ACBA
Young Lawyers Division

Point of Law

The E-Newsletter of the Young Lawyers Division of the Allegheny County Bar Association

Winter 2023

How the Tables Have Turned: Property Owners v. the Tax Man

By Maxwell R. Dormer and Matthew J. McClelland

Pennsylvania's Tax Equalization Board recently set the 2023 common level ratio for Allegheny County at 63.6%, which is a remarkable drop from 81.1% in 2022 and prior years. The drastic change to the common level ratio could result in significant real estate tax savings for Allegheny County property owners. It is worth noting that the 2022 common level ratio is currently subject to litigation. In the case *Gioffre et al. v. Fitzgerald et al.,* No. GD-21-007154 (Pa. D. & C. Nov. 30, 2022), Allegheny County Court of Common Pleas Judge Alan Hertzberg ordered a reduction of the 2022 common level ratio to 63.53%. Judge Hertzberg's order is currently under appeal to the Commonwealth Court. Assuming the reduction is not overturned on appeal, let's break this down to explain what this all means and how property owners may see tax savings.

Every county in Pennsylvania assesses property based on the fair market value of a taxpayer's property. However, it would be unfair to assess one person's property this year and another person's property a few years later because the second person's home, even if identical, would likely be assessed at a higher value due to the natural appreciation of real estate values. Under this scenario, the second person would then pay higher taxes each year because the same property tax rate is applied to a greater home value. To correct this issue, the common level ratio is used to help balance the scales. The common level ratio allows a county to assess the value of property within its domain in different years (usually when a property is sold, or a new property is built) without subjecting taxpayers to the injustice caused by natural property value appreciation. Each year the Tax Equalization Board releases each county's common level ratio, a number which is designed to take any property value in the current year and adjust it to the approximate equivalent value for the base year. The base year is the year the last countywide reassessment took place. In Allegheny County, the base year is 2012. In other words, the common level ratio is intended to equalize for assessment purposes the current fair market value of a property as if it was valued as of the based year.

Here is an example to illustrate how the 2023 common level ratio could potentially benefit property owners – if you buy a home in 2022 for $125,000, but have a base year assessment of $100,000, then application of the 2023 common level ratio to the purchase price would yield a $79,375 assessment. This reduction in the home's assessed

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2022 YLD Record-Breaking Children's Gift Drive and Holiday Party

By Devyn R. Lisi, Samantha Dorn and Matthew J. McClelland

The 2022 ACBA Young Lawyers Division Annual Children's Gift Drive and Holiday Party was another record-breaking success! The YLD was able to sponsor 945 children across 17 shelters throughout the greater Pittsburgh region with gifts this holiday season. The 945-children mark is an all-time high for the YLD, eclipsing last year's record. Providing these children with gifts this holiday season would not have been possible without the 53 law offices, firms, solo practitioners, in-house counsel departments, and the faculty and staff of the Pitt and Duquesne law schools who volunteered to sponsor these children. It is the generosity of all those who volunteered to purchase gifts that allows this program to be so successful.

In years prior to the pandemic, this program traditionally held a gift-wrapping event, where volunteers would wrap the purchased gifts and deliver them to the shelters. With the move to a virtual purchasing platform, and due to the overwhelming support by the members of the bar, the Children's Gift Drive and Holiday Party was able to incorporate a new, in-person event – the stocking stuffer drive. The stocking stuffer drive was supported by an additional 31 law offices. Stockings were provided to more than 300 children at 12 shelters hosting holiday parties. In each stocking, the children received essential items including winter hats, scarves, hand warmers, a toothbrush, and toothpaste. The children also received treats including Oreo cookies, juice boxes, and candy canes. Eat'n Park was also generous to provide coupons for a free kid's meal, included in each stocking.

Planning for the Children's Gift Drive and Holiday Party kicked off this year with an early September meeting among the co-chairs of last year's Children's Gift Drive – Tricia Martino and Rebeca Himena Miller – and the new 2022 co-chairs Devyn Lisi, Samantha Dorn, and Matthew McClelland. Thereafter, the 2022 co-chairs held weekly meetings until the December 3 stocking stuffer event and holiday parties. During this time, the co-chairs continuously coordinated with the shelters, participating attorneys, and sponsors to make sure the gift drive and holiday parties were a great success. As the occasional logistical challenge popped up, Devyn, Samantha and Matt were grateful to be able to rely on the experience and input of Tricia and Rebecca.

The Children's Gift Drive and Holiday Party culminated with the stocking stuffer event in the Koppers building and holiday parties. Starting at 8:00 a.m. on December 3, dozens of volunteers, including the entire 2022-2023 YLD Bar Leadership Initiative class, stuffed more than 300 stockings. After a morning of stuffing stockings, eight volunteers agreed to portray Santa Claus and deliver the stockings to the 12 shelters hosting holiday parties that afternoon, along with several additional volunteers. Since the holiday parties, the ACBA has received written thank you letters from several of the shelters.

