Montgomery County Estate Planning Council

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Charter Member of the NAEPC

NEWSLETTER

Fall/Winter 2022, Issue 64

Greetings from our President

Jennifer Kosteva

Dear Friends:

I hope this newsletter finds you well and enjoying the holiday season.

Please enjoy this newsletter filled with information about our upcoming programs, our newest members and our generous sponsors, along with thoughtful articles related to the estate planning field. As we approach the New Year, I would like to extend gratitude to our administrator, Wendy Rudolph, and the entire Board for their time and efforts in making the Montgomery County Estate Planning Council a highly regarded organization for professionals involved in estate planning. I got involved in MCEPC ten years ago, a bit by happenstance, because the meetings were convenient to my home and fit my schedule as a busy working mother. Over the years, I have enjoyed the camaraderie of the Council's members and its quality programming, and have developed a "go to" network of professionals in the greater Philadelphia area to best serve the needs of clients. I hope that you too will take advantage of all that MCEPC has to offer and join us at some of our upcoming events.

Cheers to a Happy and Healthy New Year, and hope to see you in 2023!

Jen Kosteva, President

MCEPC BOARD

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In This Issue:

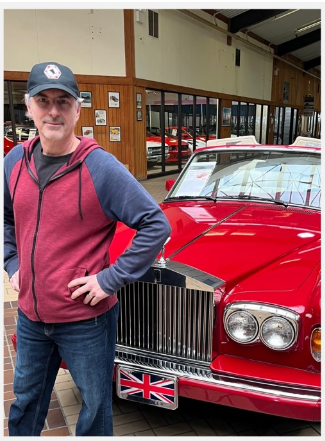
WELCOME NEW MEMBERS AND THANK YOU TO OUR REFERRING MEMBERS!!

April Charleston, Esq.—Membership Chair

We extend a warm welcome to our newest members as well as a big THANK YOU to our members who referred them! Please continue to spread the word about the great benefits of MCEPC membership – education, networking, camaraderie!

Mitchell Balaban, Always Best Care Senior Services of Eastern Montgomery County
Elizabeth Dunleavy, MSW, LSW, CMC, Kith Elder Care, LLC
Peter Moshang, Esq., Brown Brothers Harriman & Co
Steven Saffier, Classic Auto Mall
Anthony Sergio Sr., LUTCF, Sergio Financial Group an Affiliate of 1847 Financial
Scott Werner, Attorney, O'Donnell, Weiss & Mattei, P.C.
Lindsey E. Wilkinson, Esq.
Annette Wilson, Alderfer Auction
Diane Zabowski, Esq., Obermayer Rebmann Maxwell & Hippel LLP

New Member Spotlight



We welcome **Steven Saffier**, car specialist with Classic Auto Mall.

Steven worked in the non-profit conservation sector for more than 20 years before shifting gears and turning his “other” lifelong passion of cars into a career. After a short stint producing and hosting an automotive radio program on 610 ESPN, he began working for one the sponsors of the show; Classic Auto Mall in Morgantown, Berks County. He not only produces their weekly podcast and much of their social media, but as one of their Car Specialists, helps people consign their specialty or classic car at the mall which is one of the largest such facilities in the country.

When people are faced with the challenge of finding a new home for their vehicles such as those in an estate, Classic Auto Mall provides an important service that removes the complication. As a licensed Car Specialist, Steven offers a no-cost, in-person concierge service in Bucks and Montgomery Counties to assist owners or executors in the process of consigning the vehicle or collection, determining market price, and safely transporting the vehicle(s) to the facility (located about 45 minutes west of Philadelphia on the PA Turnpike).

We welcome **Annette Wilson** with Alderfer Auction.

Annette Wilson recently joined the team at Alderfer Auction in the position of Business Development and Estate Sales. Along with her professional experience, Annette brings a lifelong love of art, design, and antiques to this position.

She brings 30+ years of experience in sales, marketing, and business development, mainly in the commercial interiors industry.

In 2019, Annette shifted her career focus to senior living driven by personal experiences. Her desire was “to help families navigate the scary, stressful, world of senior living.”

She became CSA (Certified Senior Advisor) accredited in 2021 which provides her with the practical, multi-disciplinary tools and resources to help serve older adults more effectively.

She looks forward to using her background and skillset at Alderfer’s to help the senior population with the daunting question of “what am I going to do with all my stuff?”

Annette has been married for 35 years to her best friend and supporter, Kevin. Their daughter Zoe lives in Philadelphia. Annette is a volunteer teacher for “Art Goes to School” in the North Penn School District, is a member of the North Penn Arts Alliance, and the Montgomery County Beekeepers Association.

Your Clients who Want to Age in Place Need to Plan for It

Bode Hennegan, Life Managers & Associates

Although the vast majority of Americans (about 90 percent over age 65) want to stay in their homes to live out their golden years, unfortunately, it's not always that simple. As time marches on and we age, homes that were perfectly functional to us can pose obstacles later on as our abilities decline.

Think about when you were young and could bound up and down the stairs. As you age, those steps get harder to navigate and you may eventually need railings on both sides to help you slowly climb up and down them. Also, about 66 percent of the homes in the U.S. were built before 1980 and 40 percent were built before 1970, according to statistics from the U.S. Department of Housing and Urban Development. These older homes were not built for the accessibility of an older adult. The Harvard Joint Center for Housing Studies reports that fewer than 7 percent of American homes have safety and accessibility features needed for aging in place. What's more, the average life expectancy since 1970 has grown from 70.36 to 79.05 years. That means people are more likely to be living with diminished physical and cognitive abilities.

Anyone who has lived through a home renovation understands it takes time, money and stamina to complete the project. But when a person who is older gets sick or injured, it is not the time to embark on home modifications. Sadly, when a home is not set up to accommodate an aging individual, that person will have to leave that home — a situation that could have been avoided with proper planning.

It's not just the physical aspect of living in our homes to consider. It's also what help we might need as we lose some of our physical and cognitive abilities due to aging.

Clients need to think about and plan for all that's required to remain independent in their homes during this life stage.

Called interdependence, it's the period between complete independence and dependent living. This is when we can still live a full life on our own but may need assistance with tasks such as administrative, organizational or even home maintenance. It's the time of life most people don't think about planning for but could make all the difference in keeping them in their home for the long term.

Talk to your clients about their plan for aging in place.

