \$4.98 billion in 2024, with companies like Harvey securing \$300 million at a \$5 billion valuation. These aren’t tech companies selling to lawyers—though there are plenty of those, they’re AI-native practices that will set new industry standards for speed and cost.

The Learning Imperative

Even if today’s AI tools are imperfect, they are invaluable for what they teach. Consider the parallel to electronic research in the 1990s. The first versions of Westlaw and Lexis were clunky and incomplete compared to today’s tools. But the lawyers who experimented early learned new research habits, developed different expectations for speed, and built comfort with digital workflows. Within a decade, those skills became indispensable, and early adopters were setting the standard for how to use these new tools in everyday practice.

The same dynamic applies now. Effective prompting, evaluating AI outputs, redesigning workflows around automation, and understanding the tools’ limits are practical AI skills that

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only come through use. Firms that experiment today develop “muscle memory” for AI integration, positioning them to move faster when the next breakthrough arrives.

More importantly, they develop the culture of adaptation. When GPT-5 made older models obsolete overnight in many applications, firms already comfortable with AI workflows could pivot quickly. Those still debating their first implementation found themselves further behind.

The Role of Young Associates

One of the most misguided fears I hear is that AI will reduce the need for associates. The opposite is true: you should hire more, not fewer.

Here’s the strategic logic: If AI meaningfully transforms legal practice, young associates will be your guides through that transformation. They’ve been using these tools since law school—not as novelties, but as integral parts of their research and writing process. They approach AI with fluency and fewer preconceptions about “how things should be done.”

If AI doesn’t transform the landscape as dramatically as expected, you’ll still be well-staffed and competitive. Having bright, motivated young lawyers has never been a liability.

Reducing hiring now gives you the worst of both worlds: you miss the only generation of lawyers who are native AI users while hollowing out your future leadership pipeline. More strategically, young associates serve as your bridge between traditional practice and AI-native operations. They can pilot new workflows, train senior lawyers, and help the firm adapt its culture.

Recent data shows that 21% of law firms currently use generative AI, with another 29% planning to adopt it by fall 2025. The firms that integrate young, AI-fluent associates into this transition will have a decisive advantage over those that approach AI adoption as a purely technology decision.

The Vendor Advantage

Here’s the reality: even the biggest, best-resourced law firms cannot keep pace with the speed of progress across the broader AI industry if they try to do it all in-house.

More firms are attempting to build comprehensive AI capabilities in-house—hiring data scientists, developing custom models, creating their own training datasets, and building internal platforms from scratch. This approach can work, but only

with massive, sustained investment. We’re talking about millions of dollars annually in talent, infrastructure, and ongoing development costs.

This is a mistake for most firms. The analogy here is telling: you wouldn’t expect a law firm to design its own word processing software, email system, or practice management platform. Those complex technology products require dedicated teams of engineers, continual updates, and ongoing support. AI may feel different because firms want models trained on their own forms, ideas, and culture, which is central to practice and not interchangeable like a word processor. But even here, the underlying infrastructure is a specialized technology discipline that demands resources most law firms can’t sustain. The counterpoint is that customization can and should happen at the application layer, not by rebuilding the entire technology stack—otherwise, firms risk chasing uniformity without the competitive advantage they hoped for.

Even when firms succeed at building internal AI systems, they often become outdated quickly. Consider what happened when GPT-5 was released. Many firms that had built internal systems around GPT-4 suddenly found their

implementations outdated. Meanwhile, firms partnering with agile vendors could access the new capabilities within days or weeks, not months.

The smartest strategy isn't building everything in-house but partnering with best-in-class vendors who track the bleeding edge. These vendors update models, improve retrieval systems, manage compliance, and integrate new capabilities as they emerge. Strong partnerships ensure your firm benefits from improvements as soon as they're viable—without betting the farm on internal projects that may become obsolete.