Devyn, Samantha and Matt would like to thank the amazing sponsors and

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volunteers throughout the ACBA for supporting this amazing cause. Without your support, this event would not be possible. As anyone who attended any of the holiday parties can tell you, the 2022 Children's Gift Drive and Holiday Party brought significant joy to hundreds of children this holiday season. ■

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FTC Proposes National Non-Compete Ban

By Alexandra Farone

On January 5, 2023, the Federal Trade Commission (FTC) proposed a national ban on noncompetition agreements. Noncompetition agreements, or "non-competes," are contractual terms between employers and workers that prohibit the worker from working for a competing employer or starting a competing business, typically within a certain geographic area for a certain period of time. If a worker violates a non-compete clause, the employer can sue the worker for breach of contract and may be able to obtain a preliminary injunction enjoining the worker to stop the conduct that purportedly violates the non-compete clause. If successful in litigation, the employer may be able to obtain a permanent injunction and/or the payment of monetary damages. If the FTC's proposed ban becomes final, this is all about to change.

As a basis for the proposed rule, the FTC made a preliminary finding that non-competes constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act (the "Act"). Section 5 of the Act provides that "unfair methods of competition in or affecting commerce" are unlawful, and that the FTC is "empowered and directed" to prevent businesses from using unfair methods of competition.

Under the proposed rule, employers could not ask new employees, independent contractors, or even unpaid volunteers to sign non-competes. All existing non-competes would have to be rescinded, and employers would have to inform current and former workers on an individual basis that their noncompete is no longer in effect

within 45 days of the recission. The proposed rule would also prohibit employers from *attempting* to enter non-competes, or representing to a worker under certain circumstances that the worker is subject to an enforceable noncompete.

The proposed rule is focused on non-competes, but other restrictive covenants could become subject to the rule if they are so broad that they effectively function as non-competes. For example, the FTC states that a contractual term that requires the worker to pay the employer or a third party for training costs if the worker's employment terminates within a certain time period, where the payment is not reasonably related to the actual costs incurred for training, may be deemed a prohibited *de facto* non-compete clause. It is unclear whether non-solicitation agreements (agreements in which a worker agrees not to solicit the employer's other employees or clients to end their relationship with that employer) would be barred by this proposed rule, as many non-solicitation agreements are drafted broadly to have the near-effect of a non-compete. Many commentators believe that the FTC will revise the proposed rule after the comment period to provide more clarity regarding non-solicitation agreements.

There is also a proposed exception where the ban will not apply to non-compete clauses entered into by someone (1) selling a business entity, (2) disposing all of the person's ownership interest in the entity, or (3) selling substantially all of a business entity's operating assets, when the person is a substantial owner, member, or partner in the business entity at the time the person enters into the non-compete. A "substantial" owner, member, or partner is one who holds at least a 25% ownership interest in a business entity. Additionally, entities that are exempted from coverage under the Act – certain banks, savings and loan entities, federal credit unions, common carriers, air carriers, persons subject to the Packers and Stockyards Act of 1921, and entities not organized to carry on business for its own profit or that of its members – may not be subject to the rule.

The FTC voted 3-to-1 to publish the Notice of Proposed Rulemaking (NPRM). The public has 60 days to comment on the proposed rule. In the NPRM, the FTC also describes and seeks comment on several topics related to the proposed rule, including whether non-competes with senior executives should be subject to a different standard than non-competes with other workers, whether low- and high-wage workers should be treated differently, whether franchisees should be covered by the rule, and whether "no-poach" agreements and wage-fixing agreements should be barred. After the comment period closes on March 10, 2023, the rule will either take effect or be struck down.