For your clients who are thinking about aging in place, there are three major considerations:

How Safe and Accessible Is Their Home: This means anticipating some of the needs they'd have five-, 10- or even 20-plus years down the road. The client or a hired professional, needs to clear any surrounding clutter and inspect all entryways, rooms, including bathrooms, steps and handrails, along with the lighting to make sure it's safe. If it's not, how will they make modifications to it to make sure it's accessible for them? They need to think about modifications they can make now as well as in the future. For example, can they fit a walker or a wheelchair through the doorways? Can handrails be installed on steps? How is the lighting? Are rugs secure? What about door handles? Are they easy to open? Do they have a traditional bathtub or an easier-to-access shower?

Knowing When to Relinquish Responsibilities: As a person gets older, they might not be able to do the house-cleaning and outdoor maintenance (gutter cleaning, snow shoveling, painting, etc.) as well as driving, shopping or even basic activities of daily living — like dressing and cooking — that they used to do. Sometimes it's not easy to ask for help but it's imperative to have a plan for who will handle these tasks and when that might happen. Will it be a family member, a friend or a professional? At what point will the client know it's time to call them in to help?

Understanding the Costs to Staying: Clients need to consider all of the home modifications, home maintenance, utilities, as well as the costs to ensure their physical and emotional health and any extra care that they might require to stay in their home. This includes the services that will fill the role as they relinquish responsibilities for certain tasks.

Having a safe and accessible home enables clients to carry out their wishes of aging in place. Help your clients attain their goals by encouraging them to plan.

Life Managers & Associates *supports older individuals as a surrogate family member with the administrative and organizational responsibilities required to age in place. As a trusted member of their team, we help families feel safe and supported – alleviating stress for all.*

Rising Up – Planning for Higher Interest Rates

William C. Hussey, II and Franca Tavella

Introduction

The Federal Reserve has now raised the federal funds rate six times in 2022 in an effort to curb inflationary pressures in the U.S. economy. This included raising the key rate by 75 basis points at each of its June, July, September and November meetings. The rate now sits at levels not seen since before the 2008 financial crisis.

The federal funds rate has a direct effect on many other interest rates that ultimately may impact our clients' estate planning goals. Specifically, as interest rates rise, there likely will be corresponding increases in the Applicable Federal Rate and the so-called "Section 7520" rate, both of which are used to determine the tax implications of certain gifts and other transfers for federal transfer tax purposes.

Accordingly, estate planning practitioners and other advisors should contemplate how interest rate sensitive planning techniques are impacted in this changing environment. This article will explore selected gift and estate planning techniques that tend to perform better in a higher-interest rate environment and are therefore most likely to gain traction moving forward.

Charitable Remainder Annuity Trust

A Charitable Remainder Annuity Trust ("CRAT") is an estate planning vehicle where the donor contributes assets to an irrevocable trust that pays a fixed annuity to the donor (or other beneficiary) for a term of years and then distributes the remainder to a designated charity (or charities) at the end of the term. To qualify as a CRAT under the Internal Revenue Code of 1986, as amended (the "Code"), the trust must satisfy certain requirements, two of which are relevant to this discussion: the annuity amount must be at least 5%, but no more than 50%, of the initial fair market value of the property contributed to the trust; and the value of the charity's remainder interest must be at least 10% of the initial fair market value of the property contributed to the trust. The Code also requires that on the date the CRAT is created, it must pass the "probability of exhaustion test" which is explained in further detail below. If a donor can satisfy these requirements, then utilizing a CRAT will be advantageous for several reasons, including the receipt of fixed income payments and the ability to defer or avoid payment of capital gains tax on the transfer of appreciated assets to the CRAT. Additionally, in funding a CRAT, a donor is able to reduce the size of his or her taxable estate, while simultaneously providing an income stream for the donor or another person and benefiting a charity important to him or her. Lastly, and perhaps most attractive, is the charitable deduction available to the donor for income tax purposes, which is equal to the actuarial value of the remainder interest passing to the charity.

In a high interest-rate environment, a CRAT is even more advantageous; not only do high interest rates tend to produce a higher deduction, but they make it easier to satisfy the IRS requirements referenced above. With CRATs, the actuarial value of the remainder interest is valued at its present value using the Section 7520 rate. When the Section 7520 rate is higher, the value of the donor's retained interest is reduced. As a result, the value of the charity's remainder interest increases (making it easier to satisfy the 10% requirement) and consequently also increases the donor's charitable deduction.

As mentioned above, the Code also requires that a CRAT pass the "probability of exhaustion test." This means that on the day the CRAT is created there must be no more than a 5% probability that the non-charitable income beneficiary will survive the exhaustion of the trust. This test is addressed at length in Revenue Ruling 77-374. For a CRAT to pass this test, the Section 7520 rate must be equal to or greater than the percentage used to determine the annuity payment (5% being the minimum). Clearly, the low interest rates of recent years have made it nearly impossible for donors to pass this test. Although the IRS previously provided practitioners with language to include in trust instruments to remedy this issue, it is only a relatively recent solution, and will not be necessary if and when the Section 7520 rate reaches 5% or higher.

It is important to note here that the 2017 tax legislation limits the usefulness of charitable deductions for many taxpayers due to the increase in the standard deduction. This is less likely to be a concern for the category of clients who might be considering a CRAT. The deduction generated by a CRAT is likely to exceed the standard deduction threshold.

Charitable Gift Annuities

Another estate planning technique that works well in a high interest-rate environment is the use of a charitable gift annuity ("CGA"). A CGA is a contract between a donor and a charity where the donor makes a gift to the charity in exchange for a fixed stream of income. At the donor's death, the charity receives the remainder of the gift. A CGA thus serves in a similar fashion to a CRAT without the expense of creating and administering a trust. In the CGA context, the donor's gift is set aside in

Rising Up - cont

a reserve account and invested by the charity. The annuity payment that the donor receives varies among charities, and is based on several factors, such as the size of the gift and the donor's age. The annuity payment is a fixed amount. It is interesting to note that the CGA payment is guaranteed by the charity no matter how the investments perform, because the CGA payment is backed by all the charity's assets, not only the donor's gift.

Given the similarities between CGAs and CRATs, CGAs are attractive for the same reasons CRATs are when interest rates are high, i.e., larger charitable deductions. Here, the charitable deduction equals the amount of the donor's contribution in excess of the present value of the retained annuity. In addition, the donor also will receive more income than they would have in past years as interest rates continue to rise. This is because the maximum rates of return relied on by most charities are established by the American Council on Gift Annuities ("ACGA"), which monitors certain interest rates that underlie the investment return assumptions used to create their rate schedules. On May 17, 2022, the ACGA increased its suggested maximum payout rates, and it is expected to do so again in the current environment if interest rates continue to rise.