The legal AI market now includes established players with LexisNexis partnerships and innovative startups across every practice area. In estate planning, tools like Luminary's AI-powered document extraction and Vanilla's V/AI estate analysis are transforming how attorneys handle complex trust documents and wealth transfer strategies. Real estate practitioners can access specialized tools like Avail AI for title and lease review, and Skyline Legal AI for transaction compliance. These aren't experimental tools anymore—they are production-ready systems used by major firms and enterprises.

This doesn't mean outsourcing judgment. Your role as a firm remains deciding which tools to use, how to use them ethically, and where they fit into your practice. But the underlying technology development is best left to experts who can evolve with the field at machine speed.

Of course, partnering with third-party vendors also raises critical questions about attorney-client privilege, confidentiality, and data security. Firms must treat these issues as first-order considerations, not afterthoughts. Vendor arrangements should include clear contractual safeguards around data ownership, encryption standards, access limitations, and audit trails. Lawyers must understand exactly where client data is stored, how it is used to train or improve models (if at all), and what protections are in place to ensure that sensitive information cannot leak or be repurposed.

Regulators and bar associations are beginning to scrutinize these relationships, and rightly so. The duty of confidentiality extends to technology

partners, and lawyers cannot outsource ethical responsibility. Building effective vendor partnerships means balancing speed and innovation with rigorous due diligence and ongoing oversight—the same care we apply when selecting any professional services provider.

A Mini Wait Calculation for Law Firms

Here's a framework to apply Mollick's wait calculation directly to your practice:

Timeline of Adoption: How long will it realistically take your firm to train lawyers, adjust workflows, and develop internal expertise? Even with dedicated resources, meaningful AI integration takes years, not months.

Trajectory of AI Progress: Although improvements continue, evidence suggests dramatic leaps are slowing. GPT-5's advances, though significant, are more incremental than the GPT-3 to GPT-4 jump. As scaling laws hit diminishing returns, waiting for transformational breakthroughs becomes less rational.

Opportunity Cost of Delay: What business, talent, and reputation might you lose by standing still? Native AI firms like Crosby are already setting new standards for speed and cost. Your competitors who adapt early compound their learning advantages.

Flexibility of Partnerships: Could strong vendor relationships allow you to "skip ahead" when breakthroughs arrive, without years of internal development? The answer is clearly yes—but only if you've built the partnerships and internal fluency to capitalize on new tools quickly.

This calculation rarely suggests "do nothing." More often, it suggests experimenting today while staying flexible for tomorrow. The firms that balance internal learning with strategic partnerships will be best positioned for whatever comes next.

Act, Don't Freeze

The greatest risk for law firms is not adopting the "wrong" AI tool. It's doing nothing at all.

While you debate, native AI law firms redefine what clients expect from legal services. The legal AI market raised nearly \$5 billion in 2024, channeling capital into

startups and AI-native practices redefining baseline expectations for speed and cost. Unlike traditional firms, many of these ventures are not interested in playing by the same rules that constrain established practices—they are reinventing the system itself, pursuing growth in the most aggressive and profitable ways they can. This competition is no longer theoretical—it is reshaping the standards against which all firms will be measured.

Meanwhile, your future workforce is already fluent with these tools. Young associates entering the market have used AI throughout law school. They expect to work in environments where technology amplifies their capabilities, not constrains them. Firms that can't offer this will struggle to attract and retain top talent.

The path forward requires three commitments:

- **Experiment internally:** Allow associates and junior partners to explore, pilot new workflows, and share their findings. Make AI fluency a firm-wide learning objective, not a departmental afterthought.
- **Hire strategically:** See young lawyers not as potential redundancies but as multipliers who can bridge traditional practice with emerging capabilities. Their AI fluency is an asset that compounds over time.
- **Partner wisely:** Leverage specialized vendors to stay current without trying to become a technology company. Successful firms will focus on legal expertise and use the best available tools.

