



## NOTES & TRENDS

### ADMINISTRATIVE LAW

#### JUDICIAL LAW

■ **EXHAUSTION OF ADMINISTRATIVE REMEDIES.** A landowner filed a declaratory judgment action and a petition for a writ of mandamus in district court seeking to require a watershed district to repair a ditch. *Zaluckyj v. Rice Creek Watershed District*, \_\_\_\_ N.W. 2d \_\_\_\_ (Minn. App. Feb. 12, 2002). The landowner argued that it would be futile to apply to the district because it has adopted a policy that would prohibit relief. The Court of Appeals disagreed and required the landowner to exhaust his administrative remedies by filing a petition for repair with the watershed district. The court noted that the Legislature has established a specialized administrative process for addressing ditch problems that produces a record for judicial review and may avoid the need for judicial review. The court also determined that a party is not entitled to a jury trial on the issue of exhaustion of administrative remedies.

■ **DUE PROCESS/HEARING OFFICER BIAS.** The Minnesota Uniform Relocation Act (MURA) makes public funds available to reimburse relocation costs incurred by businesses displaced by public acquisitions of property. The Court of Appeals determined that, as a matter of common law, and constitutional due process principles, the Robbinsdale Economic Development Authority (REDA) had to appoint a hearing officer to hear an appeal of its denial of benefits, and that the decision of the hearing officer was final, appealable only to the Court of Appeals. *In Re James Brothers Furniture, Inc.*, \_\_\_\_ N.W. 2d \_\_\_\_ (Minn. App. April 16, 2002). The business also objected to the hearing officer because she was the city manager of a neighboring city, and the law firm representing REDA also represents her city. The Court of Appeals acknowledged that an impartial decisionmaker is an element of due process, but concluded that James Brother's procedural due process rights were not violated "by the hearing officer's conflict of interest (if any) in this case." Nonetheless, the court directed REDA to appoint a different hearing officer to conduct the additional proceedings required by a remand.

#### LEGISLATIVE AFFAIRS

The 2002 Legislature is still in session as this column goes to press. However, a few matters can be reported upon with certainty.

■ **CHAPTER 251 — CONTESTED CASE FLEXIBILITY** (Effective for proceedings initiated on or after August, 2002). This is the bill sought by the Office of Administrative Hearings providing additional flexibility and usefulness to the contested case process. This bill:

- 1) Allows an agency, upon initiation, to elect to have the ALJ report constitute the final decision in the case.
- 2) Allows parties to a potential, or pending contested case to submit the matter to arbitration before an ALJ.
- 3) Allows arbitration as an acceptable, informal disposition of a contested case.
- 4) Requires any decision or order which rejects or modifies the ALJ report to include the reasons for each modification or rejection.
- 5) Allows the ALJ report or order in a contested case to, by default, be the final decision, if the agency has not modified or rejected the ALJ report within 90 days. Also requires the ALJ report or order within 90 days, if the ALJ report or order is to be a final decision.
- 6) Repeals the option or necessity of an appellate order to force an agency decision if not made within 90 days after the closing of a contested case.

■ **CHAPTER \_\_\_\_\_ S.F. 3133 — HEALTH DEPARTMENT RULES GO UP IN SMOKE.** This bill prohibits from taking effect certain health department adopted rules regarding the Minnesota Clean Indoor Air Act. A portion of these rules cannot be effective unless approved by a law passed after January 1, 2002. This bill is effective the day following final enactment.

■ **BUDGET NEGOTIATIONS.** A last-minute curve ball which would have the effect of compromising the independence of the Office of Administrative Hearings, surfaced in the House of Representatives budget proposal. At press time, this proposal appears dead — check the next column to find out if, like the late dictator Francisco Franco, the measure is still dead.

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— MICHAEL AHERN  
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### CIVIL LITIGATION

#### JUDICIAL LAW

■ **DUTY TO DEFEND.** The Minnesota Court of Appeals recently held that two excess insurers owed duties to defend and were obligated to proportionately reimburse the underlying carrier for defense costs. *The Home Insurance Company v. National Union Fire Insurance Company*, 2002 WL 485160 (Minn. Ct. App. April 2, 2002).

