Rhode Island Bar Journal

Rhode Island Bar Association Volume 68. Number 2. **September/October 2019**

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Providence River Pedestrian Bridge, Providence, RI The newly constructed Providence River Pedestrian Bridge connects the two sides of the Providence River in the I-195 redevelopment district in Providence.

RHODE ISLAND Bar Association 1898

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Direct advertising inquiries to the Editor, Kathleen M. Bridge, Rhode Island Bar Journal, 41 Sharpe Drive, Cranston, RI 02920, (401) 421-5740.

USPS (464-680)ISSN 1079-9230
Rhode Island Bar Journal is published bimonthly by the Rhode Island Bar Association, 41 Sharpe Drive, Cranston, RI 02920.

PERIODICALS POSTAGE PAID AT PROVIDENCE, RI

Subscription: $30 per year

Postmaster
Send Address Correction to:
Rhode Island Bar Journal
41 Sharpe Drive
Cranston, RI 02920

www.ribar.com

A Mother's Advice

David N. Bazar, Esq.
President
Rhode Island Bar Association

"…in order to help your clients, you have to know and understand the law. Beyond knowing the law, a good attorney listens well and is responsive."

Be a good lawyer. My late mother gave me that admonition when I passed the bar exam. As my father will tell you, when my mother told you to do something, you did it. So what did she mean by "Be a good lawyer"? My mother was a serial entrepreneur so I only had to look back at the lessons she taught me to know what she meant.

In the early 1970s, she opened several retail stores that sold only Panasonic electronics. At that time, Panasonic made everything from AM ball radios to high-end stereo systems with televisions and toaster ovens thrown in for good measure. The Panasonic tag line was "just slightly ahead of our time," and so was my mother. She designed the stores with a futuristic tunnel entrance and abstracta system displays. She opened stores in the Wampanoag Mall, Midland Mall, Wakefield Mall and the Auburn Mall.

One day, when my mother had me restocking the back room, she pulled me aside and told me to watch a particular salesperson with a customer. After the sale had been completed, she asked me why the salesperson was so good at her job. My initial response was because she had a very deep knowledge of the product line. That was important but not the right answer. My mother pressed me. She wanted me to go through the whole conversation the salesperson had with the customer. Then it struck me. The most important part of the encounter was that the salesperson listened to the customer. She understood what they wanted and why.

My mother's next venture was to buy an inn in Waterville Valley, New Hampshire. An oil crisis and snow drought in 1973 forced the inn in New Hampshire into an SBA foreclosure. While my father was out of the country on business, my mother drove to Waterville Valley for the auction. The next day she picked my father up at Logan Airport. He asked her "Who bought the inn?" "You did," she replied.

I went from working in an electronics warehouse and driving a truck between stores, to working as a dishwasher at the inn on weekends. My mother hired a full-time innkeeper since her time in New Hampshire was limited. Again, she pulled me aside and asked me to watch the innkeeper with guests. Later, she asked me why he was such a good innkeeper. My reply was instantaneous, "because he listened." No, it was more than that. Not only did he listen, but he also cared. Not only did he know how to provide a great experience for the guests at the inn, but because he cared about each guest, he ensured that each individual had the best stay possible.

When my mother told me to be a good lawyer, I knew just what she meant. Listen to your clients and care about them. I have had the opportunity to work with many lawyers who really know the law. Leonard Decof once told me that to prepare for a medical malpractice case, he not only had to know the law, but he also had to know the medicine involved as well as the doctors did. He also had to know his client. Just as that salesperson had to know the product line, in order to help your clients, you have to know and understand the law. Beyond knowing the law, a good attorney listens well and is responsive. Simply stated, to be a good lawyer, you have to listen to my mother. ◊

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Rhode Island Bar Journal

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The Utility of Being a "Utility": At the Intersection of Telecommunications, Internet Service, and Insolvency

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Imagine you are a debtor who just filed a petition for a Chapter 7 or a Chapter 13 bankruptcy in the United States Bankruptcy Court for the District of Rhode Island. You are on your computer one night doing a research assignment for your employer, or simply looking up a debtor education course that you must complete as part of the bankruptcy process. You attempt to log on to Mozilla Firefox or Internet Explorer, only to find out that you are unable to access the same. As a follow-up, you contact Verizon, your local telecommunications provider supplying you with access to internet service. You are told by a Verizon representative that your internet service was disconnected because Verizon subsequently received notification of your bankruptcy filing with the Court. You do not have access to a laptop to perform your work on, and must now either borrow internet access from a friend or relative, or go to a public place supplying such access. This is potentially a horrifying scenario for any prospective debtor.

"Utility is when you have one telephone, luxury is when you have two, opulence is when you have three – and paradise is when you have none."
– DOUG LARSON

There is only one certainty regarding the process of insolvency and bankruptcy: It is uncertain at best. That uncertainty is compounded for a debtor by the meaning of what constitutes a "utility" under the current United States Bankruptcy Code.[1] While common sense and reason dictate that identifying which types of entities properly qualify as a "utility" is facially apparent, legalese always possesses a distinct sense of irony for formulating proper application in practice. A debtor facing the prospect of a bankruptcy in 2019 not only must worry about how they will liquidate their assets to pay current debts,[2] or repay their finances over a thirty-six (36) or sixty month (60)[3] period of time, they must also worry about whether or not they will be able to retain certain basic utility services. Given the prevalence of technology and communication devices in today's information-driven economy, the prospect of losing one's access to such devices, specifically internet service, because of the filing of a bankruptcy petition creates an undesirable situation for a debtor seeking a "fresh start."

Part 1 of this article describes the current problem under 11 U.S.C. § 366 in defining what constitutes a "utility" and who, therefore, would be subject to the mandates of such provisions, including federal case law interpreting this provision of the Bankruptcy Code. Part 1 will also conclude with a suggestion that Congress amend § 366 to more clearly define which utilities fall under its purview, as well as to specifically include telecommunications providers supplying access to internet service as part of such "utilities" because of how important internet service is in today's world. Part 2 will then examine the relationship of this provision with its immediate predecessor in the same statute,[4] and propose amendment of the same by the United States Congress as necessary to avoid further uncertainty for a debtor losing their internet service after filing for bankruptcy.

I. WHO OR WHAT IS A "UTILITY" UNDER 11 U.S.C. § 366?

11 U.S.C. § 366 provides that "…a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due."[5] This statement, on its face, appears to lay down a clear policy: utility companies may not simply "turn off" the lights, or discontinue providing electricity, or water, or any other utility service as a matter of retaliating against a debtor who files a bankruptcy petition. The United States Congress clearly recognized the importance of utility services continuing post-petition for debtors, notwithstanding their insolvent status.

The very next subsection, however, provides a proper set of circumstances under which a utility company may discontinue service to a debtor. Subsection (b) of the same statute provides "Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within twenty (20) days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date."[6] Thus, if a debtor or the trustee does not provide such proper "adequate assurances of payment"[7] to their utility providers, they may expect discontinuance of the same. As is common

in the practice, bankruptcy defers and sometimes borrows from non-bankruptcy law in using certain terminology, especially in the realm of contract law.[8]

Despite this language in the statute, it still does not answer the question of who exactly is a "utility," as that term is used in these two (2) subsections. The United States Bankruptcy Courts inevitably are left to resolve such ambiguities in statutory language. While it may appear obvious on its face that a "utility" would likely refer to an electric company, a water company, or an entity providing gas and heating to a particular debtor's home, some bankruptcy courts take the position that a "utility" can be interpreted to include services provided by a curb-side trash collector.[9] With the term "utility" not being adequately defined under the statute, there is a question as to whether some cable service providers or telecommunications providers fall under the auspices of § 366 as being a "utility," such that they would be entitled to take advantage of such protections, or, in the reverse scenario, to have the same provision used against them as a sword to hold them in contempt for violating the same. Moreover, the question remains undecided as to how a future bankruptcy court would treat internet service, as either a more basic necessity given the structure of information flow in today's society, or as a "convenience" that is not as necessary as certain other utilities.

In the bankruptcy case of **In re Moorefield**, the United States Bankruptcy Court for the Middle District of North Carolina answered this question.[10] In **Moorefield**, Chapter 13 debtors moved to hold their cable television company, Time Warner, in contempt for wrongfully terminating service to them after they filed their bankruptcy petition, and sought monetary and punitive damages for the same, arguing that they in fact qualified as a "utility" under § 366.[11] In response, Time Warner argued they were not covered as a "utility" under § 366 because utilities are only those which are "essential to the day-to-day living requirements of the debtors and include such items as electrical, phone, gas and water."[12] In elaborating on the history of § 366, the Bankruptcy Court noted that "…this section was intended to cover those utilities that have a special position with respect to the debtor, 'such as an electric company, gas supplier, or telephone company that is a monopoly in the area so the debtor cannot easily obtain comparable services from another utility'…."[13] The Bankruptcy Court thus held that because Time Warner had a non-exclusive franchise agreement for cable service with Davidson County, where the debtors lived, it did not have a monopoly over the services for that area.[14] Even further, the Bankruptcy Court noted that if it did find Time Warner to have a monopoly over that particular service area, it still would not come within the definition of a utility under § 366 because "…cable television does not rise to the level of importance of the other utilities listed under the legislative history…millions of Americans continue to exist without such a service."[15] Thus, the Bankruptcy Court for the Middle District of North Carolina laid down a bright-line rule that it believed such services are not essential "utilities" as contemplated by the statute and its legislative history.

This holding was distinguished by a more recent holding from the Bankruptcy Court for the Eastern District of Pennsylvania.[16] In **In re One Stop Realtour Place, Inc.**, the Bankruptcy Court had to decide whether a local exchange carrier called Allegiance Telecom, Inc. ("Allegiance") qualified as a "utility" under § 366.

Allegiance provided telephone services to a Chapter 7 debtor and subsequently discontinued service to them after the filing of the bankruptcy. Specifically, Allegiance argued that they could not qualify as a "utility" under § 366 because they were not a monopoly, and the debtor had alternative telephone service available to it.[17] The Bankruptcy Court for the Eastern District of Pennsylvania noted that other bankruptcy courts recognized that § 366 compels different treatment of utility services from other bankruptcy creditors because of the availability of such services from only one provider in certain areas.[18] Allegiance attempted to argue that because of the deregulation of the telephone service industry, and because the market was opened to alternative telephone service providers in the aftermath of the Telecommunications Act of 1996, that they were not a monopoly under § 366 for the purpose of being considered a "utility."[19] The Bankruptcy Court ultimately held that Allegiance did, in fact, fall under the definition of a "utility" under § 366 because it provided telephone service to the Pennsylvania public at large and was subject to regulation by both the Federal Communications Commission ("FCC") and the Pennsylvania Public Utilities Commission ("PUC").[20] More persuasively, the Court noted that "Even in the face of asserted market changes, Section 366 still must balance the debtor's need for continued access to necessary services, such as electricity, gas or telephone service, against the rights of the utility companies to adequate assurance of payment."[21]

Thus, the Bankruptcy Courts draw a clear distinction between cable service providers for television and telecommunications providers for telephone services. However, the question of whether a telecommunications provider providing ***internet service*** to a debtor's home would constitute a "utility" service necessary for a minimum standard of living, on the same level as electricity, water, gas, or heat, remains an open question that is undecided by the Courts *(emphasis added)*. It is for this reason that Congress must amend § 366 to not only specify which entities would qualify as a "utility," but to also include a specific provision codifying that a telecommunications provider who provides internet service to a debtor qualifies as a "utility" as well, such that they cannot discontinue internet service should a debtor file for bankruptcy. If Congress does not act to do this, it cannot be determined if a future bankruptcy court would take the more restrictive approach under **Moorefield**, thus treating internet service as more akin to cable television service, or if it would take the more liberal approach and treat internet service as necessary as telephone service, as the **In re One Realtour Place, Inc.** Court held. Such a worry would be allayed by congressional amendment of § 366.