Qualified Personal Residence Trust

A Qualified Personal Residence Trust ("QPRT") is yet another estate planning technique that operates in a manner similar to a CRAT, albeit with different assets and remainder beneficiaries. With a QPRT, the grantor transfers his or her primary home or vacation home into a trust while retaining the right to live in the home for a term of years; at the end of the term, the home passes to the remainder beneficiaries (for example, the grantor's descendants) free from gift and estate tax liability. Like a CRAT, computing the present value of the beneficiaries' remainder interest is determined by the Section 7520 rate. Therefore, when interest rates are higher, the value of the gift of the grantor's home is lower, which ultimately lowers the potential taxable value of the gift to the QPRT. This is a popular technique used to transfer vacation property to the next generation. Two points to keep in mind when contemplating this strategy, and in particular, the term of the QPRT: 1. If the grantor wishes to continue using the property after the end of the term, she must pay fair market value rent to the remainder beneficiary or beneficiaries (if the remainder beneficiary is a grantor trust, the payment of rent will have no income tax effect); and 2. The grantor must survive the QPRT term to have the transferred property excluded from her estate.

Conclusion

Interest rates are on the rise and this trend is expected to continue for the foreseeable future. In this environment, CRATs and CGAs most likely will become more popular tools that estate planners reach for on behalf of their clients. Practitioners also should consider the use of QPRTs, which may have fallen out of favor when interest rates were low but are certainly a more viable option now. Conversely, rising interest rates may lessen the efficacy of private annuities, grantor retained annuity trusts ("GRATs") and charitable lead trusts ("CLTs"). We, as estate planning advisors, should therefore be paying close attention to the Federal Reserve and advising our clients accordingly.

William Hussey is a partner in Kleinbard's Trusts & Estates Practice and is a member of the Business & Finance Department. He counsels clients on structuring business and investments in a tax-efficient manner. Bill counsels individuals and fiduciaries on all phases of estate and wealth transfer planning, including business succession and asset protection. He also advises non-profit clients on qualification and maintenance of tax-exempt status issues. He has frequently lectured and regularly publishes articles on tax and estate planning topics.

Franca Tavella is an associate in Kleinbard's Trusts & Estates Practice and is a member of the Business & Finance Department where she focuses her practice on estate planning, estate and trust administration, and taxation. She also has a special focus on guardianship proceedings involving the person and estate of incapacitated individuals, and she handles all aspects of guardianship administration. In addition, Franca regularly assists clients with the formation of non-profit organizations, including obtaining tax-exempt status.

Maximizing Life Settlement Value Through a Policy Auction

Jamie Mendelsohn

Life insurance can be the largest unmanaged asset that a client owns, and it is rarely appraised or valued. Policy owners allocate significant liquidity on an ongoing basis to fund a policy, sometimes long after they transition out of the original need that the policy was put in place to protect. Even after a traditional policy review and exploring historical nonforfeiture options such as a surrender, reducing the death benefit, or 1035 exchange, the client is left feeling as if they are not in an optimal position. Creating awareness and educating policy owners that the life settlement market exists can result in many planning opportunities, as well as mitigating risk and liability for the advisory teams. Asking the simple question, "when was your life insurance last appraised" can be the catalyst for many planning discussions.

Many policy owners have paid into policies for decades and want more than the intrinsic value of ownership when considering exiting it. The opportunity to take advantage of a secondary market, to capitalize on the numerous institutional buyers competing in an auction to deliver more value than other exit strategies, is an important option to discuss with policy owners. Getting clients in the habit of valuing their life insurance, like how they appraise other assets, could create additional cash flow for other planning needs.

The definition of a life settlement is the sale of an existing life insurance policy for an amount greater than the cash surrender value, but less than the death benefit. The existence of a secondary market that will purchase a policy gives policy owners the opportunity to appraise and monetize their existing life insurance policies for potentially more than what the carrier would give them for the same policy. This alternative can fund other business, retirement, and/or caregiving needs. It also could free up cashflow by reallocating premium dollars to fund coverage for adult children or grandchildren. A life settlement isn't a product sale. It is a solution that when viable and appropriate can be a better alternative than surrendering or allowing an existing policy to lapse.

Life Insurance is an Asset

Life insurance is an asset that is often not a line item on a balance sheet or recognized as a piece of property that a client owns. It should be treated like any other asset. Treating life insurance as an asset allows it to be a vehicle to create cash flow for other planning needs. Like real estate, art, and jewelry – before your clients decide what to do with it, it should be valued. Once they understand the value, they can act.

Life insurance has three potential exit values: the death benefit, the cash surrender value (CSV) or its fair market value ("FMV"). Policy owners can appraise life insurance policies, even term insurance, for its FMV in the life settlement market. This gives a policy owner the opportunity to maximize its value rather than just lapsing or surrendering the policy back to the insurance carrier for minimal value. How did life insurance become classified as property and viewed as an asset?

According to the Government Accounting Office report on life settlements, "The right of conveyance stems from a 1911 Supreme Court decision, Grigsby v. Russell. The Supreme Court noted that it was desirable to give life insurance the characteristics of property." Many consider Grigsby v. Russell as the genesis for life settlements. However, the many advantages of uncovering the FMV of life insurance would not be fully realized until almost a century later in the institutional secondary market.

Through consideration of a life settlement, advisors and their clients can appropriately value and potentially monetize life insurance policies to solve immediate financial or non-tax planning needs. The life settlement option is particularly relevant when: (1) a client plans to cease paying premiums; (2) the policy's cash value is declining; and/or (3) the client outlives or otherwise no longer needs the insurance coverage for its intended planning purpose. Life settlements also can support exit strategies for underfunded (or poorly performing) policies owned in irrevocable insurance trusts, as well as unwinding complex structures like premium finance and split-dollar for additional value. This solution continues to be integrated into estate and business planning, and it should be included when financial professionals and fiduciaries make an assessment in the client's "best interests."

Over the past 20 years, regulation and transparency have increased in the market, resulting in the life settlement op-

Maximizing Life Settlement—cont

tion being available in all states. Departments of insurance and financial services around the country regulate these transactions and require market participants to be licensed and have their forms and authorizations approved for use with consumers.

The Market Participants

The market today is highly regulated and there are specific licenses for the parties that represent the policy owner and for those that represent the investor. These two licensed parties are the life settlement broker, who serves as the seller's representative, and the life settlement provider, who serves as the buyer's agent. The broker is 100% aligned with the policy owner and has a duty to provide transparency and a best practice approach to the market. The broker's role is to craft the strongest negotiation possible to deliver the highest FMV for the life insurance policy. Brokers do this by managing a life insurance policy auction that puts providers in competition with each other, forcing them to bid against each other to purchase the insurance policy from the policy owner.