In Mollick's rocket ship analogy, waiting for a better engine makes sense if your goal is a distant star. But law is not interstellar travel. Here, waiting doesn't buy you efficiency—it risks irrelevance. For law firms, the choice is whether to start building capability today or risk irrelevance by letting others accumulate the advantages of experience while you stand still.

The age of scaling may end, but the age of smart implementation has just begun. The firms that act now—thoughtfully, strategically, but decisively—will define the future of legal practice. ■

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THE LAST WORD

It's Greek to Me: On Clarity of Expression

"Let me tell you about quantum vertices..." That was how my son's friend began a conversation during a recent cruise through the Greek Isles. He had just completed a course on quantum computing. I am certain he explained the concepts accurately, and I am equally certain that I understood none of it. But that moment struck me—not for the science but for my feelings: sitting politely, nodding, and thinking, "I have absolutely no idea what you just said." And that, dear colleagues, is how many clients feel when they talk to us.

Same Words, Different Worlds

As he explained vertices, I thought of conversations between lawyers and their clients. We often use the same words, but we mean very different things.

Consider the word *simple*. A client asking for a "simple will" envisions a one-page document with minimal fuss. A lawyer hears "simple" and thinks of drafting provisions that account for taxes, probate, guardianship, and future contingencies. Or take *review*. To a client, it means "give this a quick look." To us, it means hours dissecting indemnities and cross-references. The gap between professional meaning and client understanding can be vast.

The Lawyer's Siren Song

On our Aegean voyage, I thought of another Greek tale: the sirens. Their irresistible songs lured sailors off course, smashing them on the rocks. In our profession, the siren song is jargon. We fall into it easily, dressing our

explanations in technical vocabulary, acronyms, and war stories. We might think: *This demonstrates I'm an expert*. Clients might think: *I'm more confused than before. Maybe this person isn't an expert*. And here's the twist: most clients assume we're competent or they wouldn't be in the room. What they want to know is whether we understand them.

What Clients Really Want

Clarity of expression is not just a communication skill—it's a show of empathy. When we strip away the fog and explain things simply, we say:

- I respect you.
- I want you to feel confident, not overwhelmed.
- I measure my success not by what I say, but by what you understand.

Five Practices for Clearer Communication

1. **Assume the Benefit of the Doubt.** You don't have to prove your credentials in every sentence. Clients already grant you expert status.
2. **Translate, Don't Transcribe.** If you use a technical term, immediately follow with a plain-English explanation. Think "closed captions for clients."
3. **Check for Understanding.** Invite clients to rephrase key points in their own words. If they can explain it, you've succeeded.
4. **Use Stories Sparingly.** Facts tell and stories sell, but anecdotes should clarify, not complicate. If they cloud the issue, save them for the bar association dinner.
5. **Measure by Decisions.** The real test is whether clients feel informed enough to act, not whether they were dazzled by your vocabulary.

From Latin to Layman—Legalese vs. Plain English

Here are two examples.

- **Contract Termination Legalese:** "Notwithstanding anything to the contrary contained herein, this Agreement shall terminate upon the expiration of the initial term unless renewed in writing by the parties hereto."
Client's Reaction: "What?"
Plain English: "This contract ends at the end of the first term unless you both agree in writing to renew it."
Client's Reaction: "Got it."
- **Will Provision Legalese:** "I devise and bequeath the residue of my estate, both real and personal, of whatsoever nature and wheresoever situated, to my issue per stirpes."
Client's Reaction: "Is that Latin?"
Plain English: "It means you leave everything left of your estate to your children, and if a child has died, their share goes to their children."
Client's Reaction: "Okay, that makes sense."

Back to the Greek Isles

My son's friend's enthusiastic dive into quantum computing reminded me that clarity doesn't mean "dumbing down." It means lifting up, bringing complex ideas onto solid ground where real decisions can be made. So, the next time you're tempted to demonstrate expertise through complexity, remember the Greek Isles, the sirens, and yes, the quantum vertices. Because in serving clients, clarity isn't just golden—it's Greek to none. ■

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