II. THE RELATIONSHIP BETWEEN 11 U.S.C. § 366 AND 11 U.S.C. § 365

There is a secondary question that also must be addressed with regards to § 366: Do such contracts for utility service constitute an "executory contract" that is not completed for the purposes of allowing the Bankruptcy Trustee to reject the same under 11 U.S.C. § 365(a)?[22]

The term "executory contract" was previously defined by one legal scholar as a contract "under which the obligation of both the bankrupt and the other party…are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."[23] In

particular, there is an argument to be made that debtors and creditors are treated differently in bankruptcy, specifically when it comes to property and contract rights in the context of executory contracts.[24] This argument posits that the difference in treatment between debtors and creditors for executory contracts allows debtors to enjoy greater rights than they have outside of bankruptcy as compared to the other party to the contract.[25] Specifically, this line of reasoning indicates that a debtor's right to the creditor's performance under the contract becomes property of the bankrupt's estate, but the creditor's right to the debtor's performance is reduced to nothing more than a proof of claim against the estate.[26] While theoretically persuasive and consistent, this line of reasoning does not account for the necessity that certain services provide to a debtor, such as that of utilities that are basic for a minimum standard of living, which should include internet services.

Only one prior bankruptcy court case addresses this specific issue, but the circuit courts of appeals and the United States Supreme Court never addressed the same. In **In re Gehrke**, the Bankruptcy Court for the District of Oregon was faced with the specific question of whether § 366 or § 365 should govern a dispute regarding an "executory contract" between a utility provider and the debtor.[27] In that case, the Bankruptcy Court for the District of Oregon noted a major distinction between § 365 and § 366: "Pursuant to § 366(b), a debtor need not cure prepetition defaults in order to continue to receive utility service. In contracts, § 365 requires cure (or adequate assurance of prompt cure) of defaults as a condition to assumption."[28] The Court noted that "The legislative history accompanying § 366 indicates that the section was designed to protect debtors from the cessation of utility service due to "the non payment of a bill that would be discharged in a bankruptcy case."[29] Thus, the Court opined that "Section 366 therefore is an ***exception*** to § 365 and the former therefore governs agreements for the furnishing of utilities."[30]

It is clear, therefore, from the holding in **Gehrke** that the question of whether or not a contract between a debtor and a telecommunications provider that includes internet service needs to be properly defined. If the telecommunications provider in that instance is treated as a "utility," then § 366 would apply to govern the dispute. A debtor who has uncured, pre-petition debts to a telecommunications provider supplying access to internet service would not be allowed to discontinue such service merely because the debtor filed bankruptcy. On the other hand, if internet service is not considered an essential component of a minimum standard of living, such that a supplying telecommunications provider is not treated as a "utility," then § 365 would govern and thus subject a debtor to having to cure pre-petition debts (or give adequate assurances thereon) in order for the Bankruptcy Trustee to not reject what would be viewed as an "executory contract." The better policy would be for the bankruptcy courts to view the telecommunications provider supplying the internet access to the debtor as a "utility," such that the debtor would not need to cure pre-petition defaults in order to maintain service, and thus allow the debtor to provide adequate assurances on their own without automatically losing internet service. However, it is unknown how any particular bankruptcy court will rule on this particular matter. It thus further underscores the imperative for Congress to amend § 366 to include telecommunications providers who supply access to internet

service as a "utility," such that debtors do not lose internet access should they file bankruptcy.

III. CONCLUSION

In conclusion, it is abundantly evident that without proper congressional amendment, a debtor filing for bankruptcy in 2019 is at risk of their telecommunications provider shutting off their access to internet service if the provider finds out the debtor filed bankruptcy. Such a prospect for a debtor is a horrifying thought, especially given the myriad of tasks to be performed on computers today requiring internet service. Without any case law from a bankruptcy court in the United States holding that telecommunications providers providing internet service (and not merely telephone service) constitute a "utility" for purposes of § 366, debtors are left to wonder if this most key feature of their lives will be taken away from them merely for filing bankruptcy, or rejected by a bankruptcy trustee under § 365 as nothing more than an "executory contract." It is thus imperative for the United States Congress to amend § 366 of the Bankruptcy Code to clearly define telecommunications providers supplying access to internet service to debtors as "utilities" for the sake of ensuring that such debtors do not become disconnected from the world around them, both technologically and financially.

ENDNOTES

1 ***See*** *11 U.S.C. § 366 (lacking definition of term "utility").*
2 ***See*** *11 U.S.C. § 701, et seq. (pertaining to Chapter 7 bankruptcies)*
3 ***See*** *11 U.S.C. § 1301, et seq. (pertaining to Chapter 13 bankruptcies)*
4 ***See*** *11 U.S.C. § 365 (granting power to trustee to "assume or reject any executory contract or unexpired lease of the debtor.")*
5 ***See*** *11 U.S.C. § 366(a).*
6 ***See*** *11 U.S.C. § 366(b).*
7 ***See*** *11 U.S.C. § 366(c) (defining "assurance of payment" to include cash deposits, letters of credit, certificates of deposit, surety bonds, prepayment of utility consumption, or any other form of security mutually agreed upon between the utility and the debtor or trustee).*
8 ***See*** *U.C.C. Article 2, § 2-609, titled "Right to Adequate Assurance of Performance" (stating that "When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.").*
9 ***See In re Sanchez****, 545 B.R. 55 (Bankr. D.N.M. 2016) (holding that trash collection constitutes a "utility" service under § 366).*
10 ***See In re Moorefield****, 218 B.R. 795 (Bankr. M.D.N.C. 1997).*
11 ***See Id.****, at 796.*
12 ***See Id.*** *(**quoting** House Report No. 95-595, 95th Cong., 1st Sess. P. 350 (1977)).*
13 ***See Id.***
14 ***See Id.*** *at 797.*
15 ***See Id.***
16 ***See In re One Stop Realtour Place, Inc.****, 268 B.R. 430 (Bankr. E.D. Pa. 2001).*
17 ***See In re One Stop Realtour Place, Inc.****, at 435.*
18 ***See Id.****, at 435-36 (**quoting In re Whittaker**, 882 F.2d 791, 794 (3rd Cir. 1989) ("The subject matter of § 366 received special treatment because Congress recognized both that utility service is essential to a minimally acceptable standard of living and that such services are often available only from a single source.")).*
19 ***See In re One Stop Realtour Place, Inc.****, at 436.*
20 ***See Id.***
21 ***See Id.*** *(**citing In re Moorefield**, 218 B.R. 795, 796 (Bankr. M.D.N.C. 1997)).*
22 ***See*** *11 U.S.C. § 365(a) ("…the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor…").*
23 ***See*** *Vern Countryman, Executory Contracts in Bankruptcy (pt. 1), 57 MINN. L. REV. 439, 460 (1973).*
24 ***See*** *Blake Rohrbacher, "More Equal than Others: Defending Property-Contract Parity in Bankruptcy," 114 YALE L. J. 1099, 1127-1128 (2005)*
25 ***See Id.*** *at p. 1128.*
26 ***See Id.***
27 ***See In re Gehrke****, 57 B.R. 97 (Bankr. D. Or. 1985).*
28 ***See Id.****, at 98.*
29 ***See Id.*** *(**referencing** Notes of Committee on the Judiciary, Senate Report No. 95-989).*
30 ***See Id.*** *(**emphasis added**).* ◊

Evergreen Contracts and Municipal Standing Under the Contract Clause

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I. Introduction

On May 14, 2019, Governor Gina Raimondo signed into law the "evergreen contracts" bill, P.L. 2019, ch. 15 & 16. The law provides that, for school teachers and other municipal union employees, the terms of an expired collective bargaining agreement (CBA) pertaining to wages and benefits "shall continue as agreed to in the expired collective bargaining agreement until such time as a successor agreement has been reached between the parties." In essence, this bill would make it so that the provisions in municipal CBAs regarding wages and benefits would extend indefinitely, regardless of the agreed upon duration contained in the CBA.

Some of the press and opinion pieces surrounding this legislation have juxtaposed the Governor's (then Treasurer) championing of the 2011 pension overhaul, compared to the Governor's current support for the evergreen bill.[1] Putting politics aside, the 2011 pension overhaul and the evergreen bill provide a comparison on an interesting legal issue. When the Rhode Island Retirement Security Act of 2011 (RIRSA) was enacted into law, the unions sued, arguing that the RIRSA unlawfully impaired the obligation of their contracts.[2] Both the U.S. Constitution and the Rhode Island Constitution prohibit the General Assembly from enacting any "law impairing the obligation of contracts."[3] The unions were somewhat successful in their legal challenge. The suit survived a motion to dismiss, with the Superior Court concluding, on April 25, 2014, that the unions had a contract right protected by the Contract Clause. This left for further litigation whether that contract right was substantially impaired by the RIRSA and, if so, whether the RIRSA was supported by a legitimate public purpose that would justify the impairment. Faced with the uncertainty of this litigation, the union forced the state to the bargaining table, which ultimately resulted in a compromise that impacted the unions less harshly than the RIRSA would have as originally enacted.

Whether or not the act in question ultimately survives judicial scrutiny, the adversarial process, conducted under a court's supervision, will only promote better legislation and greater respect for the Constitution.

Using the RIRSA litigation as an example, one might expect that, now that the evergreen bill is enacted into law, it is the municipalities' turn to bring a Contract Clause suit. If unions have a protected contract interest in their CBAs, one would assume that municipalities – and, by extension, municipal taxpayers – also have a protected contract interest. Transforming a contract of a few years' duration into a contract of limitless duration by legislative fiat would certainly seem to be a substantial impairment of that contract. As stated by the Rhode Island League of Cities and Towns, the evergreen law will "tie the hands of local elected officials when negotiating in the best interests of their taxpayers. The expiration date of collective bargaining agreements is important – it motivates the parties to come together and resolve their issues prior to the close of the contract."[4] Although it is subject to debate whether this substantial impairment is justified by some overriding legitimate public interest, municipalities should have the opportunity to make their case to the court in a Contract Clause suit to the same extent that unions did when challenging the RIRSA.

However, in an old line of cases, the U.S. Supreme Court has held that a municipality may not seek to protect its constitutional right to contract from interference by the state legislature by invoking the Contract Clause of the U.S. Constitution. Although the Rhode Island Supreme Court has discussed this doctrine in *dicta*, the Court has not adopted it. This article will argue that the Rhode Island Supreme Court should not apply this federally created doctrine to the R.I. Contract Clause. Instead, the Court should leave the door open for Rhode Island municipalities to make a state constitutional challenge to General Assembly acts, like the evergreen bill, that impair municipal CBAs.

This article will first examine the nature of the Contract Clause. Next, the article will look at the federal doctrine limiting a municipality's ability to make a Contract Clause claim. Finally, the article will argue that such municipal Contract Clause claims should be allowed under the R.I. Constitution, and will discuss the current state of Rhode Island law on this issue.