Cargill and various related entities in an underlying action tendered the defense to Home, which commenced a declaratory judgment action for a determination that it owed no coverage. While the declaratory action was pending, Cargill retained counsel to defend its enti-

ties and was ultimately successful, but incurred approximately \$3 million in defense costs. In the declaratory action, the court eventually ruled that Home owed a duty to defend. Home then agreed to “advance” defense costs to Cargill pursuant to a loan receipt agreement that reserved Home’s right to seek reimbursement from the excess carriers, National Union and Travelers.

The District Court held and the Court of Appeals agreed that the loan receipt agreement allowed Home to pursue reimbursement from National Union and Travelers for the defense costs.

Next, the Court of Appeals held that National Union’s duty to defend was effectively triggered when it received from Cargill copies of the underlying Complaint. The Court also held that National Union could not assert a defense that Cargill had not given proper notice that it was about to incur “excess” defense costs, because National Union had breached its duty to defend.

Finally, the Court concluded that Travelers also owed a duty to defend because at least some of the claims in the underlying action included allegations which implicated Travelers’ insured. The Court remanded to the District Court for a determination of the appropriate allocation among the insurers of the defense costs incurred.

■ **NO-FAULT OFFSETS.** The Court of Appeals holds that a motion to reduce the verdict by the amount of the no-fault benefits paid must be made within the ten-day deadline of the collateral source statute, Minn. Stat. § 548.36, subd. 2 (2000). Therefore, the Court disallowed, as untimely, defendant’s motion to amend, made nearly two months after entry of the judgment. *Lee v. Hunt*, 2002 WL 485287 (Minn. Ct. App. April 2, 2002).

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## CRIMINAL LAW

### JUDICIAL LAW

■ **EVIDENCE: SHOW-UP: IMPERMISSIBLY SUGGESTIVE: NO IN-COURT I.D.** A neighbor called police with what he suspected was a burglary in progress. The eye-witness neighbor gave generalized descriptions of the two men, and stated that they were both carrying black or silver garbage bags. Police responded to the area, and stopped an individual who matched the description and was carrying a silver garbage bag containing computer equipment. Police arrested the appellant and brought him back to the neighbor, telling the eye-witness that “we have the person that matched the description in custody.” Following that statement, the neighbor identified the appellant in the show-up procedure. At trial, the eye-witness failed to identify the appellant, even though he was sitting next to defense counsel, and also failed to recognize the clothing which was put into evidence.

The conviction is reversed and the case remanded. This opinion cites *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) for the proposition that one person show-ups are unnecessarily suggestive if the police single out a person from the general population, based on the victim’s description, and present that person in handcuffs for identification. Here, the police utilized such a one-person show-up and furthermore informed the eye-witness that the person in custody for the show-up matched the identification given by the eye-witness, thereby tainting the show-up and making an impermissible suggestion with a substantial likelihood of misidentification. Finally, the eye-witness’ inability to identify the appellant at trial compels the Court of Appeals to conclude that the error was not harmless. *State v. James Edward Anderson*, Ct. App. 3/19/02, Minnesota Lawyer 3/25/02, p. A-40.

■ **DNA: PCR-STR TESTING: TWGDAM V. DAB GUIDELINES:** At trial, PCR-STR DNA blood evidence was used against the appellant. The appellant had been accused of stabbing an individual, and was found at the scene with a bloody knife, cocaine in his pockets, and blood on his pants. Appellant was convicted of Second Degree Assault and a drug offense.

Appellant’s appeal centers on the admission of the PCR-STR evidence. The appellant does not contest that the PCR technique is, in the abstract, generally accepted in the scientific community, but rather casts a dispute over whether the kits in question, which are produced by a private company, have been designed in accordance with accepted guarantees on reliability, a challenge under the second prong of the *Frye-Mack test*. It appears from the opinion that the kits used in this case are not in accordance with the TWGDAM standard, but do comply with a newer standard, the DAB Guidelines, which the FBI has adopted since October 1, 1998. The DAB standards require less information for approval of the methodology. The PCR-STR testing conducted in this case satisfies the DAB requirements, but apparently was not acceptable under the TWGDAM standard in Minnesota.