Like other property sales, competition drives more value to the seller. Knowing the different market participants and ensuring your client is aligned with a party that represents them in the auction is very important. In a recent sale, a male age 75 with a $3 million guaranteed universal life policy, initially reacted to advertising by a provider, a single buyer, to whom he was going to sell his policy for $180,000. The client and his advisory team went to a life settlement broker who negotiated 30 bids, resulting in a sale price of $270,000. Seller representation, competition and negotiating on the policy owner's behalf delivered an additional $90,000 to the policy owner. The sale created the cash flow for the client's other planning needs, as well as mitigated risk to the advisors by ensuring they had documented a best interest, best practice approach to the market.

Helping clients to recognize the importance of knowing the value of a policy before making any decisions or taking any actions will have long lasting impact. Discussing the opportunity to take an illiquid asset and monetize it when clients are going through a financial transition, whether to fund business, retirement, long term care or charitable endeavors, can be a powerful client conversation.

Business Owned Life Insurance

According to a Wharton School Study, "almost 85% of term policies fail to pay a death claim; nearly 88% of universal life policies ultimately don't terminate with a death benefit claim." Many of these low cash value polices were forfeited back to the insurance company for their cash surrender value without anyone in the planning community asking for an appraisal to uncover any additional life settlement value. It is important to understand that you don't need to be a life insurance expert to help your clients uncover life settlement value and protect their best interests. In another example, a seller's representative worked with an advisory team to a retiring business owner to value an existing $3 million term life insurance policy on his life. The business owner was going to allow the policy to lapse; however, the advisory team went through the valuation process and the life settlement auction. After 18 bids, the policy sold for $490,000.

Questions to Ask When Selecting a Life Settlement Resource

- Are you a licensed provider that buys policies with a fiduciary duty to investors, or a licensed broker that forces a policy auction, acting as a fiduciary to the policy owner?
- Are life settlements your core business? How many life settlements have you completed in your career?
- Will you disclose your pricing and value analysis, as well as longevity underwriting to select life expectancy estimates?

Ideal Client for the Current Market

The life settlement solution will be most relevant to retirement-age clients. However, we recommend you discuss this option with all policy owners and interested parties to your clients' life insurance assets. If the life settlement sale is the outcome of the valuation, the owner(s), insured(s), and beneficiary(s) are required to sign off on the sale. Most market buyers are purchasing policies on insureds over the age of 70, that is, those with life expectancies under 18 years. Nonetheless, there is a limited market for insureds under age 70 if certain variables exist. Many times, the policies that are most interesting to purchasers will have some type of health arbitrage since the origination of the policy (e.g., insureds rated preferred at issuance of a policy but who now fall in a standard or sub-standard rating class).

Maximizing Life Settlement—cont

Most buyers will require the last three years of medical records on the insured for their medical underwriting reviews. Unlike the initial medical underwriting process, the life settlement process isn't physically invasive for the insured as there are no required medical exams or blood tests. Buyers are analyzing the medical history to determine the life expectancy/ longevity data points on the insured(s). There are a limited number of buyers who will consider purchasing a policy without any medical records.

There are buyers for all policy types with face amounts of $100,000 to $50 million+ on individuals or survivorship policies. Universal life ("UL") policies are usually the most competitive in today's market. The following policy types have the highest demand in the current market: guaranteed universal life ("GUL"), as well as policies with riders, such as no-lapse guarantee ("NLG") and return-of-premium. There is interest in all UL products, as well as in term insurance that is convertible to a UL product. Whole life ("WL") products have a limited market, since most WL products have high cash values, and the majority of buyers don't want to take cash to buy cash. There is current capital in the market looking to purchase WL policies on insureds over the age of 65; however, it is limited in scope.

The types of institutional capital purchasing life insurance policies are private equity, hedge funds, pension funds, large multifamily offices, and asset managers. These buyers are looking for high single-digit, low double-digit rates of return and there is a high demand in the market for life insurance policies. Many of these investors view their allocation in the life settlement space as part of their alternative asset allocation.

Aging Population Increases Demand

Due to the maturity of the secondary market for life insurance, and health arbitrage that has been fueled by increasing longevity, the stage has been set for you to help many of your clients reaching retirement age and beyond. According to the U.S. Department of Health Statistics, Americans aged 85 and older are the fastest growing demographic group. Furthermore, individuals at higher income levels are likely to live 8-12 years longer than their counterparts at lower income levels because of access to better health care and a healthy lifestyle. Currently, there are approximately 70,000 people in the U.S. over the age of 100; by 2045, this population is expected to number over 700,000. Does the planning you are doing with your clients take into consideration them living well into their 80s, 90s or past 100? Is there a risk if you aren't managing your clients' life insurance policies assuming they could live well into these later ages?

Where to Identify At-Risk Policies

If you are working with retirement age clients or persons that sit on the boards of companies or charities, integrating the policy review and valuation of their life insurance assets can have meaningful results. With the changing landscape of life insurance, many policy owners don't understand their insurance or how the products vary in their premium needs. UL policies require the most management. Many of these policies have been severely impacted by a sustained low interest rate environment. What happens to an ILIT that is holding a UL policy if the agent who sold the policy has since retired or is deceased? Who is managing the policy performance? What happens if the insured is living much longer than expected and premium requirements are increasing dramatically? It has been our experience that most ILIT trustees, planned-giving departments of charities and businesses don't routinely appraise their policies.

Imagine a decision made by an ILIT trustee to discontinue paying premiums because they were escalating and too expensive. This is a fact pattern we went through with a healthy client that expects to live well into his 90s. The trust owned a $2 million GUL policy on a male age 87 in good health with a zero cash surrender value ("CSV"). The policy premiums were escalating, and the decision was made to surrender the policy. On the surface that would seem like a logical decision. However, a policy valuation revealed significant value. We represented the policy owner and advisory team in the negotiations and sale of the policy. During the auction stage, more than a dozen offers were negotiated to secure an FMV of $665,000. The sale resulted in a big win for the family, with the trust beneficiaries satisfied and the trustee not having the liability that may have resulted if instead the trustee had surrendered the policy for $0. The moral of the story is that before making any material changes, all life insurance policies should be appraised for FMV.

Maximizing Life Settlement—cont

Liquidating a Policy to Fund Long Term Care and Retirement Needs

Many older clients own one or more life insurance policies and often drop their policies because their original need no longer exists, they want to eliminate escalating premium payments, they are living longer than expected, or they just need some additional liquidity to help with medical and retirement needs. Below are descriptions of two additional life insurance FMV solutions that ended in a life settlement:

1. **Funds needed for long term care (LTC) expenses** – An advisor contacted us about a $100,000 policy on a 90-year-old male that was no longer affordable. His adult children were helping to pay his skilled nursing home costs. The client's daughter voiced concerns about her cash flow to the advisor, who then educated her about the life settlement option. The decision was made to appraise the policy and determine its viability in the market. It qualified for sale and after receiving a half dozen offers in the auction, sold for $56,000, delivering capital to fund the client's skilled nursing home expenses for a few years.