II. The Contract Clause

The Contract Clause in Art. I, sec. 10 of the

U.S. Constitution is one of the very few prohibitions placed on state legislatures by the framers of the originally enacted Constitution, predating both the Bill of Rights and Reconstruction amendments. The Contract Clause is grouped together in Art. I, sec. 10 with such venerable constitutional controls on state legislative authority as the prohibition on *ex-post facto* laws and the prohibition on bills of attainder. Madison stated in the Federalist Papers that "laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation."[5] He described the Contract Clause as part of a "constitutional bulwark in favor of personal security and private rights," and went on to state:

> "The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less-informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."[6]

The intent of the framers of the Contract Clause was to give stability to people structuring their affairs through contracts and to prevent "enterprising and influential speculators" from taking unfair advantage of their influence in the state legislature to unsettle settled expectations. In other words, the prohibition on laws impairing the obligation of contract is important. It is important to individual rights. It is important to the democratic process.

Because of this important purpose, "in the Contracts Clause the framers were absolute. They took the view that treating existing contracts as 'inviolable' would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them – even if they or their agreements later prove unpopular with some passing majority."[7] In more recent years, the U.S. Supreme Court has watered down the absolute approach of the framers and, instead, has held that a state legislature may "'substantially impair' a contractual obligation in pursuit of 'a significant and legitimate public purpose' so long as the impairment is 'reasonable.'"[8] The Rhode Island Supreme Court has adopted this non-absolutist test when interpreting the Contract Clause of the Rhode Island Constitution.[9]

Even in the non-absolute version, the Contract Clause provides an important democratic function. It provides a check on politically influential groups from using legislative clout to alter previously negotiated contract terms and obligations, merely to provide an advantage to that influential group. That is because, under the modern interpretation of the Clause, the state is forced to justify any contract interference in court. Once in court, if the state could not show a significant and legitimate public purpose for its actions, while also showing that contract interference is a reasonable means of serving that purpose, the court would strike the act down as unconstitutional. In this way, the Clause protects against arbitrary or illegitimate legislative interference with contract.

III. Municipal federal Contract Clause claims and the Hunter doctrine

Based upon the above examination of the Contract Clause, it would seem municipalities would have a decent case that the evergreen contracts law would be unconstitutional. There is no question that the law would substantially impair municipal CBAs. Therefore, under U.S. and Rhode Island Supreme Court precedent, the state would have to justify in court that evergreen contracts are a reasonable means of serving a significant and legitimate public interest. Further, when looking at the underlying purpose of the Contract Clause – checking the power of politically influential groups – it would seem that the municipalities might have a good case. Critics of the evergreen bill have painted it as the General Assembly interfering with settled contract expectations at the behest of a powerful coalition of unions. Or, as the Providence Journal editorial board put it, state elected officials "appear intent on shoveling taxpayer dollars into the maw of the special interests that helped put them in office."[10] Whether or not this perception proves accurate, the fact that CBAs are being substantially impaired should give municipalities the right to have that issue tried in court.

However, based upon a doctrine developed in an old line of U.S. Supreme Court cases, R.I. municipalities would likely have that argument foreclosed under the Contract Clause of the U.S. Constitution. The progenitor of this doctrine is **Hunter v. City of Pittsburgh**.[11] That case involved a Pennsylvania municipality that was merged into the City of Pittsburgh by the state legislature, without the consent of the municipal voters. The municipality asserted a Contract Clause violation based upon "the novel proposition that there is a contract between the citizens and taxpayers of a municipal corporation and the corporation itself, that the citizens and taxpayers shall be taxed only for the uses of that corporation, … [which] arises out of the relation of the parties to each other."[12] The Court decided against the municipality by concluding that there was no such contract and, thus, no contract that could be impaired under the Clause.

Rather than stopping there, the Court went on to provide further justification for its decision with broadly worded and sweeping *dicta* regarding "the nature of municipal corporations."[13] The Court stated, "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them.… The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest."[14]

The Court relied on the *dicta* to develop a doctrine that renders municipalities powerless to assert rights under the United States Constitution against the state legislature. For instance, in **Williams v. Mayor and City Council of Baltimore**,[15] Justice Cardozo opined, "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." Later, the Court put a finer point on this doctrine in **Coleman v. Miller**,[16] holding, "Being but creatures of the State, municipal corporations have

no standing to invoke the Contract Clause… of the Constitution in opposition to the will of their creator." The Court essentially held that, when it comes to municipal rights under the U.S. Constitution, the state legislature giveth and the state legislature taketh away.

IV. The Hunter doctrine should not be applied to Rhode Island municipalities

The **Hunter** doctrine has been criticized by some scholars, as it is founded on assumptions about the "nature of municipalities" that have no basis in the text of the Constitution.[17] One scholar has described the underpinnings of this doctrine as a "kind of federal general common law that was widespread in the 1800s before **Erie Railroad Co. v. Tompkins**," but has since been discredited.[18] What's worse, in Rhode Island, the **Hunter** Court's assumptions about the nature of a municipal corporation are entirely antithetical to the Rhode Island Constitution.

While "[t]raditionally, [Rhode Island] cities and towns were held to be creatures of the Legislature having no inherent right to self-government," this traditional view was fundamentally changed by the passage of the Home Rule Amendment of the R.I. Constitution in 1951.[19] After the passage of that amendment, a home rule municipality has inherent constitutional authority to "enact and amend local laws relating to its property, affairs and government," even without a delegation of authority from the General Assembly.[20]

Our Constitution also limits the laws that the General Assembly may enact affecting municipalities. Under Art. XIII, sec. 4, the General Assembly may only "act in relation to the property, affairs and government of a particular city or town" if the act is approved by the voters of that city or town. Further, under that section, although the General Assembly may "act in relation to the property, affairs and government of any city or town by general laws which shall apply alike to all cities and towns," it is flatly prohibited from "affect[ing] the form of government of any city or town." Therefore, when the U.S. Supreme Court said in **Hunter**,[21] that the state legislature may "repeal the [municipal] charter and destroy the corporation…with or without the consent of the citizens, or even against their protest," that statement is simply not true in Rhode Island. Since the justification for the **Hunter** doctrine is not applicable to Rhode Island municipalities, this doctrine should not apply to a Rhode Island municipality bringing a Contract Clause claim under the Rhode Island Constitution. Rhode Island municipalities and municipal elected officials are not merely dutiful servants of the state government. Instead, municipal elected officials are independently chosen by the municipal electorate to wield home rule authority and to be the voice of local citizens in local matters.

Further, applying the **Hunter** doctrine to a Rhode Island municipal Contract Clause claim doesn't serve any purpose. In the seminal case of **Trustees of Dartmouth College v. Woodward**,[22] the U.S. Supreme Court decided that a private corporation, even a non-profit private corporation serving a charitable purpose for the public benefit, is entitled to the protection of the Contract Clause. There is no reasoned distinction for providing that type of corporation Contract Clause protection but denying the same protection to a municipal corporation.

For example, suppose a group of residents in Little Compton got together to form a private nonprofit corporation – The Little Compton Beautification Society (LCBS). Further suppose that

the members of the LCBS all kicked some money into the corporate funds and the corporation hired a landscaping company on a three-year contract to care for open space in the Town, clean up the beaches, clear hiking trails, *etc*. If a powerful landscaping lobby were to force legislation through the General Assembly requiring that all landscaping contracts be of unlimited duration, the LCBS would certainly have a colorable Contract Clause claim. Why should a municipality be prohibited from making that claim when it forms the same type of contract, in the same manner, for the same purpose? Or, as another example, suppose a homeowners' association consisting of homeowners in a large subdivision hired a paving company to pave private roads in the subdivision. The contract between the homeowners' association and the paving company would be protected from General Assembly interference under the Contract Clause. When a municipality forms the same type of contract and performs the same type of function, expending municipal taxpayer funds to pave local roads, that contract should also be protected.

Finally, the most important reason that the Rhode Island Supreme Court should allow municipalities to bring Contract Clause claims under the Rhode Island Constitution is because unions have already successfully been allowed to bring such claims. As noted above, unions challenged the 2011 pension overhaul on Contract Clause grounds, forcing the state to negotiate.[23] Also, when the General Assembly enacted a statute authorizing municipalities to move eligible retirees off of municipal CBA benefits and onto Medicare, and the City of

continued on page 36

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You have a lot to share, and your colleagues appreciate learning from you. We are always in need of scholarly discourses and articles, and we also encourage point-counterpoint pieces. Or, if you have recently given, or you are planning on developing a Continuing Legal Education seminar, please consider sharing your information through a related article in the *Rhode Island Bar Journal*. While you reached a classroom of attorneys with your CLE seminar, there is also a larger audience among the over 6,500 lawyers, judges and other *Journal* subscribers, many of whom are equally interested in what you have to share. For more information on our article selection criteria, please visit the Bar's website, under News and *Bar Journal*, and click *Bar Journal* Homepage. The Editorial Statement and Selection Criteria is also on page 4 of every issue. Please contact Director of Communications Kathleen Bridge at 401-421-5740 or kbridge@ribar.com if you have any questions.

Bar's Government Lawyers Committee Offering Free, 1-Credit CLE

The Rhode Island Bar Association's Government Lawyers Committee is sponsoring a free-to-Bar-members, one-credit, Committee CLE seminar. On **Monday, September 9th, from 12:30 pm – 1:30 pm** at Rhode Island Bar Association headquarters, 41 Sharpe Drive in Cranston, Rhode Island, Parole Board Chairperson Laura A. Pisaturo, Esq. and Chief of the RI Public Defender Appellate Division Lara Montecalvo, Esq. will present ***The Intersection of State Occupational Licensing and the Criminal Process***. The seminar will provide participants with a short overview of the criminal process from arrest through conviction (and collateral consequences) and cover the processes and common conditions of probation and parole (including conditions for employment). Attendees will gain an understanding of the issues of clients dealing with the intersection of state occupational licensing and the criminal process, and more generally, an overview of the criminal process as a background for different types of civil cases that have criminal cases running in parallel.

To register, and for additional information, please contact Amy Morales: Amy.Morales@dbr.ri.gov.

RHODE ISLAND BAR ASSOCIATION
2019 LEGISLATIVE REPORT

William A. Farrell, Esq.
Rhode Island Bar Association Legislative Agent

During the course of the 2019 General Assembly session, over 2,300 legislative proposals were introduced and reviewed by RIBA's legislative counsel; 125 of those bills were deemed to impact the practice of law and were forwarded to the relevant RIBA committees.

In addition to the monitoring of legislative introductions, the RIBA adopted an assertive legislative agenda comprised of three legislative initiatives which are more fully described in the 2019 Amicus Notice.

Ultimately, the Bar Association was successful in urging the adoption of a proposal presented by the Superior Court Bench/Bar Committee and sponsored by Representative Carol McEntee and Senator Frank Lombardi. The proposed Uniform Interstate Depositions and Discovery Act would streamline the out-of-state discovery process and bring Rhode Island in line with other states that have adopted a version of the Uniform Act. At this time, approximately 40 states and the U.S. Virgin Islands are using some version of this Uniform Act. In short, this Act would obviate the need for a Miscellaneous Petition, Motion for Commission and/or request for Letters Rogatory in order to serve discovery outside of Rhode Island for an action pending within the State of Rhode Island and vice versa. The Act permits the practitioner, in conjunction with the Rhode Island Courts, to issue subpoenas and authorize foreign depositions and discovery.

Other legislation proposed by the Bar's Probate and Trust Committee involving the Rhode Island Estate Tax failed due to the impact the proposals would have on the state's budget as did the Committee's proposal to insulate certain Trustee action in Directed Trusts.