The Court of Appeals finds that the TWGDAM standards, which are still in effect in Minnesota, have not been superseded by the DAB standards. The Court of Appeals notes that the Minnesota Supreme Court has repeatedly and consistently upheld the standards under TWGDAM, but not DAB. Accordingly, absent a decision by our state’s highest court, the TWGDAM Guidelines remain the standard for determining reliability of DNA evidence. As such, it was error for the trial court to admit the PCR-STR evidence with the particular kits used (manufactured by PerkinElmer, Inc.) However, because the other evidence was strong, the DNA evidence was merely corroborative, and the other evidence was more than sufficient to support the conviction. *State v. Raymond Joseph Traylor*, Ct. App. 3/26/02, Minnesota Lawyer 4/1/02, p. A-23.

■ **POLICE JURISDICTION: OUT OF JURISDICTION TRAFFIC STOP.** Officer Bunde is employed full time as a peace officer by the City of Madison Lake. After Bunde issued traffic citations, his customary practice is to drive to the Blue Earth County Law Enforcement Center in Mankato to obtain driver and registration records. On the date in question, Bunde was on his way to Mankato to obtain those records when he saw a car traveling 85 MPH in a 65 MPH zone. Bunde was outside of the Mankato limits and beyond the territorial jurisdiction of Madison Lake. This stop resulted in a citation of the driver for a DWI.

Held, the traffic stop is lawful. Minn. Stat. § 629.40, subd. 3 (1998) states that an officer may make a warrantless arrest outside of his jurisdiction when he is acting within the course and scope of his employment as a peace officer. Here, although the stop and arrest of the

appellant began and ended outside of Bunde's "jurisdiction," he was acting within the scope and course of his employment as a peace officer by going to Mankato to obtain traffic records. The Court of Appeals rejects any distinction between "core" police activities versus administrative and ministerial acts in determining whether the peace officer is within the scope of his employment. *State v. Gary R. Meyer*, Ct. App. 3/19/02, Minnesota Lawyer 3/25/02, p. A-41.

■ **CLOSING ARGUMENT: PROPENSITY TO COMMIT CRIME: DISPARAGEMENT OF DEFENSE.** In a prosecution for gross misdemeanor DWI, the appellant did not stipulate to prior convictions or to the fact that his license was under revocation. The district court admitted the appellant's entire driving record into evidence, which contained multiple DWI convictions, several of which were not relevant to the charges at bar. During closing statements, the prosecution argued that the appellant's six prior DWIs indicate that he has a serious problem with alcohol, that Minnesota tries to get people to use designated drivers to protect our loved ones, that there was no explanation by the defense for horizontal gaze nystagmus evidence, and that the defense argument concerning the accuracy of the Intoxilyzer was "ridiculous" and the jury should not be "snowed" by it.

Held, the above statements by the prosecution constitute serious misconduct, far exceeding the bounds of an ethical professional summation. The Court of Appeals concludes that the errors were not harmless beyond a reasonable doubt, and the conviction is reversed and remanded for trial. *State v. Walter Paul Hoppe*, Ct. App. 3/19/02, Minnesota Lawyer 3/25/02, p. A-41.

■ **OBSTRUCTING LEGAL PROCESS: WORDS ONLY: JURY INSTRUCTIONS.** It was plain error for the trial court to use CRIMJIG 24.25 and 24.26 (1999) as jury instructions on the charge of obstructing legal process: these instructions do not contain the parameters articulated 13 years ago in *State v. Krawsky*, 426 N.W.2d 875 (Minn. 1998), which construe the statute narrowly to require that a defendant acted intentionally and that the statute is directed at words and acts which have the effect of physically obstructing or interfering with a peace officer. However, although the error is plain, there was no reasonable likelihood that a more accurate instruction would have changed the outcome of this case: the jury did answer a special verdict question stating that the appellant's act was accompanied by force or violence. *State v. Mark Arthur Ihle*, S.Ct. 3/20/02, Minnesota Lawyer 4/1/02, p. A-5.

