

## FEATURED NEWS

### *State Tax Spotlight on Mitchell Newmark*

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Mitchell A. Newmark couldn't have known it at the time, but the day he won a scholarship from the Monmouth Bar Foundation would turn out to be one of the most momentous of his career.

"I remember that whether he won or not, I was really impressed by him," said Paul Frankel of Morrison & Foerster LLP, who like Newmark hails from Monmouth County, New Jersey. "Our county bar gave scholarships to law students who were good, worthy, and hard-working, and he certainly was."

In addition to being impressed, the veteran state and local tax lawyer never forgot the young law student. Several years later, Morrison & Foerster had an opening, and today, Newmark himself is a veteran SALT lawyer in the firm's Manhattan office. He handles cases all over the country but continues to be noted for his expertise in New Jersey where he has argued New Jersey Supreme Court cases such as *United Parcel Service General Services Co. v. Division of Taxation* and *Whirlpool Properties Inc. v. Division of Taxation*, the latter with Frankel.

"Paul is my professional father," Newmark, 48, told Tax Analysts. "He and Craig Fields [also a partner at Morrison & Foerster in Manhattan] made me the lawyer I am today."

Frankel said he was grateful but demurred.

"Mitchell is what he is with or without us," he said.

#### **Deputy Attorney General for New Jersey**

Newmark joined Morrison & Foerster in 2003 after a meeting with Fields, but he learned about the state and local tax world with the New Jersey state government. After earning his J.D. at the Widener University School of Law in 1996, he clerked for one year in the New Jersey Superior Court Appellate Division. He was interested in taxation, and after the year was up, his judge steered him toward the New Jersey office of the attorney general.

"He thought it was a good place to learn to litigate," Newmark said. "Cut your teeth, see lots of different things, become a better lawyer, and then, later go out into private practice."

At the time, Newmark said, state supreme court Justice Jaynee LaVecchia was the director of the Division of Law



Mitchell A. Newmark

within the Department of Law and Public Safety, responsible for legal work of all lawyers assigned to the civil side of the attorney general's office.

"So I came on board wanting to do tax," Newmark said. "And Justice LaVecchia said, 'OK, good. You'll go to insurance.' The thought was you should be able to litigate any case, any court, any time, and before I went to tax, she wanted me to see some other things."

In the six and a half years that followed, Newmark indeed saw some other things. He litigated insurance company takeovers, bank takeovers, insurance rate setting cases, bond cases, and pensions and benefits, among other issues. Gradually, he transitioned to the corporation business tax and the gross income tax (New Jersey's name for the personal income tax).

Asked if it was challenging, Newmark responded: "The bureaucracy was challenging, but the cases? I loved them all. As a state lawyer, I found many times I didn't necessarily agree with the position or with the law. But I was still charged with defending it."

In his tenure as a deputy attorney general, Newmark received two certificates of recognition. One was for work on a highly complex transaction in which Prudential Insurance Co. underwent demutualization — the transition from a company owned by its policyholders to a more typical corporate structure owned by shareholders. Newmark was involved in overseeing the restructure of the company and then in subsequent litigation challenging the demutualization.

“Any time there is a share of something to be given out, there are going to be people who didn’t think they got the right share, so that was a challenge,” Newmark said.

His other certificate of recognition involved something far more personal, and nearly 15 years later, Newmark speaks of it haltingly, with pauses to collect himself. Deputies in the attorney general’s office frequently volunteer on behalf of the state, and many, including Newmark, responded to a call in the days following September 11, 2001.

“After 9/11, you may remember, there was a lot of difficulty identifying remains,” Newmark said. “New Jersey had set up a temporary structure in Liberty State Park where people could go and bring hairbrushes, toothbrushes, other things from which someone could get a DNA sample. So the families could come and drop those off.”

Newmark and his colleagues did intake for this process. They collected the items that survivors had brought in to ideally identify the remains of their loved ones, they spoke to the families, and they tried — on behalf of the state — to offer some comfort.

“This was probably the hardest part,” Newmark said. “Remains were hard to come by, so they had urns filled with ashes from the [Twin Towers] site. The families could come, and there was a little chapel set up, and they could pick up an urn, and a flag, since many families didn’t have anything. That was probably the hardest part . . . to hand over an urn and a flag. Because you can’t do anything more.”

### Litigating and Mediating

Newmark said his time with New Jersey was a constant learning experience filled with teachers such as Justice LaVecchia and Judge Karen L. Suter, who now serves on the state superior court, but was in the attorney general’s office when Newmark was there. However, he said, “It became time for me to decide whether the private sector or the public sector was right for me, long term.” And then in 2003, he ran into Frankel in Trenton.

“He said my colleague is looking for somebody,” Newmark recalled. “His name is Craig Fields. So Craig and I met for a cup of coffee, and the rest is history, as they say.”

Fields said he and Newmark work together closely, often collaborating on 20 cases or more at a time. Most of those cases do not reach the stage of a published decision, but Fields has had plenty of opportunity to observe Newmark in the courtroom.

“He seems very comfortable in the courtroom, and perhaps that’s from his earlier days working with the AG’s office,” Fields said. “With the experience he had in New

Jersey, he views cases as an advocate for his client, but he also knows it from the state side, and that gives him insight into the case that others would not necessarily have.”