In addition to the legislative agenda initially approved by the Executive Committee, the Bar Association received concerns regarding a legislative proposal that involved legislation which would have eliminated the provision requiring payment of attorney fees from the employment security administrative fund for successful representation of a claimant for employment security (unemployment) benefits. If enacted, the bill would have had an impact on Rhode Islanders using the Lawyer Referral Service. The legislation passed in the Senate and was referred to the House Labor Committee, where the bill ultimately died.

Senator Erin Lynch Prata, Chairwoman of the Senate Judiciary Committee, and Representative Robert Craven, Chairman of the House Judiciary Committee, due to the complexity of the RIBA Agenda, required supportive memoranda detailing the issues involved in each of the RIBA legislative proposals and scheduled eight legislative hearings on the legislation. Representatives from both the RIBA Committees on Superior Court Bench/Bar and Probate and Trust, along with RIBA's legislative counsel, testified in support of the proposals and responded to questions from the respective Committees.

A special word of thanks to those RIBA member legislators and non-Bar member legislators who introduced the legislation on behalf of the RIBA and who managed the legislative package through the committees and on the floor of the Senate and House; namely, Senator Frank Lombardi/ Representative Carol McEntee – Interstate Depositions and Discovery Act; Representative Joseph Solomon/Senator Frank Ciccone – Portability; and Representative Robert Craven/Senator Stephen Archambault – Directed Trusts.

Throughout the 2019 session, the response of the House leadership team led by Speaker Nicholas Mattiello and Majority Leader K. Joseph Shekarchi, together with the Senate leadership team of Senate President Dominick Ruggerio and Majority Leader Michael McCaffrey, was truly appreciated and their support of the RIBA agenda was instrumental in the accomplishments achieved.

The specific detail of any of the RIBA-sponsored proposals or of any other proposal relating to the practice of law can be available upon request to the RIBA.

Do you or your family need help with any personal challenges?

We provide free, confidential assistance to Bar members and their families.

Confidential and free help, information, assessment and referral for personal challenges are available **now** for Rhode Island Bar Association members and their families. This no-cost assistance is available through the Bar's contract with **Coastline Employee Assistance Program (EAP)** and through the members of the Bar Association's Lawyers Helping Lawyers (LHL) Committee. To discuss your concerns, or those you may have about a colleague, you may contact a LHL member, or go directly to professionals at Coastline EAP who provide confidential consultation for a wide range of personal concerns including but not limited to: balancing work and family, depression, anxiety, domestic violence, childcare, eldercare, grief, career satisfaction, alcohol and substance abuse, and problem gambling.

When contacting Coastline EAP, please identify yourself as a Rhode Island Bar Association member or family member. A Coastline EAP Consultant will briefly discuss your concerns to determine if your situation needs immediate attention. If not, initial appointments are made within 24 to 48 hours at a location convenient to you. Or, visit our website at coastlineeap.com (company name login is "RIBAR"). Please contact Coastline EAP by telephone: 401-732-9444 or toll-free: 1-800-445-1195.

Lawyers Helping Lawyers Committee members choose this volunteer assignment because they understand the issues and want to help you find answers and appropriate courses of action. Committee members listen to your concerns, share their experiences, offer advice and support, and keep all information completely confidential.

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SOLACE

Helping Bar Members in Times of Need

SOLACE, an acronym for Support of Lawyers, All Concern Encouraged, is a new Rhode Island Bar Association program allowing Bar members to reach out, in a meaningful and compassionate way, to their colleagues. SOLACE communications are through voluntary participation in an email-based network through which Bar members may ask for help, or volunteer to assist others, with medical or other matters.

Issues addressed through SOLACE may range from a need for information about, and assistance with, major medical problems, to recovery from an office fire and from the need for temporary professional space, to help for an out-of-state family member.

The program is quite simple, but the effects are significant. Bar members notify the Bar Association when they need help, or learn of another Bar member with a need, or if they have something to share or donate. Requests for, or offers of, help are screened and then directed through the SOLACE volunteer email network where members may then respond. On a related note, members using SOLACE may request, and be assured of, anonymity for any requests for, or offers of, help.

To sign-up for SOLACE, please go to the Bar's website at ribar.com, login to the Members Only section, scroll down the menu, click on the SOLACE Program Sign-Up, and follow the prompts. Signing up includes your name and email address on the Bar's SOLACE network. As our network grows, there will be increased opportunities to help and be helped by your colleagues. And, the SOLACE email list also keeps you informed of what Rhode Island Bar Association members are doing for each other in times of need. These communications provide a reminder that if you have a need, help is only an email away. If you need help, or know another Bar member who does, please contact Executive Director Helen McDonald at hmcdonald@ribar.com or 401.421.5740.

Rhode Island Women Lawyers: Past, Present, & Future

This series was inspired by Roger Williams University School of Law's annual *Women in Robes* event, and was created in alliance with their exciting new project The First Women, which recognizes and honors the first women of the Rhode Island bar.

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Lise J. Gescheidt, Esq.

Like many lawyers of her generation, Lise Gescheidt was inspired to pursue law after watching *Perry Mason*. From the age of 13, she knew she would follow that path. As an only child, she received the support and encouragement she needed to pursue her goal. Leaving Florida to attend Trinity College in Hartford, Connecticut, she graduated in 1974 with a major in history and a minor in psychology. Hers was the second co-educational graduating class from that institution. Although she was tempted to put her legal career on hold to "bum around" the Greek Islands, she did not waver from her goal and attended Boston College Law School, graduating in 1977.

While in college, she fell in love with Newport, working as a bartender there during her summer breaks. It should be no surprise that while pursuing her goal of becoming a public defender, she volunteered at the Rhode Island Public Defender's Office. Upon graduation, she became an assistant public defender, working with lawyers like Barbara Hurst and Allegra Munson, both of whom were tough women and great teachers.

During her first six months as an assistant public defender, Attorney Gescheidt worked in the appellate division in an age before computers. While working there, her practice focused on conducting legal research in actual books, drafting briefs, and arguing before the Supreme Court. She also had the opportunity to work on an amicus brief regarding the insanity defense. Women lawyers appearing before the Rhode Island Supreme Court was not unusual in those days, and she generally felt comfortable and accepted in that role. However, once she switched to the trial court, "sexism and the old boy network were rampant."

Some of the instances of sexist behavior could be dismissed as "ignorance," while some perpetrators were "just plain pigs." Groping and unwanted physical contact with women lawyers, their secretaries, and female clerks were common. When she and other women were not victimized by unwanted physical actions, they would be marginalized or ignored. She relayed an occasion where she was the only woman attorney among three male colleagues on trial. When the judge took the bench, he greeted counsel with "Good morning, *gentlemen*." Opposing counsel could also be patronizing. If you showed emotion as a female attorney, "the men across the aisle would treat you like your hormones were raging." Turning to other women for support was not always a comfort. No one talked about the elephant in the room; you did not want to complain for fear that no one would believe you or that you would be perceived as overly sensitive.

Men who wielded their power outside of the courtroom also stood in opposition to women participating in the criminal justice system. For example, men working for the Department of Corrections blocked women from entering prisons to speak with their clients because they were wearing underwire bras that set off the metal detectors (while allowing other metal objects, like keys and belt buckles). When women removed their bras in the bathroom before visits, they were blocked again and told that women who did not wear bras could not enter either. Women were also denied entrance to the prison for wearing open-toed shoes or sandals. On one occasion, Attorney Gescheidt was finally allowed into the prison wearing golf spikes because she had no other shoes that were acceptable to the guard.

Attorney Gescheidt worked in the Public Defender's Office for nine years before changing career paths by practicing civil litigation at Adler Pollock & Sheehan. However, the civil bar was not any more welcoming of a female practitioner than in the criminal bar. Other attorneys would talk down to her and called her "deary." Further, clients openly objected to being represented by a "woman lawyer."

After eighteen months practicing civil law, she decided to leave and return to practicing criminal law. She took a "beach leave" of several months before starting her own practice, and later became a partner in MacFadyen, Gescheidt & O'Brien. Attorney Gescheidt spent the rest of her career working as a private criminal defense attorney where she represented both paying and court-appointed clients in serious criminal cases, abuse and neglect cases in Family Court, and in front of the Parole Board. After spending forty-one years practicing law, she recently assumed semi-retirement status and became a practicing farmer and horticulturalist.

Being a woman lawyer was challenging in the beginning of her career. She worked hard to gain self-confidence while learning the subtleties of the law and the art of persuasion, not to mention the management of staggering caseloads – "It was terrifying as a young lawyer, not knowing anything." In addition to this, she had to navigate a sexist and patronizing legal system. Attorney Gescheidt "worked her ass off," had supportive mentors, and gave back to the profession through her work on committees. She also "went out for a beer" with her colleagues and developed strong personal relationships with opposing counsel. On one occasion after a judge had been "very nasty" to her in chambers, opposing counsel, a male attorney, called her just to tell her he was sorry that she was treated in that manner and that she did nothing to deserve it. Through it all, you have to "…go in, roll with it, and give it the best you can do. Being a lawyer is a lot of work, sacrifice, and fun."

Although she "played the game" to do what was best for her clients, putting up with the demands of criminal defense work wore on her. She observed that the legal profession has changed over time, raising a question as to whether it is still an honorable profession. She is disappointed to see how lawyers disrespect other lawyers, their clients, as well as the Court. She also sees how the Court can disrespect lawyers as well. "Some of it may be insecurity or a need to exert control

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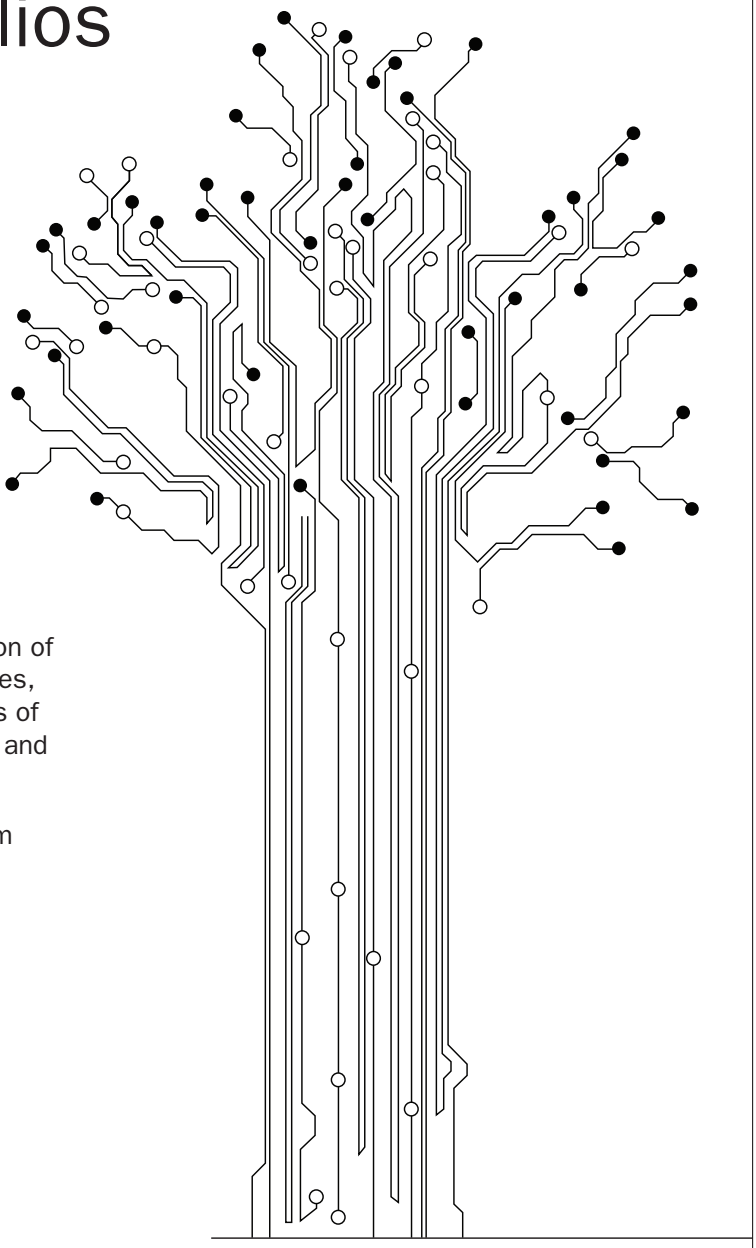

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over a system that is out of control," she postulated. She would like to see lawyers and judges acting like "real people guided by their conscience, not [by their] ego or fear of negative press coverage….Some people with no experiential basis should not be making judgments about people from diverse backgrounds and cultures. Ultimately, whatever role you assume in this human drama called justice, you have to look yourself in the mirror, like yourself, and feel good about the work you do. You look back at your life, and you can't get those years back." She also advised to "be yourself, wear the clothes that make you comfortable – whether it is cowboy boots or a shirt with a bowtie – and consider smelling the roses while you still have a sense of smell."