■ **TAMPERING WITH A MOTOR VEHICLE: DEFINED.** The appellant was convicted, among other things, of tampering with a motor vehicle. The evidence shows that he looked inside a vehicle with a flashlight, and pulled on the car door handle. At that point, he was spotted, ran away, but was later apprehended.

Under various definitions of the word "tamper," including *Blacks Law Dictionary* and *The American Heritage Dictionary*, the Court of Appeals holds that in order for tampering to occur, there must be some change or alteration to the object. The Court of Appeals also looks to the definition of "tampering" as construed by courts in foreign jurisdictions. Based on this analysis, the court concludes that "tamper with" as used in Minn. Stat. § 609.546(2) requires that the individual engage in conduct which results in some degree of change, alteration or substantial interference with a vehicle. Appellant's conduct simply does not rise to that level and his adjudication is reversed. *In re W.A.H.*, Ct. App. 3/2/02, Minnesota Lawyer 4/1/02, p. A-25.

■ **DISORDERLY CONDUCT: FIGHTING WORDS: SUFFICIENCY OF EVIDENCE.** The juvenile in this case had been caught by civilians while he was tampering with a motor vehicle. While he was restrained, he used frequent obscenities against his civilian captors. Held, while his words may have been offensive, obscene or abusive, they did not rise to the level of "fighting words." In order to sustain a conviction for disorderly conduct, words alone will not suffice unless they are "true fighting words" which are not only abusive, but defined as: "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction or (words) which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *In re S.L.J.*, 263 N.W.2d 412, 419 (1978). *In re W.A.H.*, *supra*.

■ **CONFESSIONS: RIGHT TO SILENCE: INVOCATION.** Several years after the death of her child, the respondent became a homicide suspect. When she reported to her probation officer, she was arrested on a welfare fraud warrant. When asked if she wished to talk to the police, she responded: "No. I don't wish to say anything." Police then told the respondent that she was being arrested for welfare fraud, and then began to question her about her child's death. During extensive questioning she denied any involvement in the death of her child. Detectives told her that they would keep "bothering her" until she told the truth. While being transported in a squad car, she confessed to killing the child. This was tape-recorded at the Dakota County Jail. The detective continued questioning and again read her *Miranda* rights. During this questioning, she made statements that she had not wanted the child to suffer and that the child may have been the source of discord between herself and her husband.

Held, the statement made by the respondent, "No. I don't wish to say anything" is an unequivocal and unambiguous invocation of her right to remain silent. The Minnesota Supreme Court has recently adopted a bright-line approach in reviewing invocation of *Miranda* rights: "The inquiry is whether the accused asserted his right in a way that a reasonable police officer in the same circumstances would understand the statement to be an invocation of the right to remain silent." *State v. Kathleen Mary Marshall*, Ct. App. 4/2/02, Minnesota Lawyer 4/8/02, p. A-17.

■ **VOLUNTARINESS: COERCION.** Approximately 20 years after the death of her child, the respondent received a visit by two BCA agents, unannounced. The interview lasted approximately 90 minutes. Respondent had been up since 1:30 in the morning, had worked all day, and had not eaten. The BCA agent separated the daughter into another room, were armed, and inquired as to where the other exits from the apartment were. They did not tell her that she was free to leave or that she was free to end the conversation. She was not read her *Miranda* rights. During the interrogation, they exploited her religious beliefs by stating that she would go to hell if she had a mortal sin on her soul. The agent testified at the omnibus hearing that the purpose of going to her apartment was to secure a confession.

The record supports the trial court's decision that the statement was not voluntary, and must be suppressed. All of the above factors combined to have overcome the will of the respondent: "The questioning was not merely 'unpleasant' . . ." it was, given the totality of the circumstances, inherently coercive. *State v. Kathleen Mary Marshall*, *supra*.