2. **Policy no longer needed** – Many clients outlive the need for their life insurance. A recent sale was the result of a healthy couple age 90 and 89 that no longer wanted to fund a policy since its purposes no longer existed. After negotiating 29 offers in the market, their $2.9 million policy sold for $300,000 over its surrender value. The client was thrilled to have use of those dollars today versus having to pay another approximate $1.8 million into the policy (based on their longevity estimates).

Ensuring your clients have seller representation, which will force competition among multiple buyers, will help protect you and your clients in a life settlement transaction. Recognizing life insurance as a potentially valuable asset can help clients with retirement, wealth preservation, LTC, bankruptcy, divorce, charitable and other financial planning needs.

PRACTICE TIP:

Always secure an appraisal of your clients' existing life insurance prior to making any material changes to a policy. Add this simple question to your annual review and check list - "When was the last time your life insurance was appraised?"

Jamie L. Mendelsohn is the Executive Vice President of Ashar Group – a family-owned business with a national footprint. Since 2003, Ashar Group has partnered with financial professionals, fiduciaries, broker-dealers, and institutions serving as an independent advanced planning resource in the secondary market for life insurance. Jamie works with advanced planners and fiduciaries. If the decision is made to sell a policy as a life settlement, she negotiates with licensed buyers on behalf of her clients. Jamie speaks nationally at financial services conferences, and estate planning councils, and provides continuing education for both financial and insurance professionals.

The New Uniform Fiduciary Income and Principal Act

The first uniform principal and income act (the "Act") was enacted by the Uniform Law Commission ("ULC") in 1931 to harmonize and codify common law trust accounting principles in the United States. The Act subsequently has been updated and amended several times due to significant changes in law and tax policy, updates to accounting practices and the use of new financial instruments (like puts, call, options).[1] With significant changes in fiduciary investment practices and new uses and designs of trusts, ULC has again updated the Act. The new name (and acronym), The Uniform Fiduciary Income and Principal Act ("UFIPA"), heralds the expansion of the power to adjust, the introduction of unitrust provisions, and a change in the governing law of a trust. Most states rely on some version of the Act[2] and since UFIPA's approval in 2018, six states have adopted it and three states have introduced bills for adoption.[3]

A. Fiduciary's Power to Adjust: Origin and Purpose

The Act's most significant change is the expansion of a fiduciary's power to adjust. Before discussing this change, it might be useful to examine the historical interplay and alignment between the Uniform Prudent Investor Act ("UPIA") and UFIPA. Both UPIA and UFIPA are cornerstones to a fiduciary's duties and responsibilities. They both play an important role in trust investment and administration.

The approval of UPIA in 1994 modernized the law of trust investments by codifying for the first time the "prudent investor" standard previously promulgated by the American Law Institute in its Restatement (Third) of Trusts: Prudent Investor Rule (1992).[4] The origins of this standard, now codified, can be traced back to changes in the "prudent man" standard that occurred over time in common law. These changes were the result of the introduction of new types of investments, a better understanding of the behavior of capital markets, and a shift away from the singular focus on the preservation of trust principal to a modern portfolio theory[5] that focused on total return investing.

The codification of the prudent investor standard triggered major updates to the Act, including the addition of the power to adjust. Prior to the introduction of the power to adjust, income distributions were analyzed under a "traditional approach." This approach required a trustee to determine the settlor's objectives, ascertain the financial needs of the beneficiaries, and then allocate the trust's assets between stocks and fixed income to support the needs of the income beneficiary. The introduction of the power to adjust allows a fiduciary to adjust between principal and income. RUPIA-08 commentary notes that the purpose of Section 104 was to enable a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such as interest, dividends, and rents.

1. Power to Adjust: Then and Now

Under former Section 104, the power to adjust could only be exercised if three threshold hurdles (subject to other limitations) were overcome: (1) the trust assets were invested and managed under the prudent investor rule; (2) the trust provisions define the current income beneficiary's rights using traditional accounting principles; and (3) the fiduciary was unable to act impartially after applying UPIA or the governing instrument.[6] In other words, the power to adjust was available only if a trustee was unable to administer the trust impartially.[7]

New Section 203(a) of UFIPA provides as follows:

> Except as otherwise provided in the terms of a trust or this section, a fiduciary, in a record, without court approval, may adjust between income and principal if the fiduciary determines the exercise of the power to adjust will assist the fiduciary to administer the trust or estate impartially.

Noticeably absent are the former Section 104 threshold hurdles. Instead, when the power to adjust is exercised, a fiduciary need only consider if the adjustment assists the fiduciary in administering the trust estate impartially. This change signals a shift from restrictive to permissive language. The new language not only expands a fiduciary's power, but also allows for greater flexibility in drafting governing instruments.

2. Factors in Determining Whether to Adjust

Although Section 203(a) expands a fiduciary's power to adjust, it is important to note that it is not without limitations. First, if a power to adjust is expressed within the governing instrument, then the fiduciary must act according to the governing instrument's terms. Second, in deciding whether and to what extent to exercise the power to adjust, a fiduciary must still consider the factors that previously were found in Section 104 (a), and are now revised extensively in Section 201(e), and set forth below:

- the terms of the trust;
- the nature, distribution standards, and expected duration of the trust;

The New Uniform Fiduciary Income and Principal Act—cont

- the effect of the allocation rules, including specific adjustments between income and principal, under Articles 4 through 7 of UFIPA;
- the desirability of liquidity and regularity of income;
- the desirability of the preservation and appreciation of principal;
- the extent to which an asset is used or may be used by a beneficiary;
- the increase or decrease in the value of principal assets, reasonably determined by the fiduciary;
- whether and to what extent the terms of the trust give the fiduciary power to accumulate income or invade principal or prohibit the fiduciary from accumulating income or invading principal;
- the extent to which the fiduciary has accumulated income or invaded principal in preceding accounting periods;
- the effect of current and reasonably expected economic conditions; and
- the reasonably expected tax consequences of the exercise of the power.[8]

3. Restrictions on the Power to Adjust

Previously, the Act prohibited a fiduciary from exercising the power to adjust if it could be determined by the terms of the trust that the grantor's intent was to deny trustees this power. Now, the Act eliminates this guessing game. Rather, it is presumed that the trustee has the power to adjust unless the power is expressly denied or limited under the trust agreement.