As for working to continue to overcome sexism, "You have to look at each other as individuals, not based on sex. We are all in this together, and we have to be supportive of and kind to each other." ◊

Seeking Law Related Education Program Attorney Volunteers!

Your Bar Association supports law related education (LRE) for Rhode Island children and adults through three, longstanding programs: *Lawyers in the Classroom* and *Rhode Island Law Day* for upper and middle school teachers and students, and the *Speakers Bureau* for adult organizations. Responding to LRE requests, Bar volunteers are contacted – based on their geographic location and noted areas of legal interest – to determine their interest and availability.

If you are interested in serving as a LRE volunteer, please go to the Bar's website at **ribar.com**, click on **FOR ATTORNEYS**, click on **LAW RELATED EDUCATION**, click on **ATTORNEY ONLY LRE APPLICATION**. All Bar members interested in serving as LRE volunteers, now and in the future, must sign-up this year, as we are refreshing our database.

Questions? Please contact: Kathleen M. Bridge, Director of Communications or Erin Cute, Member Services Coordinator at: (**401) 421-5740**.

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RI Bar Association Continuing Legal Education Seminars

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September 10 *Tuesday*
Cyber Threats, Risks, Responsibilities and Cyber Security Insurance
Rhode Island Law Center, Cranston
2:00 p.m. – 4:00 p.m., 1.5 credits + 0.5 ethics
Also available as a LIVE WEBCAST!

September 12 *Thursday*
After the Filing: Chapter 7 & 13
Rhode Island Law Center, Cranston
1:00 p.m. – 4:00 p.m., 2.5 credits + 0.5 ethics

September 17 *Tuesday*
60 (Productivity) Apps In 60 (Productive) Minutes
Rhode Island Law Center, Cranston
12:45 p.m. – 1:45 p.m., 1.0 credit
Also available as a LIVE WEBCAST!

September 18 *Wednesday*
Preparing a Cybersecurity Risk Mitigation Plan
Rhode Island Law Center, Cranston
2:00 p.m. – 4:00 p.m., 1.5 credits + 0.5 ethics
Also available as a LIVE WEBCAST!

September 19 *Thursday*
Firearm Licensing in Rhode Island
Rhode Island Law Center, Cranston
12:45 p.m. – 1:45 p.m., 1.0 credits
Also available as a LIVE WECAST!

September 24 *Tuesday*
Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics
Rhodes-on-the-Pawtuxet, 60 Rhodes Pl. Cranston
5:30 p.m. – 7:30 p.m., 2.0 ethics

September 25 *Wednesday*
Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics
Rhodes-on-the-Pawtuxet, 60 Rhodes Pl. Cranston
2:00 p.m. – 4:00 p.m., 2.0 ethics

September 26 *Thursday*
Exit Row Ethics: What Rude Airline Travel Stories Teach About Attorney Ethics
Rhodes-on-the-Pawtuxet, 60 Rhodes Pl. Cranston
9:00 a.m. – 11:00 a.m., 2.0 ethics

October 3 *Thursday*
Developing a Cybersecurity Incident Response Plan – Part Three
Rhode Island Law Center, Cranston
2:00 p.m. – 4:00 p.m., 1.5 credits + 0.5 ethics
Also available as a LIVE WEBCAST!

October 7 *Monday*
Commercial Law 2019: A Comprehensive Update on Recent Developments
Rhode Island Law Center, Cranston
9:00 a.m. – 1:00 p.m., 4.0 credits + 0.5 ethics
Also available as a LIVE WEBCAST!

October 17 *Thursday*
Available Electronic Evidence and How to Access It
Rhode Island Law Center, Cranston
3:00 p.m. – 5:00 p.m., 1.5 credits + 0.5 ethics

October 18 *Friday*
Adult Drug Court
Rhode Island Law Center, Cranston
12:45 p.m. – 1:45 p.m., 1.0 credit
Also available as a LIVE WEBCAST!

October 24 *Thursday*
Direct & Cross Examination of Fact Witness
Rhode Island Law Center, Cranston
3:00 p.m. – 5:00 p.m., 1.5 credits + 0.5 ethics

October 31 *Thursday*
Understanding Long-Term Care Insurance Plans
Rhode Island Law Center, Cranston
12:45 p.m. – 1:45 p.m., 1.0 credit
Also available as a LIVE WEBCAST!

Times and dates subject to change.
For updated information go to ribar.com

NOTE: You must register online for live webcasts.

RHODE ISLAND LAW CENTER LOCATION
41 Sharpe Drive in Cranston, Rhode Island

Continuing Legal Education Telephone:
401-421-5740.

Reminder: Bar members may complete six credits through participation in online CLE seminars. To register for an online seminar, go to the Bar's website: **ribar.com** and click on CONTINUING LEGAL EDUCATION on the left side menu.

Thanks to Our CLE Speakers

The success of the Rhode Island Bar Association's Continuing Legal Education (CLE) programming relies on dedicated Bar members who volunteer hundreds of hours to prepare and present seminars every year. Their generous efforts and willingness to share their experience and expertise helps to make CLE programming relevant and practical for our Bar members. We recognize the professionalism and dedication of all CLE speakers and thank them for their contributions.

Below is a list of the Rhode Island Bar members who have participated in CLE seminars during the month of May.

David D. Curtin, Esq.
Rhode Island Disciplinary Counsel's Office

Eric B. DiMario, Esq.
Kiernan, Plunkett & Redihan

Sean M. Fontes, Esq.
Rhode Island Department of Labor and Training

John K. Fulweiler Jr., Esq.
Fulweiler LLC

Jane F. Howlett, Esq.
Attorney at Law

William A. Poore, Esq.
Poore & Rosenbaum LLP

David M. Spinella, Esq.
Attorney at Law

Deborah M. Tate, Esq.
McIntyre Tate LLP

Hon. Frank J. Williams
Chief Justice (ret.)
Rhode Island Supreme Court

Ada Sawyer and the Rhode Island Supreme Court

Denise C. Aiken, Esq.
Providence

Most of us have become familiar with the fact that Ada Sawyer became the first woman in Rhode Island to become an attorney in the fall of 1920. We may not, however, be aware that Ms. Sawyer and her mentor/partner, Percy Winchester Gardner, were frequently before the Rhode Island Supreme Court.

There were thirteen cases between 1921 and 1959 in which Ms. Gardner was either involved as a representative of a litigant or as a party in her capacity as a trustee or administrator.

A scant few months after passing the Rhode Island bar exam, Mr. Gardner and Ms. Sawyer appeared for some respondents in the case of **R.I. Hospital Trust Co. vs. Herbert C. Calef, et al.** 43 RI 518, 112 A. 787, decided March 16, 1921. That was a request for instructions brought by the trustee on a question of the proper construction of a will and codicil.

Some of the cases brought before the Court read like movie plots, (**Charlotte Remington Hatton vs. Howard Braiding Company et al.**, 47 RI 47, 129 A. 805, decided June 29, 1925) and some are fine points of estate law.

There are thirteen cases in all. And some are still being cited.

Ada Sawyer, Esq.

The *Journal* will feature a series of articles related to Ada Sawyer and how she enhanced the status of women in Rhode Island. The articles are leading up to a commemorative event, organized by the Bar Association's Ada Sawyer Centennial Planning Committee and supported by the RI Women's Bar Association and the Roger Williams University School of Law, scheduled for October 15, 2020.

1. RI HOSPITAL TRUST CO., Admr. and Tr.
   vs.
   HERBERT C. CALEF, et al.
   43 RI 518, 112 A. 787
   decided March 16, 1921

2. CHARLOTTE REMINGTON HATTON
   vs.
   HOWARD BRADING COMPANY et al.
   47 RI 47, 129 A. 805
   decided June 29, 1925

3. PERCY W. GARDNER Ex.
   vs.
   EDWIN A. KNOWLES et al.,
   48 RI 231, 136 A. 883
   decided April 13, 1927

4. PERCY W. GARDNER, Trustee
   vs.
   CHARLES P. SISSON, Attorney-General
   49 RI 504, 144 A. 669
   decided January 21, 1929

5. OLIVE WELLING TIFFANY et al.
   vs.
   RICHARD H. BABCOCK et al.
   51 RI 350, 154 A. 784
   decided May 22, 1931

6. DANIEL O. HAMILTON
   vs.
   STERLING MOTOR TRUCK CO. OF NEW ENGLAND
   52 RI 328, 160 A. 866
   decided June 10, 1932

7. WILLIAM H. GILMORE
   vs.
   JAMES H. PRIOR, Ex.
   52 RI 395, 161 A. 137
   decided June 27, 1932

8. JOHN R. REYNOLDS
   vs.
   THOMAS E. MARSDEN Ex.
   60 RI 91, 197 A. 193
   decided February 14, 1938

9. HENRY N. GIRARD
   vs.
   ADA L. SAWYER, Admx. d.b.n.c.t.a.
   64 RI 48, 9 A.2d 854
   decided December 22, 1939

10. HENRY N. GIRARD
    vs.
    ADA L. SAWYER, Adm'x.
    66 RI 403, 19 A.2d 769
    decided April 28, 1941

11. NARRAGANSETT PIER RAILROAD COMPANY
    vs.
    LEROY W. PALMER. SAME **vs.**
    CHARLES B. CLARKE
    70 RI 298, 38 A.2d 761
    decided July 14, 1944

12. MABEL L. RITCHIE
    vs.
    ADA L. SAWYER et al.
    75 RI 223, 65 A.2d 458
    decided April 11, 1949

13. ADA L. SAWYER et al., Trustees
    vs.
    GORDON POTEAT, Adm'r, et al.
    90 RI 51, 153 A.2d 541
    decided July 27, 1959

HONOR ROLL

Volunteers Serving Rhode Islanders' Legal Needs

The Rhode Island Bar Association applauds the following attorneys for their outstanding pro bono service through the Bar's Volunteer Lawyer Program, Elderly Pro Bono Program, Foreclosure Prevention Project, Legal Clinics, and Ask a Lawyer events during June and July 2019.