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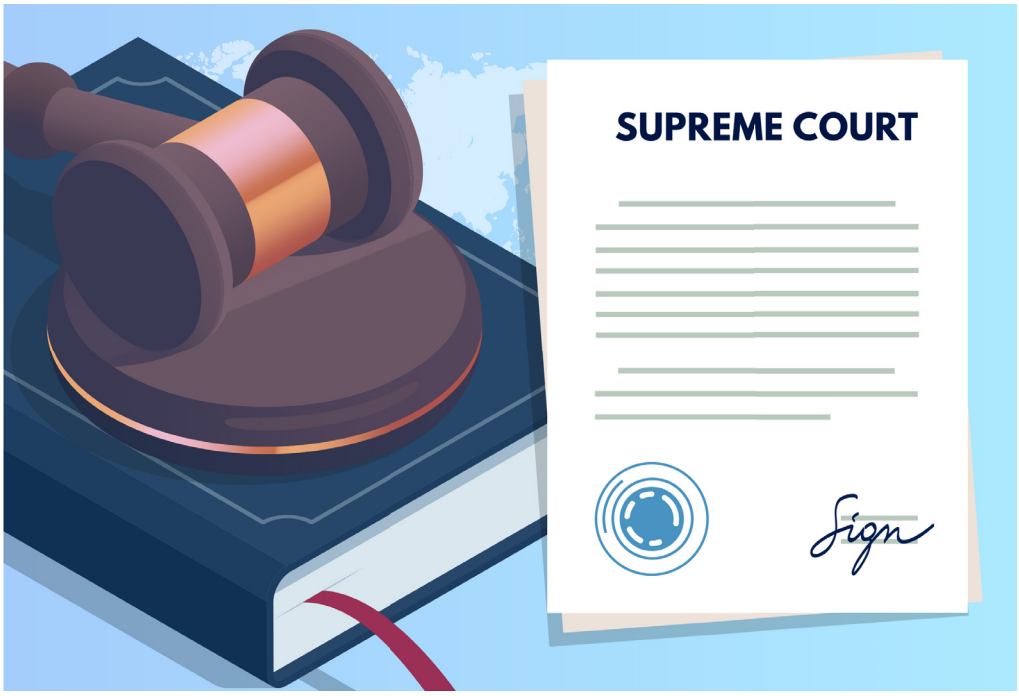
SCOTUS to Weigh in on Privilege Standard for Dual-Purpose Communications

By Jessica Barnes

A "bedrock doctrine of the legal profession," "hallmark of Anglo-American jurisprudence," and "cornerstone of the American legal system" – these are just a few ways that the attorney-client privilege was described in briefing in a matter before the Supreme Court of the United States (SCOTUS) that has attracted attention from legal scholars across the country.

This closely watched SCOTUS case is *In Re Grand Jury,* No. 21-1397, which involves a dispute over the withholding of documents in the form of communications containing both legal and non-legal advice ("dual purpose communications") in response to grand jury subpoenas on the basis of privilege. Specifically, the Petitioner-law firm provided legal advice to a client regarding the tax consequences of the client's anticipated expatriation (*i.e.,* renouncing citizenship). Thus, some of the communications from the law firm to the client were made for the dual purpose of providing legal advice about tax consequences *and* to facilitate preparation of the client's tax returns.

For example, some of the documents that the law firm withheld on a privileged basis included communications related to unsettled statutory requirements, strategies for filing amended income tax returns for purposes of expatriation, and the drafting of a submission to the IRS advocating for the abatement of a penalty assessment. The law firm withheld these dual-purpose communications on the ground that, while relating to the client's tax returns, they were sufficiently motivated by the additional purpose of obtaining or providing legal advice regarding the client's taxes.



The District Court for the Central District of California utilized the "primary purpose test" and permitted Petitioner-law firm to withhold in full a set of documents related to the preparation of the client's tax return because the "primary purpose" of those documents was obtaining legal advice and not solely tax return preparation. Additionally, the district court ordered disclosure of the portions of communications where the primary or predominate purpose concerned the procedural aspects of the preparation of the client's tax return.

Where it found a portion of a tax-preparation communication contained tax-related legal advice, the district court instructed Petitioner-law firm to redact the communication before disclosing the rest of the document. The Ninth Circuit affirmed, upholding the primary purpose test's application to dual-purpose communications.

Notably, there is a Circuit split as to when the attorney-client privilege applies in dual purpose communications:

• The D.C. Circuit uses the "significant purpose test" and directs courts to look to the legal purpose behind a communication and evaluate whether it is significant.

• The Ninth Circuit, on the other hand, utilizes the primary purpose test and directs courts to determine the primary purpose of a communication, and find that the communication is privileged only when that one primary purpose is legal advice.

• Seventh Circuit has taken a different approach, at least in the context of tax law, concluding that a dual-purpose tax-related document – a document prepared for use in preparing tax returns and for use in litigation – is *not* privileged.

Various amici filed briefs arguing against the stricter standard for asserting attorney client privilege, including:

• Association of Professional Responsibility Lawyers – While ultimately

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value would result in notably decreased real estate taxes.

In most years, it is the real estate taxing bodies that file real estate assessment tax appeals against new property owners with the Allegheny County Board of Property Assessment Appeals and Reviews ("BPAAR"). In these cases, the taxing body seeks to show that the taxpayer's property value, based on the purchase price, has increased and should result in an increased real estate assessment, thus bringing in greater tax revenue. But now, the tables have turned. The dramatic decrease to the common level ratio has shifted the power in appeals to property owners. As illustrated above, the reduced common level ratio now provides property owners the unprecedented opportunity to file appeals and potentially lower their tax bill for years to come.