A fiduciary also is prohibited from exercising the power to adjust if the exercise or even the possession of the power might result in unfavorable federal tax results previously expressed in former Section 104(c) of UPIA, such as:

- loss of the marital deduction
- loss of the annual gift tax exclusion
- loss of annuity trust or unitrust treatment
- loss of charitable deduction
- loss of grantor trust treatment
- exposure to estate tax

Section 203(e) of UFIPA also adds adverse results, not previously contemplated by prior versions of principal and income acts, such as

- disqualification of a trust to hold S corporation stock as a qualified subchapter S trust (QSST) (defined under Section 102(19)(B))
- loss of grandfathered or exempt status for generation-skipping transfer tax (GST) purposes (defined under Section 103(19)(D) and (E))
- a taxable gift by a beneficiary or fiduciary
- jeopardizing of exemption for public benefit purposes

Finally, the power to adjust can only be exercised by an "independent person" as defined in Section 102(11).[9] UFIPA commentary notes that the definition was added to "protect against unwelcome tax consequences" and in large part is similar to the definition of a "related or subordinate party" found at Section 672 of the Internal Revenue Code of 1986, as amended. Section 102(11) defines an "independent person," as a person that is not

(A) for a trust:

(i) a qualified beneficiary determined under Uniform Trust Code Section 103(13);

(ii) a settlor of the trust; or

(iii) an individual whose legal obligation to support a beneficiary may be satisfied by a distribution from the trust.

(B) for an estate, a beneficiary;

(C) a spouse, parent, brother, sister, or issue of an individual described in subparagraph (A) or (B);

(D) a corporation, partnership, limited liability company, or other entity in which persons described in subparagraphs (A) through (C), in the aggregate, have voting control; or

(E) an employee of a person described in subparagraph (A), (B), (C), or (D).

B. Uniform Unitrust Language

Often a fiduciary will convert a trust to a unitrust to balance the competing interests of the income and remainder beneficiaries. Under a unitrust, the income beneficiary receives a distribution based on a fixed percentage of the fair market value of the trust's assets, whether income is equal to, greater than or less than that amount. A unitrust eliminates the need to balance the impact of allocating receipts and disbursements between income and principal.

Until 2018, there was no uniform unitrust act; rather 36 states had enacted statutes permitting a trustee to convert to or from a unitrust or to change a unitrust.[10] For the first time, UFIPA adds an entire article, Article 3, to the Act,

The New Uniform Fiduciary Income and Principal Act—cont

providing authority to a trustee to convert a trust to a unitrust. It is apparent that the Drafting Committee reviewed and considered existing state unitrust statutes,[11] but as UFIPA's commentary notes, Article 3 is "broader and more flexible" than most state statutes. For example, a unitrust rate may be the commonly used "fixed" unitrust rate (often an amount between 3% - 5%) or the rate could vary each period using a market index or other published date or a mathematical blend of market indices.[12] The determination of the fair market value of a trust also can vary by payment frequency, the valuation date and the types of assets that may be excluded.[13] Furthermore, a unitrust period is no longer required to be fixed to a calendar year. Rather it could be any 12-month period, a calendar quarter, a three-month period, or any other period prescribed by the unitrust policy.[14] The variations and features outlined in Article 3 will provide greater flexibility to estate planners and administrators in meeting beneficiary needs and balancing competing interests while reacting to ever changing capital markets.

C. Uniform Governing Law

The other significant change in UFIPA is the introduction of a new Section 104 that clarifies, and hopefully provides a unified approach, to the governing law applicable to the income and principal rules. Are the income and principal rules governed by the "rule of construction" or the "rule of administration?" Recall that a rule of construction is generally governed by the law of the place where the trust was created. A rule of administration is generally governed by the law of the situs of the trust. A trust's situs varies - it may be the state where the trust originated, the state whose laws will govern the trust, or the place of administration. New Section 104 provides clarity: if the trust agreement is silent, then the governing law for principal and income rules will be the principal place of trust administration rather than those from the state in which the trust was created. This aligns with the other uniform codes such as the Uniform Trust Code (Sections 107 and 108) and the Uniform Directed Trust Act (Section 3).

As is detailed above, UFIPA adds much needed flexibility to modernize trust administration.

1 The Uniform Principal and Income Act (UPIA-31) was revised in 1962 (the "Revised UPIA," or "RUPIA-62"), and then again in 1997 ("RUPIA-97"). Although the RUPIA-97 was updated with minor revisions in 2000 and 2008 ("RUPIA-00" and "RUPIA-08," respectively), the RUPIA-97 was the last major update.

2 Forty-six states and the District of Colombia have adopted the 2000 amended version of UPIA, and thirty-six states have adopted the 2008 amended version.

3 Arkansas, Colorado, Kansas, Utah, Virginia, and Washington have adopted UFIPA in some form, while California, Missouri, and Tennessee have bills pending before their state legislature.

4 Uniform Prudent Investor Act, Prefatory Note (Unif. Law Comm'n 1994)

5 Modern Portfolio Theory requires a trustee to address levels of diversification and risk in investment choices.

6 UPIA §104 cmt. (Unif. Law Comm'n 2008)

7 UFIPA §203(a) (Unif. Law Comm'n 2018)

8 UFIPA §201(e) (Unif. Law Comm'n 2018)

9 UFIPA §203(e)(7)

10 The states that enacted such statutes are Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

11 See September 2016 Committee Meeting – Compilation of States' Statutory Text (2016 Sep RUPIA Westlaw – List of 2184 Editors and Revisors Notes for Refs and Annos.)

12 UFIPA §306(a)

13 UFIPA §307

14 UFIPA §308

Econometrics and Estate Planning: A Promising Way to Enhance Outcomes

Victor S. Levy and Gregory Rothkoff

Alfred Marshall, the famous British economist of the 19th century said, "economics is the study of mankind in the ordinary business of life." This field of study is useful and may have application beyond simply mainstream uses like predicting future inflation or gross domestic product. This use of economic modeling may hold promise for estate planning advisors.

To begin, it is the job of an economist to study the relationship between resources and the outputs produced by those resources, using multiple indicators to predict future trends. The primary tools that economists use to predict future trends are found in the field of econometrics, which is the application of statistical techniques to analyze economic data.

The uses of these statistical techniques can work for data beyond the economic type. For example, statistical analysis may be used by a political analyst to determine how political affiliation effects a voter's likelihood to vote for a certain candidate. In this use, these techniques may include finding the mean and median of a dataset while testing the probability of an event occurring.