JUNE 2019

Volunteer Lawyer Program

Tiffinay A. Antoch, Esq., *Heitke Cook Antoch LLC*
Barbara A. Barrow, Esq., *Moore, Virgadamo & Lynch, Ltd.*
David N. Bazar, Esq., *Bazar & Associates, P.C.*
Andrew M. Cagen, Esq., *Providence*
Michael A. Castner, Esq., *Jamestown*
Ronald C. Desnoyers, Esq., *Law Office of Ronald C. Desnoyers, Inc.*
Edward J. Gomes, Esq., *Law Office of Edward J, Gomes*
Casby Harrison III, Esq., *Harrison Law Associates, Inc*
Phillip C. Koutsogiane, Esq., *Law Offices of Phillip Koutsogiane*
Doris A. Lavallee, Esq., *Lavallee Law Associates*
Dadriana A. Lepore, Esq., *Coia & Lepore, Ltd.*
Tracy Loignon, Esq., *West Warwick*
Felicia A. Manni-Paquette, Esq., *Azzinaro, Manni-Paquette*
Laurie A. Meier, Esq., *Providence*
Adam G. Northup, Esq., *Law Office of Adam G. Northup*
Charles A. Pisaturo, Jr., Esq., *Providence*
Janne Reisch, Esq., *Janne Reisch, Attorney at Law*
Timothy J. Robenhymer, Esq., *Warwick*
Steven Aaron Robinson, Esq., *Robinson & Robinson*
Edward C. Roy, Jr., Esq., *North Kingstown*
Gregory P. Sorbello, Esq., *Peter M. Iascone & Associates, LTD.*
David J. Strachman, Esq., *McIntyre Tate LLP*

Elderly Pro Bono Program

Christopher M. Bijesse, Esq., *Woonsocket*
Michael A. Castner, Esq., *Jamestown*
Michael J. Chazan, Esq., *Merolla, Accetturo & Lough*
Karen L. Davidson, Esq., *Cranston*
Michael A. Devane, Esq., *Devane & Devane Law Offices*
Sherry A. Goldin, Esq., *Goldin & Associates, Inc.*
Deborah S. Gonzalez, Esq., *Roger Williams University School of Law*
Peter M. Iascone, Esq., *Peter M. Iascone & Associates, LTD.*
James S. Lawrence, Esq., *Lawrence & Associates, Inc.*
Christopher M. Lefebvre, Esq., *Consumer & Family Law Center of Claude F. Lefebvre, Christopher M. Lefebvre*
Elizabeth Peterson Santilli, Esq., *Cutcliffe Archetto & Santilli*

JULY 2019

Volunteer Lawyer Program

Tiffinay A. Antoch, Esq., *Heitke Cook Antoch LLC*
Carolyn R. Barone, Esq., *Kirshenbaum Law Associates*
Armando E. Batastini, Esq., *Nixon Peabody, LLP*
Justin T. Bonnick, Esq., *Greenville*
Michael A. Castner, Esq., *Jamestown*
Laurie Christensen, Esq., *Gerstenblatt Law Offices, Ltd.*
Priscilla Facha DiMaio, Esq., *Providence*
Kristy J. Garside, Esq., *The Law Office Howe & Garside, Ltd.*
Laurie A. Meier, Esq., *Providence*
Dawn F. Oliveri, Esq., *Providence*
Kimberly Ann Page, Esq., *North Kingstown*
Susan M. Pires, Esq., *The Law Office of Susan Pires*
Scott M. Pollard, Esq., *Law Office of Scott M. Pollard, Inc.*
Janne Reisch, Esq., *Janne Reisch, Attorney at Law*
David J. Strachman, Esq., *McIntyre Tate LLP*
Thomas E. Wright, Esq., *Warren*

Elderly Pro Bono Program

Richard P. D'Addario, Esq., *Law Offices of Richard P. D'Addario*
Richard K. Foster, Esq., *Coventry*
Charles Greenwood, Esq., *Providence*
Jeremy W. Howe, Esq., *The Law Offices of Howe & Garside, Ltd.*
Richard P. Kelaghan, Esq., *Cranston*
James S. Lawrence, Esq., *Lawrence & Associates, Inc.*
John T. Longo, Esq., *Citadel Consumer Litigation, PC*
Marcela Ordonez, Esq., *Law Office of Marcela Ordonez*
Arthur D. Parise, Esq., *Warwick*
Janne Reisch, Esq., *Janne Reisch, Attorney at Law*
Edythe C. Warren, Esq., *Law Office of Edythe C. Warren*

The Bar also thanks the following volunteers for taking cases for the Foreclosure Prevention Project and for participating in Legal Clinic and Ask a Lawyer events during June and July.

Foreclosure Prevention Project

Andrew M. Cagen, Esq., *Providence*
Arthur D. Parise, Esq., *Warwick*

Legal Clinic

Brian G. Goldstein, Esq., *Law Offices of Brian G. Goldstein*
James S. Lawrence, Esq., *Lawrence & Associates, Inc.*
Gregory P. Sorbello, Esq., *Peter M. Iascone & Associates, LTD.*
Steven H. Surdut, Esq., *Law Office of George A. Comoli*

Ask a Lawyer

Patrick O. Hayes Jr., Esq., *Corcoran, Peckham, Hayes, Leys & Olaynack, P.C.*
Thomas M. Petronio, Esq., *Law Offices of Thomas M. Petronio, Esq.*

For information and to join a Bar pro bono program, please contact the Bar's **Public Services Director Susan Fontaine** at: **sfontaine@ribar.com** or **401-421-7758**. For your convenience, Public Services program applications may be accessed on the Bar's website at **ribar.com** and completed online.

Legal Community Gathers to Support One of Its Own

Matthew B. Toro, Esq.
Deputy Director
RI Public Defender

Angela Yingling, Esq.
Assistant Public Defender
RI Public Defender

On Thursday, July 18, 2019, members of the Rhode Island bar and judiciary gathered at the LineSider Brewery in East Greenwich for a fundraiser in honor of federal public defender Olin Thompson, who was recently diagnosed with ALS (Lou Gehrig's Disease), a neurodegenerative condition that affects nerve cells in the brain and spinal cord and leads to advanced muscle weakness and atrophy. Due to the progressive nature of the disease, those diagnosed with ALS often require specialized equipment and substantial home renovations (such as the installation of ramps and rail chairs) in order to remain at home safely and comfortably with their families. Accordingly, Olin's friends and colleagues have joined together to assist the Thompson family.

The number of people who braved the rain on July 18th is a testament to the impact that Olin has had on the Rhode Island community. After graduating Duke Law School in 1996, Olin has continued to tirelessly fight for justice as a state public defender, a federal public defender, and a private practitioner. When not cheering for his three sons (Olin, Jr., (16), Atticus (13), and Nathanial (9)) from the sidelines of their basketball and soccer games, Olin has dedicated much of his free time to volunteer work, serving as both past president of the Rhode Island Association of Criminal Defense Lawyers (RIACDL), and as a member of the East Greenwich Juvenile Hearing Board for many years.

Approximately 175 people attended the LineSider fundraiser, representing a diverse cross-section of the legal community. In attendance were members of the state and federal judiciary, public defenders, prosecutors, probation officers, court staff, members of various law enforcement agencies, private practitioners, and many family friends. All gathered to show support for Olin, his wife Christa, and their sons during this difficult time, and the event and associated fundraising will help the family cover the significant medical expenses associated with ALS. Thank you to the organizers of the fundraiser, all of the attendees and contributors to the fund, and to the LineSider Brewery for hosting the event. Anyone interested in learning more about this effort is encouraged to contact Kevin Fitzgerald (Kevin_Fitzgerald@fd.org) or Matthew Toro (mtoro@ripd.org) for more information. ◊

I to r: Dana Smith, Christopher T. Millea, Esq., Hon. Alice Bridget Gibney, and Matthew B. Toro, Esq.

Many of Olin's colleagues and friends attended the fundraiser to show their support.

I to r: Michael A. DiLauro, Esq., Pamela Chin, Esq., and James F. Dube, Esq.

I to r: Nicholas J. Parrillo, Esq., Eric Slingo, Esq., Angela Yingling, Esq., Philip F. Vicini, Esq., and Rebecca L. Aitchison, Esq.

ALL PHOTOS BY MICHAEL A. DILAURO, ESQ.

Rhode Island Bar Foundation

Founded in 1958, the Rhode Island Bar Foundation is the non-profit philanthropic arm of the state's legal profession. Its mission is to foster and maintain the honor and integrity of the legal profession and to study, improve and facilitate the administration of justice. The Foundation receives support from members of the Bar, other foundations, and from honorary and memorial contributions.

Today, more than ever, the Foundation faces great challenges in funding its good works, particularly those that help low-income and disadvantaged people achieve justice. Given this, the Foundation needs your support and invites you to complete and mail this form, with your contribution to the Rhode Island Bar Foundation.

Help Our Bar Foundation Help Others

RHODE ISLAND BAR FOUNDATION GIFT

PLEASE PRINT

My enclosed gift in the amount of $ _____

Please accept this gift in my name

or

In Memory of _____

or

In Honor of _____

Your Name(s) _____

Address _____

City/State/Zip _____

Phone (in case of questions) _____

Email: _____

Please mail this form and your contribution to:

Rhode Island Bar Foundation

41 Sharpe Drive

Cranston, RI 02920

Questions? Please contact Virginia Caldwell at 421-6541

or gcaldwell@ribar.com

Rhode Island Legal Services
Campaign for Justice

Call to Serve!

Rhode Island Legal Services, Inc. needs **YOUR** help in fundraising for our annual Campaign for Justice! We are **recruiting committee volunteers** who are eager to help the local Rhode Island community. Your participation on this committee will assist us with our fundraising efforts during our Campaign for Justice.

Participating on the **Campaign for Justice Committee** is an excellent opportunity to give back to people in need, network with community passionate individuals, and become more involved in RILS' mission to provide legal aid to low-income Rhode Islanders.

A Planning Meeting will be held on **Friday, September 20th**. Lunch to be provided.

If you are interested in volunteering for the **Campaign for Justice Committee**, please send an email expressing your interest to Annie Dwyer at **adwyer@rils.org** or call **401-633-9139**.

Make a Contribution!

Unable to volunteer? Continue to support our mission to serve Rhode Islanders and their families by making a **tax-deductible donation**. Donations can be made via our website or by mailing a check, made payable to Rhode Island Legal Services, Inc.

56 Pine Street, Suite 400, Providence, RI 02903
401-274-2652 ▪ www.rils.org

Rhode Island LEGAL SERVICES 50

Proposed Title Standards Practice Form 15
Open for Bar Member Review and Comment

The Rhode Island Bar Association's Real Estate Title Standards and Practices Committee, chaired by Michael B. Mellion, Esq., at their meeting on May 16, 2019, voted unanimously to submit the following Proposed Practice Form 15 to the Rhode Island Bar Association's Executive Committee for its consideration. Bar members are invited to comment on these proposed changes, no later than October 1, 2019, by contacting Rhode Island Bar Association Executive Director Helen Desmond McDonald by postal mail: 41 Sharpe Drive, Cranston, RI 02920 or email: hmcdonald@ribar.com.

Explanation

In view of the enactment of R.I.G.L. § 42-30.1-1 et seq by Chapter 104 of the 2018 Public Laws, entitled "Uniform Law on Notarial Acts", which became effective on January 1, 2019, the Real Estate Title Standards and Practices Committee developed a set of acknowledgment forms that incorporated various provisions of that Act.

Use of these forms is suggested, but any substantively equivalent form is acceptable.

1. INDIVIDUAL ACKNOWLEDGMENT

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument, and acknowledged that _____ executed said instrument for the purpose stated therein as _____ free act and deed.