Not all property owners are in a position to file an appeal. Before filing a real estate assessment tax appeal, a property owner should know the current fair market value of their property and apply it to the common level ratio to see if it would result in a reduced assessment. The best way to determine the current fair market value is either the purchase price from a 2022 arms-length transaction or an appraisal. Filing an appeal without knowing your property's value could result in the BPAAR finding the property significantly increased in value and warranting an increase in its assessment.

What to do about it? The burden of proving that one's property is over-assessed lies with the property owner. Therefore, a property owner who believes their property is over-assessed will need to file an assessment appeal with the BPAAR. The deadline to file an appeal for 2023 in Allegheny County is March 31. The BPAAR will then schedule a hearing date with the property owner, municipality, and school district at which time the parties will each have the opportunity to provide testimony and present evidence of the property's value. Based on the testimony and documentary evidence, the BPAAR will issue a decision.

Allegheny County property owners will also be incentivized to file a tax appeal, if warranted, because future real estate tax millage increases will be based on the property's assessed value. A property owner who fails to file a real estate tax appeal that would have resulted in savings will end up paying unnecessarily higher real estate taxes.

At minimum, the decrease to the Allegheny County common level ratio calls for property owners to jump onto the Allegheny County website and check what their property is currently assessed at. It could merit an appeal to the BPAAR. Happy filing! ■

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The Young Lawyers Division (YLD) of the Allegheny County Bar Association is comprised of all lawyers who have been admitted to the practice of law for 10 years or less. Lawyers who join the ACBA and meet the criteria automatically become members of the Young Lawyers Division without paying any additional dues. The Young Lawyers Division provides young lawyers with a means of gaining broader participation in bar activities, a forum for continuing legal education, and a vehicle for social exchange with their contemporaries at the bar.

The YLD is actively involved in helping young lawyers participate in activities of the ACBA and directs activities toward improving the administration of justice and prompting public welfare. The YLD helps young lawyers deal with problems and obligations specific to its members, and advises the ACBA of the needs and opinions of its newer members.

If you're interested in getting more involved in the division, find out more at *www.acbayld.org.*

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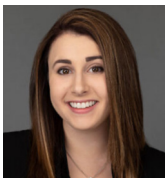
Compliance would be mandated 180 days after the adoption of the rule. If adopted, it is generally expected that there will be multiple challenges to the FTC's authority to issue this non-compete ban, which may result in a stay in enforcement of the ban until any litigation is resolved.

This proposed rule has been expected for some time. More than one year ago, on July 9, 2021, President Joe Biden signed Executive Order 14036 encouraging the FTC to limit or ban noncompetition agreements. The FTC estimates that 18% of U.S. workers are currently covered by non-competes. The FTC further predicts that this ban may result in up to $300 billion in additional earned wages, save consumers up to $148 billion on health costs annually, and double the number of companies in the same industry founded by a former worker.

There is a reasonable likelihood that legal challenges to this ban would be successful. In *West Virginia v. EPA,* No. 20-1530, -- U.S. -- (June 30, 2022), the Court recently demonstrated skepticism of sweeping rule-making from regulatory agencies, due to potential violation of the separation of powers doctrine. The Court adopted the major questions doctrine, which holds that in extraordinary cases of political and economic significance, where an agency makes "unheralded" use of its authority, the agency must be able to identify a clear statement from Congress authorizing that particular action. Given the broad scope, it is very likely that a national non-compete ban would be considered an extraordinary case of political and economic significance, and would have to clear the major questions doctrine hurdle to survive.

Employers who use non-competes should consider submitting comments to the FTC on the proposed ban and should begin thinking strategically about implementing non-disclosures and confidentiality agreements in lieu of non-compete agreements should the ban become law. ■



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not supporting either side, the Association emphasized the critical importance of the privilege and urged the Court to adopt a rule that provides certainty and clarity as to the scope of the privilege at the moment that communications between lawyers and their clients occur.

• Federation of Defense & Corporate Counsel – Writing in support of Petitioner-law firm, the group argued the need for certainty is heightened further by the new realities of corporate life, in which legal advice is often sought for combined legal and business reasons by digital means, leading to even more dual-purpose legal communications. Ultimately, this group concluded that the Significant Purpose Test strikes the right balance.

• American Bar Association – Filing a brief in support of Petitioner-law firm, the ABA argued that the Primary Purpose Test would narrow the privilege far beyond already well-established exceptions and limitations (*e.g.,* crime-fraud exception, waiver by publication to third parties, and inapplicability when not seeking legal advice at all), without justification.

Overall, it is important for attorneys to be mindful of the state of the law in the jurisdictions in which they practice, especially until SCOTUS opines on the breadth of the sacred attorney-client privilege in the realm of dual-purpose communications. ■

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