The primary tool used by an economist is the building of linear and nonlinear regression models. These models provide a formal approach to analyzing the marginal effect that an independent variable has on a dependent variable. The marginal effect is how economists understand cause and effect and make future predictions. A linear model (shown below) shows with a straight line how the independent variable, "X," effects the dependent variable, "Y." The independent variable is what causes the change in the dependent variable. So, in the political analyst example, political affiliation (X) is what causes the change in the likelihood to vote for a certain candidate (Y).

In the real world, it is rare to find a situation where two variables are accurately related with a linear scenario, so economists tend to use nonlinear regressions (sample curve shown below) that relate the independent and dependent variables with a curve. The curve is about putting a real-world scenario into a statistical format and trying to forecast outcomes.

When building models, economists attempt to replicate a real-world scenario by adding control variables that are additional factors that also may effect the outcome (dependent) variable. Economics does not only describe fiscal policy, it also shows how society functions on a larger scale. As a result, it is important that economists build their models with control variables to account for the many complex interactions that occur in society.

Thus, to predict voter outcomes, the political analyst may add an additional variable to their model to account for the income level of the respondent because that factor often effects an individual's likelihood to vote for a certain candidate. After an economist builds an economic model and conducts regression analysis, she will use hypothesis testing to find whether the independent variable had a significant effect on the dependent variable. Through these statistical techniques, economists are able to both support their economic theories with empirical evidence and make future predictions.

Professionals from all different sectors use econometrics to enhance their practices. Here is another scenario from outside the estate planning field where we might see econometric methods used. Prior to this season's World Series run, the Philadelphia Phillies had gone through a sharp decline in ticket sales over the last few seasons and the majority owner, John Middleton, wanted to create an advertising campaign to raise ticket sales and bring fans back to Citizens Bank Park. To do this, he enlisted the expertise of the Phillies marketing department. The marketing team chose to run several commercials throughout the day on a local television network. Middleton did not want to spend too much money on advertising because his team's roster was very expensive, so he asked his marketing team to analyze how the amount of money spent on commercials effected ticket sales.

The marketing team built a nonlinear statistical model to create this report for Middleton. The independent variable, X, was the amount of money spent on advertising, and the dependent variable, Y, was ticket sales. Of course, poor performance from the Phillies at that time also influenced ticket sales, so the marketing team chose to include the team's record as one of their control variables. After building the model, the marketing team ran a nonlinear regression, and the resulting curve looked like a half upside-down U-shape (as shown on the below graph). This told the marketing team that the marginal effect on the graph from points 1 to 2 was greater than the marginal effect of points 3 to 4, and there-

Econometrics and Estate Planning—cont

fore spending additional advertising money after a certain point would be inefficient. Next, they conducted a hypothesis test to confirm for Middleton that the advertising campaign had a significant impact on ticket sales. This analysis neglected to take into account the impact a World Series run would have on ticket sales, which we imagine will factor into ticket sales for 2023.

Now we see how econometrics and statistical methods are used in the world of political analysis and marketing, but how can we apply these tools to the field of estate planning? Here are two scenarios to show how econometrics can inform estate planning outcomes.

Example 1 – Predicting the Longevity of Trust Resources

This scenario involves using past data to create a prediction for the future. The first step in tackling this example is to identify independent (X) and dependent (Y) variables. The independent variable will be the age of the trust (time) and the dependent variable will be asset (cash) consumption. Since we are looking to figure out how long the trust resources will last, the available trust resources will be treated as an upper limit. This is all shown on the graph below.

It is important to know that econometrics only works if there is data involved. Therefore, the estate planning economist would need to have data for the chosen variables, such as data that details the trust's past distribution and expense history. In addition, we must include control variables to account for outside factors influencing the trust assets. For example, we may want to include future tax rate predictions (for non-grantor trusts) or additional generations of trust beneficiaries being born (as is typical in dynasty trusts). These data points will allow a more accurate analysis as to how the trust assets are effected. An example curve is shown below.

When we conduct the nonlinear regression, it will tell the marginal effect an additional year has on the consumption of trust assets. That is, how many additional trust assets would be spent during an additional year of the trust's existence. We will then use the predicted future shape of this curve to predict how much longer trust assets may last. As seen on the above graph, as the trust's age increases, the consumption of trust assets is expected to get closer to the trust resources' upper limit. This comes as no surprise. In a real-world scenario, we may find that asset consumption may go up sharply every 20 years based on new generations of trust beneficiaries being born. Therefore, a real-world curve may look like this:

As depicted above, the steep parts of the nonlinear curve represent increased spending as a result of a new generation using the trust assets. As time goes on, the control variable would be changed to account for the changing variables impacting trust asset consumption aside from the trust's age. As helpful as this model may be in making predictions, it is important to note that it is only one piece of evidence and that a holistic approach must go beyond the quantitative into the qualitative aspects of a trust's administration to really add greater certainty to the predictions.

Example 2 – What is the likelihood of taxes going up or down in the future based upon current and 10 years of prior spending?

When trying to find likelihoods, we use a nonlinear "logit" regression to find the probabilities. This technique is about measuring the parameters of a logistic model. Like the previous example, we would use past data to predict the future. The independent variable (X) is spending patterns from the previous ten years, and the dependent variable (Y) takes two forms as a probability. That is, assuming the trust is a non-grantor trust, either trust income taxes went up (100%) or did not go up (0%). Additionally, we would include a control variable to account for the outlay of cash from those previous ten years. These variables are shown on the graph below.

The shape of the below graph shows what a logit regression looks like. The vertical (Y) axis represents the probability, and the point on the line is the specific probability given a certain point on the horizontal (X) axis.

The above graph represents the past, but we are treating that as a model for the future. Consequently, this graph would be interpreted as when spending patterns are either increased or decreased, the probability of taxes increasing in the future would fall at some probability between 0 and 100. Additionally, we could include control variables to account for changes to the scenario that may not have been present in the past, but that we expect to be there in the future.

Economic modeling could be used to enhance an estate planning practice. It creates a methodology to look at past metrics to draw estimations about the future. Such information could prove useful to practitioners in advising clients and supporting certain recommendations. Finally, it represents a potentially promising way to enhance the efficacy of planning advice and may be worth consideration, specifically in providing guidance about the future.