_____
Notary Public
Printed Name: _____
My commission expires: _____

2. INDIVIDUAL ACKNOWLEDGMENT BY MARK

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument by making ____ mark or adopting the mark seen above as _____ signature, and acknowledged that _____ executed said instrument for the purpose stated therein as _____ free act and deed.

_____
Notary Public
Printed Name: _____
My commission expires: _____

3. INDIVIDUAL ACKNOWLEDGMENT – INDIVIDUAL UNABLE TO SIGN

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument, and acknowledged he/she executed said instrument for the purpose stated therein in the name of and at the direction of _____, who also appeared before me and provided satisfactory identification but is physically unable to sign the instrument, as the free act and deed of [both names].

_____
Notary Public
Printed Name: _____
My commission expires: _____

4. CORPORATE ACKNOWLEDGMENT

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, the _____ of _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument on behalf of said corporation, and acknowledged that _____ executed said instrument with proper authority for the purpose stated therein as _____ free act and deed in said capacity and the free act and deed of said corporation.

_____
Notary Public
Printed Name: _____
My commission expires: _____

5. GENERAL OR LIMITED PARTNERSHIP ACKNOWLEDGMENT – INDIVIDUAL GENERAL PARTNER

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, the general partner of _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument on behalf of said partnership, and acknowledged that _____ executed said instrument with proper authority for the purpose stated therein as _____ free act and deed in said capacity, and the free act and deed of said partnership.

_____
Notary Public
Printed Name: _____
My commission expires: _____

6. GENERAL OR LIMITED PARTNERSHIP ACKNOWLEDGMENT – ENTITY AS GENERAL PARTNER

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, the _____ of _____, a _____, the general partner of _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument on behalf of _____ in its capacity as general partner of said partnership, and acknowledged that _____ executed said instrument with proper authority for the purpose stated therein as _____ free act and deed in said capacity, the free act and deed of said _____ in its said capacity, and the free act and deed of said partnership.

_____
Notary Public
Printed Name: _____
My commission expires: _____

7. LIMITED LIABILITY COMPANY ACKNOWLEDGMENT – INDIVIDUAL AS MEMBER OR MANAGER

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, the _____ of _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument on behalf of said limited liability company, and acknowledged that executed said instrument with proper authority for the purpose stated therein as _____ free act and deed in said capacity and the free act and deed of said limited liability company.

_____
Notary Public
Printed Name: _____
My commission expires: _____

8. LIMITED LIABILITY COMPANY ACKNOWLEDGMENT – ENTITY AS MEMBER OR MANAGER

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, the _____ of _____, a _____, the _____ of _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument on behalf of _____ in its capacity as _____ of said limited liability company, and acknowledged that _____ executed said instrument with proper authority for the purpose stated therein as his free act and deed in said capacity, the free act and deed of said _____ in its said capacity, and the free act and deed of said limited liability company.

9. TRUSTEE ACKNOWLEDGMENT – INDIVIDUAL AS TRUSTEE

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, the Trustee of _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument as trustee of said Trust, and acknowledged _____ executed said instrument with proper authority for the purpose stated therein as _____ free act and deed in said capacity as Trustee.

_____
Notary Public
Printed Name: _____
My commission expires: _____

10. TRUSTEE ACKNOWLEDGMENT – ENTITY AS TRUSTEE

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, the _____ of _____, the Trustee of _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument on behalf of _____ as Trustee of said Trust, and acknowledged _____ executed said instrument with proper authority for the purpose stated therein as _____ free act and deed in said capacity and the free act and deed of _____ in its capacity as Trustee.

_____
Notary Public
Printed Name: _____
My commission expires: _____

11. ADMINISTRATOR, EXECUTOR OR GUARDIAN ACKNOWLEDGMENT

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, the _____ of the Estate of _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument, and acknowledged that _____ executed said instrument with proper authority for the purpose stated therein as _____ free act and deed individually and _____ free act and deed in said capacity as _____.

_____
Notary Public
Printed Name: _____
My commission expires: _____

12. COURT – APPOINTED FIDUCIARY ACKNOWLEDGMENT

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, the duly appointed _____ of _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument, and acknowledged _____ executed said instrument with proper authority for the purpose stated therein as _____ free act and deed in said capacity as the _____ of _____.

_____
Notary Public
Printed Name: _____
My commission expires: _____

13. ATTORNEY IN FACT – ACKNOWLEDGMENT BY INDIVIDUAL

STATE OF RHODE ISLAND
COUNTY OF

In _____ on this ____ day of _____, ____, before me personally appeared _____, attorney in fact for _____, to me known and known by me or proved to me through satisfactory evidence to be the party executing the foregoing instrument, and acknowledged that _____ executed said instrument with proper authority for the purpose stated therein as _____ free act and deed in said capacity and the free act and deed of _____.

_____
Notary Public
Printed Name: _____
My commission expires: _____

14. FOREIGN ACKNOWLEDGMENT – BEFORE AMERICAN CONSULAR OFFICIAL

_____, _____

In _____, _____ on the ____ day of _____, ____ before me, a consular officer of the United States of America appointed and accredited to and residing within _____, personally appeared _____, to me known and known by me or proved to me through satisfactory evidence to be the person executing the foregoing instrument, and acknowledged he executed said instrument for the purpose stated therein as _____ free act and deed.

_____
Notary Public
Printed Name: _____
My commission expires: _____

15. JURAT – FOR USE WITH AFFIDAVIT

STATE OF RHODE ISLAND
COUNTY OF

Subscribed and sworn to before me in _____ in said County on this _____ day of _____, _____ by _____, to me known and known by me or proved to me through satisfactory evidence to be the person executing the foregoing instrument.

_____
Notary Public
Printed Name: _____
My commission expires: _____

16. JURAT COMBINED WITH ACKNOWLEDGEMENT FOR AFFIDAVIT

State of _____
County of _____

In _____ in said County on the _____ day of _____, _____ before me personally appeared _____, to me known and known by me or proved to me through satisfactory evidence to be the person signing the within instrument, who swore under the pains and penalties of perjury that the facts set forth therein are true, and acknowledged that _____ executed said instrument for the purpose stated therein as _____ free act and deed.

_____
Notary Public
Printed Name: _____
My commission expires: _____

Lawyers on the Move

Thomas R. Bender, Esq. is now of counsel to **Higgins, Cavanagh & Cooney, LLP**, 10 Dorrance Street, Suite 400, Providence, RI 02903.
401-272-3500 tbender@hcc-law.com hcc-law.com

Alexander L. Friedman, Esq. is now an associate at **O'Leary Murphy, LLC**, 4060 Post Road, Warwick, RI 02886.
401-615-8584 alf@olearymurphy.com olearymurphy.com

Deana M. Tomaselli, Esq. is now a partner at **The Bottaro Law Firm, LLC**, 756 Eddy Street, Providence, RI 02903.
401-777-7777 deana@bottarolaw.com bottarolaw.com

RHODE ISLAND BAR ASSOCIATION'S

Online Attorney Resources (OAR)

Exclusively designed to help Bar members receive and offer timely and direct assistance with practice-related questions.

OAR provides new and more seasoned Bar members with the names, contact information and Bar admission date of volunteer attorneys who answer questions concerning particular practice areas based on their professional knowledge and experience. Questions handled by **OAR** volunteers may range from specific court procedures and expectations to current and future opportunities within the following **OAR** practice areas:

Administrative Law
Business Law
Civil Law
Creditors and Debtors
Criminal Law
Domestic/Family Law
Federal Court
Probate and Estates
Real Estate
Workers' Compensation

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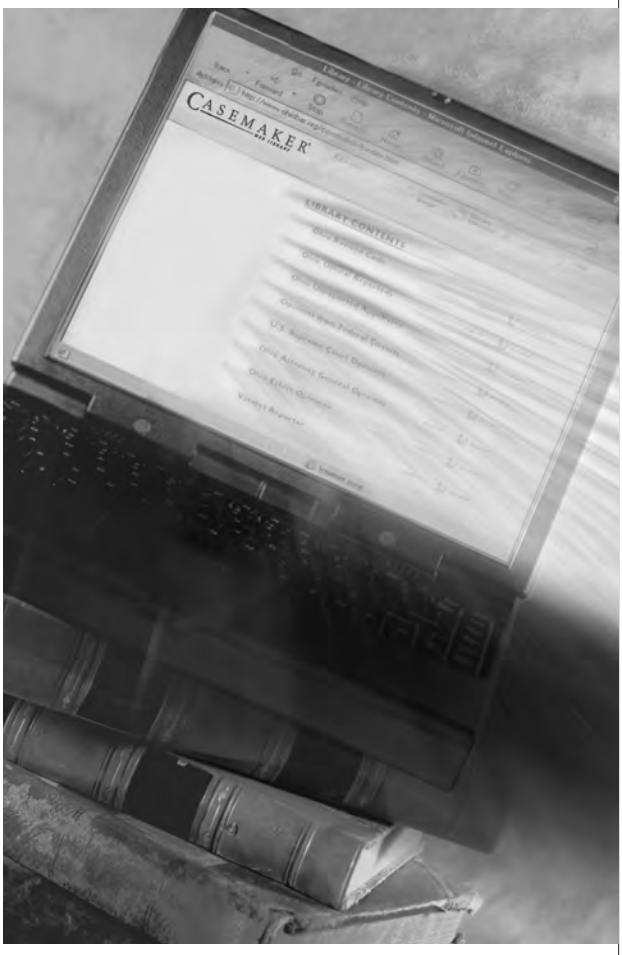

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In Memoriam

Gerald M. Brenner, Esq.
Gerald M. Brenner, of Woonsocket, died July 15, 2019. He was the husband of Marjory (Miller) Brenner. Born in Woonsocket, he was the son of the late Morris and Sylvia (Pullman) Brenner. Mr. Brenner was a graduate of Woonsocket High School class of 1956, received a BA from URI in 1960 where he was also a member of the Golden Grads Committee, and received his law degree from Suffolk University in 1965. He was an attorney and partner for many years with the firm Zimmerman, Roszkowski & Brenner. In 2015, he was honored for being admitted to the RI Bar Association for fifty years. He represented many clients in both state and federal courts in RI and MA. In 1984, he was admitted to appear in the United States Supreme Court. Along with his wife Marjory, he is survived by his four sons, Jeffrey Brenner, Esq. and his wife Elizabeth Brenner, Esq. of Barrington; Dr. Richard Brenner and his wife Dr. Andrea Brenner of Bethesda, MD; Todd Brenner and his wife Dr. Lauren Brenner of Waltham, MA; and Dr. Jay Brenner and his wife Larissa of Manlius, NY; his brother, Henry Brenner of Fargo, ND; his sister, Zita Kaplan of Delray Beach, FL; and eight grandchildren.

B. Mitchell Simpson III, Esq.
B. Mitchell "Tony" Simpson III, of Newport, died on May 9, 2019. Tony was married to Wilma M. Simpson for 51 years. Tony was born in Philadelphia, PA, to Marshall (Hall) Simpson and B. Mitchell Simpson II. He graduated with honors from Colgate University with a BA then received his law degree from the University of Pennsylvania. Subsequently, he entered the U.S. Navy and served honorably for twenty years on five ships, including USS Franklin D. Roosevelt and USS Perry. During his distinguished service in the Navy, Tony received three degrees from the Fletcher School of Law and Diplomacy at Tufts University: Master of Arts (MA), Master of Arts in Law and Diplomacy (MALD), and a Doctor of Philosophy (PhD). He was a respected member of the faculty of the U.S. Naval War College from 1970-1977, retiring from active duty as a Lt. Commander. Upon retirement from the Navy, he continued his law career in private practice in Newport and pursued his passion as a true academic and historian. Over the course of his notable career, he published many articles, several books, and other scholarly materials on naval strategy, history, and law. He continued to serve the community in a variety of ways, including eight years on the Newport City Council, as Senior Warden of Trinity Church Newport, Chairman and Co-Founder of the Festa Italiana, and Trustee and Trustee Emeritus of The Pennfield School. From 2000-2018 he was a professor of law at Roger Williams University School of Law. Tony is survived by his wife Wilma, daughters Fiona and Isla, sons-in-law Rob and Steven, and three grandchildren.