That kind of insight, Fields said, helped Newmark be part of the first-ever mediation of a matter pending at the New York Division of Tax Appeals. Newmark worked with Argi O’Leary, then assistant deputy commissioner for litigation strategy for the New York State Department of Taxation and Finance, to resolve a case in a way that had never been done before.

O’Leary, now deputy commissioner of the department’s Civil Enforcement Division, said the matter had to do with whether a delivery service had nexus with New York because it entered the state to make deliveries. As O’Leary recalled:

At the time I had a lot of involvement in our higher profile or novel litigation matters, and that was one of them that was headed down the path toward a Division of Tax Appeals proceeding. Mitchell proposed doing mediation. His client had interest in getting to a quicker resolution, and it was a case that we were eager to get resolved, too. So we gave it a shot, and it did work well. I felt we were both coming at it from the same approach, committed to resolving the issue fairly. You don’t always get that.

Terry McWhorter of Caterpillar Inc. said his company puts great stock on Newmark’s relationships in New Jersey and New York.

“Those relationships have already helped us on certain matters,” McWhorter said. “And I know he continues to nurture those relationships and treat them respectfully, and that is to his clients’ advantage.”

University of Connecticut law professor Richard Pomp said Newmark has established himself as “the go-to person on New Jersey tax issues.” Newmark is equally facile at litigation and at settling cases, he added.

“Sometimes he will call me up and we will just brainstorm. He has a great feel for how a judge’s mind works, and that is from his New Jersey days, including his clerkship,” Pomp said. “Some people clerk and they seem to learn nothing. Watching him, I think it was a transformative experience.”

Roberta Moseley Nero, president and commissioner of the New York State Tax Appeals Tribunal, said she is looking forward to having Newmark appear before her some day. It will be a different experience for both of them; she was of counsel at Morrison & Foerster when he joined. They then worked together for the next 10 years.

“I never actually got to go and see him argue,” Nero said. “I look forward to it. He is very smart, overly enthusiastic, and very much a perfectionist, and that was evident from the first time I met him.”

### Top Cases in New Jersey

Among Newmark’s most cited cases are two significant wins for taxpayers: *UPS*, which was resolved by the New Jersey Supreme Court, and *Lorillard Licensing Co. LLC v. Division of Taxation*, which the tax department has appealed

to the supreme court. In *Lorillard*, the appellate court affirmed a tax court decision that the tax department's application of its throwout rule to receipts that other states could have taxed, but opted not to, is unconstitutional. The throwout rule was in effect for tax years 2002-2010 and has since been repealed. (Prior coverage: *State Tax Notes*, Dec. 14, 2015, p. 802.)

In *UPS*, the supreme court affirmed an Appellate Division decision finding that five subsidiaries were entitled to waiver of late payment and amnesty-related penalties because the taxpayer had reasonable cause for failure to pay taxes on intercompany fund transfers due to an honest misunderstanding of fact or law. Newmark said the lesson of the case "is so fundamental to tax law."

"When you make a good faith effort, and it's a case of first impression, there's no room for penalties," he said.

*Lorillard*, Newmark said, is "the union" of *Whirlpool Properties* and *Lanco Inc. v. Division of Taxation*. The appellate division agreed with the tax court that in relying on *Lanco*, the state could tax *Lorillard* even though the company had no physical presence in New Jersey. But citing *Whirlpool Properties*, it also ruled that the throwout rule must be constitutionally applied and that in this case, the rule did not meet that test.

"New Jersey thinks it gets its own constitutional authority," Newmark said.

Philip Tatarowicz of Morrison & Foerster and the Georgetown University Law School said these cases illustrate Newmark's command of the principle of federalism.

"To me, that's absolutely critical," Tatarowicz said. "You look at *Lorillard* and *Whirlpool Properties*, for instance. Those have very subtle and important aspects of federal limitations on subnational governments' powers to tax. He obviously brings those to the forefront very effectively to win cases for his clients."

### Mentoring

Newmark and his wife now live in Manhattan, but his ties to New Jersey continue to go beyond what he does for clients. He has been a member of the New Jersey Supreme Court Committee on the Tax Court since 2008. He is a past chair of the New Jersey Bar Association's Tax Section and remains a committee chair. He also speaks often at conferences and has published various papers and articles on state tax matters.

However, Newmark said he views his most important service contribution to be right in the office. He frequently participates in lunchtime enrichment programs for associates and tries to be a mentor in less formal ways as well, he said. He spoke at length of the time that colleagues such as Frankel, Fields, and Nero spent with him.

"So many people poured so much into me that I feel I have to give back," Newmark said. "I think it is so important to train and mentor the next generation of lawyers. I also believe that is part of my responsibility to my clients."

Newmark said that to him, all days ending in Y are work days, but he tries to at least avoid the office on Saturdays. He

and his wife enjoy traveling to Europe, and as a native of the Jersey shore, he still loves the beach. He also said the TV is constantly tuned to sports in his house, but he is not the one watching.

"My wife is a huge, huge sports fan" who follows hockey, football, baseball, soccer, and NASCAR, among others, Newmark said. And she is employed by the NHL, which means he gets no attention at parties.

"She works for the NHL, and I'm a tax lawyer," Newmark said. "We meet people, and they're like, 'Can you go get us some drinks?' Because we want to talk to your wife." ☆