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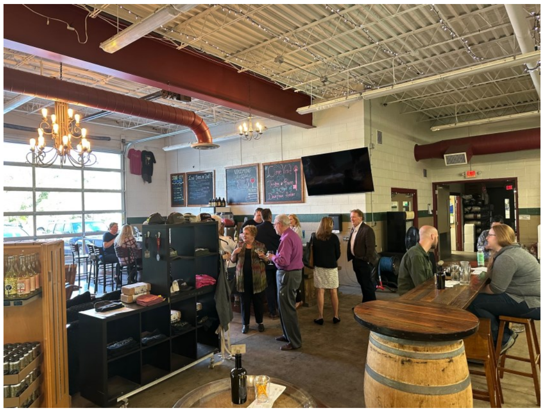

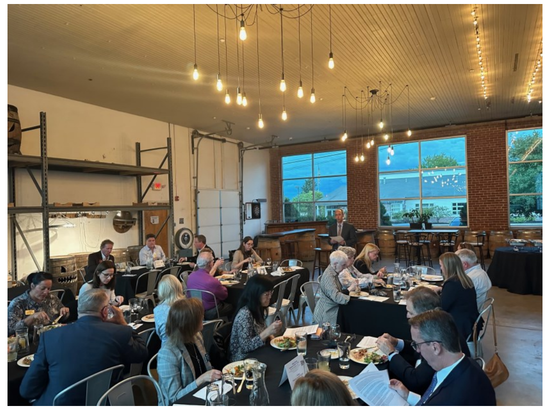

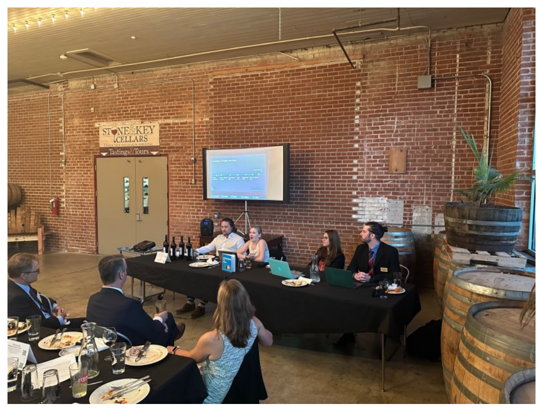

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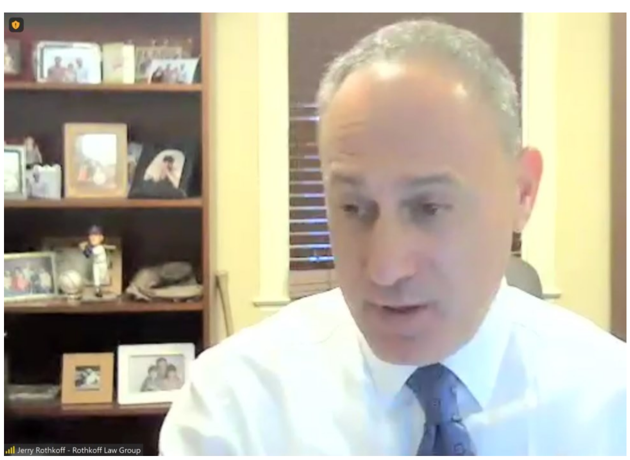

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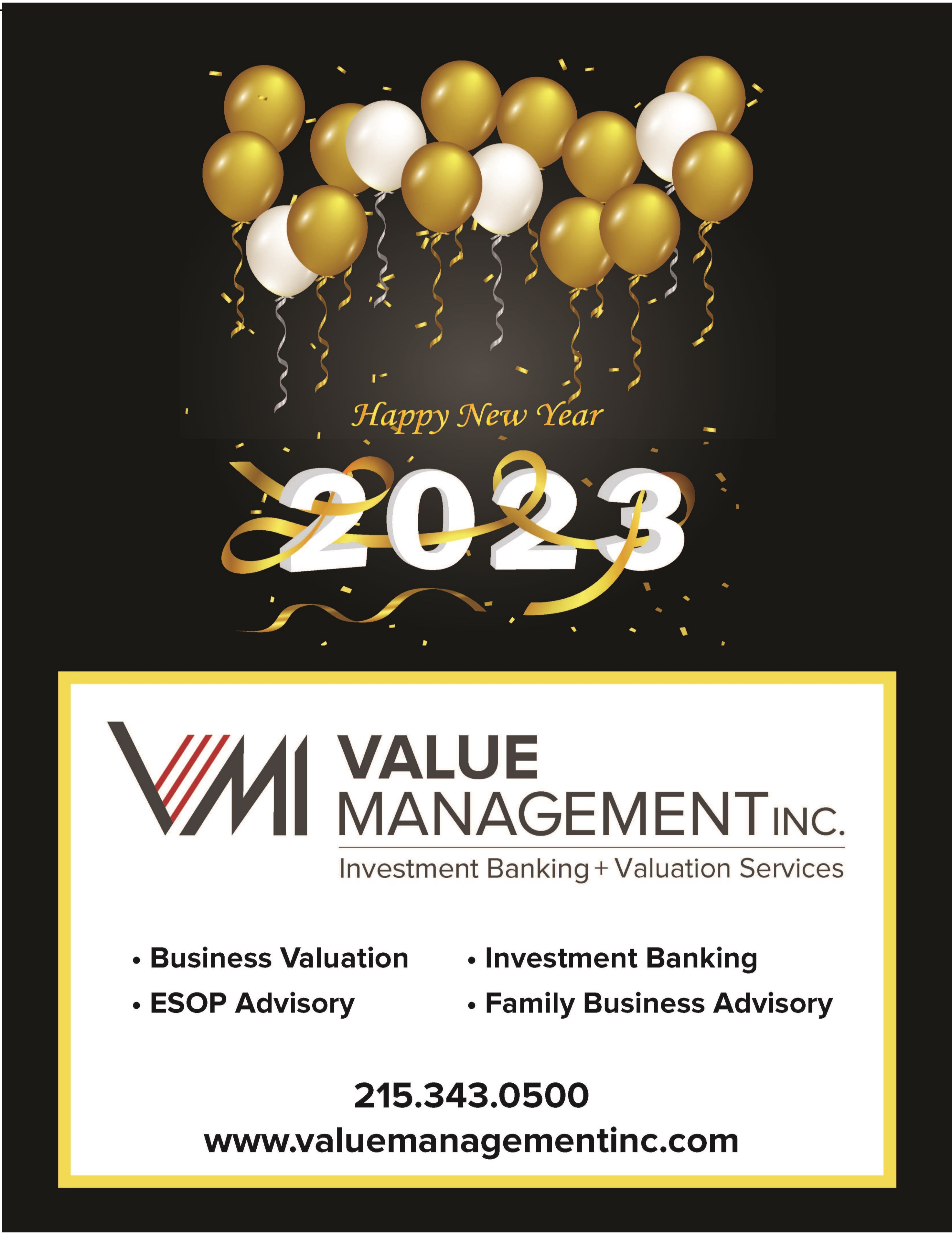
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