Raymond A. Tomasso, Esq.
Raymond A. Tomasso died Sunday, June 30, 2019. A lifelong resident of Providence, he was married to the late Rosemarie (Michela) Tomasso. Her family operated the antique Philadelphia Toboggan Carousel #44 in Roger Williams Park for 3 generations. After many years in the amusement business, he obtained his BS in Business Administration in 1971 from the University of Rhode Island. In 1974, he received both his MBA from URI and his Juris Doctor from Suffolk University Law School. He was admitted to the RI bar on his 44th birthday and specialized in real estate closings and probate matters. He served as a Providence city councilman for Ward 9 from 1976 to 1980. He was a son of the late Michele and Angelina (Rossi) Tomasso. He leaves two sons, Raymond J. Tomasso and his wife Catherine of Cranston, and John P. Tomasso and his wife Winnie of Lincoln, and four grandchildren. He was the brother of Eleanor Colangelo, Elda Rossi and Mario Tomasso, all predeceased.

continued from page 15

Providence attempted to use that statute for its police and fire retirees, the retirees successfully obtained a preliminary injunction under the Contract Clause.[24] This, again, forced Providence to the negotiating table on the issue. Since labor representatives are effectively applying the Contract Clause to General Assembly interference with municipal CBAs, the representatives of municipal residents and taxpayers should be given an equal opportunity to make the same case. Otherwise, this would give a lopsided advantage to one party to the CBA (the union) with the possibility of an unredressed constitutional injury to the other party to the CBA (municipal residents and taxpayers).

V. The state of the law in Rhode Island

Although the Rhode Island Supreme Court generally follows the U.S. Supreme Court's lead in interpreting the Contract Clause of the Rhode Island Constitution,[25] the Rhode Island Supreme Court has never adopted the **Hunter** doctrine. The Court has, however, flirted with the **Hunter** doctrine in *dicta*. In **Lincoln, et al., v. Pawtucket, et al.**,[26] Lincoln, Smithfield, Cumberland, and East Providence brought suit seeking a declaration that legislation conferring certain powers on the Narragansett Bay Commission was in violation of the equal protection and due process clauses of the R.I. and federal constitution. No party in the case raised the issue of the municipalities' standing to bring the constitutional claims, so the Court "assume[d] without deciding, that the municipalities have… standing to challenge the subject legislation as violative of the State Constitution."[27] However, the Court dropped a footnote recognizing the **Hunter** doctrine under the federal constitution and going on to state that "it is doubtful that a municipality has standing to challenge a state statute under the Rhode Island Constitution with the probable exception that it can challenge an act of the General Assembly imposed upon it in violation of the Home Rule Amendment."[28]

If the Court ever officially adopted the *dicta* stated in **Lincoln**,[29] it would make the Rhode Island Contract Clause a one-way ratchet for municipal CBAs: available to challenge General Assembly interference that harms union employees and unavailable to challenge interference that harms municipal taxpayers. This is especially so because, in Rhode Island, taxpayers generally lack standing to bring suit on their own behalf and, instead, must rely on their elected officials to act for them.[30] Fortunately, the Court has walked back from the *dicta* in **Lincoln**,[31] in a more recent decision.

In **Moreau v. Flanders**,[32] the then-Mayor of Central Falls brought a suit challenging the law enabling appointment of a receiver over the City, raising a plethora of constitutional claims. The Mayor's claims included not only an alleged violation of the home rule charter amendment, but also the separation of powers doctrine, substantive due process, as well as constitutional claims sounding in nondelegation and vagueness principles. The Mayor lost on every claim.[33] In **Shine v. Moreau**,[34] the Court considered whether the now ex-Mayor should be indemnified by the City for the legal costs of bringing the suit, with the relevant inquiry turning on whether the Mayor was acting within the scope of his official duties when he brought suit to challenge the law. The Court opined that the Mayor should be indemnified, because "the Mayor, as the City's chief elected official, had a right, if not a duty, to challenge the Act."[35] The fact that the Court recognized a municipal elected official's right and/or duty to challenge the constitutionality of an act of the General Assembly certainly seems to indicate that the Court has abandoned the *dicta* in **Lincoln**,[36] and is not applying the **Hunter** doctrine to state constitutional claims.

It is a good thing for municipal CBAs that the Court seems to have moved away from the **Hunter** doctrine. Doing so puts municipal union employees and municipal taxpayers on equal footing under the Contract Clause, giving both parties a reasonable assurance against unconstitutional legislative interference in their CBAs. Beyond that, it is also good for our system of government. Municipal elected officials have a duty to act on behalf of their constituents and uphold the constitution of our state. This means that municipalities should be allowed to challenge an act of the General Assembly when, in the opinion of the elected officials, the act would violate the constitution and harm municipal residents and taxpayers. Whether or not the act in question ultimately survives judicial scrutiny, the adversarial process, conducted under a court's supervision, will only promote better legislation and greater respect for the Constitution.

VI. Conclusion

The Contract Clause of the Rhode Island and federal Constitutions serves an important purpose in our system of government. It allows people to settle their affairs through mutually agreed upon contracts, without fear that those settled expectations will be upset by the caprice of a politically powerful group.

Unions, and the employees those unions represent, have invoked the protections afforded by the Contract Clause, with some success, when the General Assembly has attempted to interfere with municipal CBAs to the union's disadvantage. Similarly, municipal residents and taxpayers should be able to invoke those same protections when the General Assembly attempts to interfere with CBAs to their disadvantage, with legislation like the evergreen contracts law. Unfortunately, the U.S. Supreme Court has shut the doors of the federal courthouse to municipal residents and taxpayers making such a claim under the U.S. Constitution. That is why it is even more important that the state courthouse remain open to such claims. When it comes to Contract Clause claims based on municipal CBAs, the obligation of contract should be a two-way street.

ENDNOTES

1 ***See**, e.g., Allysia Finley,* Blue-State Politics Are Eroding Little Rhody's Big Reforms, *Wall Street Journal (May 3, 2019).*

2 ***See Rhode Island Council 94, et al., v. Chafee, et al.**, PC-2012-3168; **Bristol/Warren Regional School Employees, et al., v. Chafee, et al.**, PC-2012-3167; PC-2012-3169; PC-2012-3579.*

3 *U.S. Const. Article I, section 10, clause 1; R.I. Const. Art. I, section 12.*

4 *R.I. League of Cities and Towns, Testimony from Brian M. Daniels, Executive Director In Opposition to Continuing Contract Bills (H5143, H5144) House Committee on Labor (January 31, 2019).*

5 *The Federalist Papers No. 44.*

6 ***Id.***

7 ***Sveen v. Melin**, 138 S.Ct. 1815, 1827 (2018) (Gorsuch, J., dissenting).*

8 ***Id.** (**quoting Energy Reserves Group, Inc. v. Kansas Power & Light Co.**, 459 U.S. 400, 411–412 (1983)).*

9 ***See R.I. Depositors Econ. Prot. Corp. v. Brown**, 659 A.2d 95, 106 (R.I. 1995).*

10 *Editorial: The evergreen nightmare,* The Providence Journal *(April 15, 2019).*

11 *207 U.S. 161 (1907).*

12 ***Hunter**, 207 U.S. at 177.*

13 ***Id.** at 178.*

14 ***Id.** at 178-79.*

15 *289 U.S. 36 (1933).*

16 *307 U.S. 433 (1939)*

17 *Josh Bendor, Municipal Constitutional Rights: A New Approach, Yale Law & Policy Review, Vol. 31, Issue 2, Art. 5 (2012).*

18 ***Id.***

19 ***See Lynch v. King**, 391 A.2d 117, 122 (R.I. 1978).*

20 *R.I. Const. Art. XIII, § 2.*

21 ***Supra.***

22 *17 U.S. 518 (1819).*

23 ***See Rhode Island Council 94, et al., v. Chafee, et al.**, PC-2012-3168; **Bristol/Warren Regional School Employees, et al., v. Chafee, et al.**, PC-2012-3167; PC-2012-3169; PC-2012-3579.*

24 ***See Providence Retired Police and Firefighters Association v. City of Providence**, PC-2011-5853.*

25 ***See R.I. Depositors Econ. Prot. Corp., supra.***

26 *745 A.2d 139 (R.I. 2000).*

27 ***Lincoln, et al.**, 745 A.2d at 145.*

28 ***Id.**, fn. 1.*

29 ***Supra.***

30 ***See Watson v. Fox**, 44 A.3d 130 (R.I. 2012).*

31 ***Supra.***

32 *15 A.3d 565 (R.I. 2011).*

33 ***Moreau**, 15 A.3d at 589.*

34 *119 A.3d 1 (R.I. 2015).*

35 ***Shine**, 119 A.3d at 14.*

36 ***Supra.*** ◊

Caption This! Contest

We will post a cartoon in each issue of the *Rhode Island Bar Journal*, and you, the reader, can create the punchline.

How It Works: Readers are asked to consider what's happening in the cartoon above and submit clever, original captions. Editorial Board staff will review entries, and will post their top choices in the following issue of the *Journal*, along with a new cartoon to be captioned.

How to Enter: Submit the caption you think best fits the scene depicted in the cartoon above by sending an email to kbridge@ribar.com with "Caption Contest for September/October" in the subject line.

Deadline for entry: Contest entries must be submitted by October 1st, 2019.

By submitting a caption for consideration in the contest, the author grants the Rhode Island Bar Association the non-exclusive and perpetual right to license the caption to others and to publish the caption in its Journal, whether print or digital.

Winning caption for July/August

"St. Peter, as you can see, my client already has his halo. This is res judicata."

ROBERT A. D'ALFONSO, III, ESQ.

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The next time you are visiting the Rhode Island Law Center for a Continuing Legal Education program or committee meeting, be sure to ask about how easy it is to update your online attorney directory photograph. All you need to do is step into the lawyers' lounge, located at the Law Center, and a staff member will snap your photo, upload it to the directory, and, if you'd like, email you a copy for your own personal use. The directory is available for the convenience of Bar members, clients, and potential clients, so be sure to keep your listing up to date! Attorney Directory contact information may include the Bar member's name, photograph, law office name, postal address, email address, telephone number, and facsimile number. If you would rather send us your own photo, you may do so by emailing it to Erin Cute at ecute@ribar.com. Photographs must be provided in a jpg format of at least 300 dpi.

It's Not Too Late to Sign Up for Your 2019-2020 Bar Committees!

If you have not yet signed up as a member of a 2019-2020 Rhode Island Bar Association Committee, you can still do so! Bar committee membership runs from July 1st to June 30th.

Even Bar members who served on Bar committees this year must reaffirm their interest for the coming year, as committee membership does not automatically carry over from one Bar year to the next. Please join no more than three committees.

For more information, visit the Bar's website under For Attorneys-Bar Committees. Anyone signing up for Bar committees after August 15th can do so by contacting Erin Cute at ecute@ribar.com.

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