■ **CRIMINAL PROCEDURE: WAIVER OF JURY TRIAL.** Subsequent to testimony by the state's first witness, the trial court judge inquired whether the defendant waived his right to a jury trial. The attorney for the appellant assured the court that he went over his rights with regard to a jury trial and explained to him his two choices (court versus jury trial). At no time was the appellant himself asked to state his waiver on the record, or to acquiesce to the attorney's statement.

Held, Rule 26.01 subd. 1(1)(a) requires defendants to waive their right to a jury, "personally in writing or orally upon the record in open court," after being advised by the court of such a right, and after having had an opportunity to consult with counsel. Because the rule is clear and plain in its meaning, and because compliance did not take place, the conviction is reversed and remanded. *State v. Ruben Perez Tlapa*, Ct. App. 4/9/02, Minnesota Lawyer 4/15/02, p. A-11.

■ **DWI/IMPLIED CONSENT: SERIES 68-01 INTOXILYZER: APPROVAL BY COMMISSIONER.** The Supreme Court affirms the Court of Appeals, and a district court below, in ruling that the Series 68-01 was properly approved by the Commissioner of Public Safety. In 1984, the Commissioner of Public Safety promulgated Rule 7502.0420, subp. 2, which provided that: "The Intoxilyzer 5000 instrument, which uses infrared technology, is approved for use in the state for the purpose of determining the alcohol concentration of a breath sample." Changes in the 90s resulted in the BCA replacing Series 64 and 66 with the new Series 68-01. Various "orders" were issued by the Commissioner approving Series 68 for use in Minnesota, without adhering to the formal rule-making procedure. The Supreme Court sustains the decision below, that the Series 68-01 was properly approved by the Commissioner, on the basis that the method of analysis — infrared — used by the instrument in Series 68-01 is identical to that used in Series 64 and 66. Hence, Series 68-01 falls within the scope of the original 1981 rule and is therefore properly approved as a "infrared breath testing instrument," defined in Minn. Stat. § 169.01, subd. 68. The court also notes that, the approval issue notwithstanding, Series 68-01 was found by a lower court to be an accurate and reliable scientific device, and is admissible into evidence on this independent ground. *James O. Jasper v. Commissioner of Public Safety*, S.Ct. 4/18/02, Minnesota Lawyer, 4/22/02, p. A-3.

■ **INDEPENDENT TESTS: REFUSAL: DUE PROCESS.** The defendant was arrested for DWI and was allowed to call an attorney before making his decision as to whether he would submit to the implied consent test. When he finished speaking with his attorney, the defendant stated that he would refuse to take a test, on his attorney's advice. However, the defendant requested his own test from an additional testing agency. A deputy at the county jail denied his request for an independent test, knowing that he had refused to submit to the alcohol test by law enforcement. The deputy believed that he could have an independent test only after he permitted law enforcement authorities to test him.

Held, an independent chemical test, in a DWI prosecution, need only be offered to those who submit to an alcohol test requested by police. In other words, the police-administered test is a "condition precedent" to independent testing. The statute in question, former Minn. Stat. § 169.123, subd. 3(a) is clear and unambiguous. The statutory right to obtain an additional test is a limited right. Finally, there is no *Brady* violation, because the defendant has not shown that the state willfully suppressed the evidence, nor that the evidence was favorable to him, nor that he was deprived of a defense. *State v. Michael Larivee*, Ct. App. 4/16/02, Minnesota Lawyer 4/22/02, p. A-35.

■ **SELF DEFENSE: CONTROL OF GUN: JURY INSTRUCTION.** Testimony at trial showed that the appellant visited his ex-wife at her home, when an argument ensued. At some point, one of the parties pulled out a gun. The appellant sustained two gunshot wounds to the stomach, and his ex-wife sustained one fatal gunshot wound to the chest. Appellant testified that his ex-wife produced the gun and shot him in the stomach. He then admitted shooting the ex-wife after a scuffle over the gun during which he wrestled the gun away from her by tackling, then straddled her, held the gun above her head, and while on top of her, aimed the gun at her and shot her in the chest. Police had also received a 911 call from the victim stating that her ex-husband had shot her. After arrival, the appellant fled from the home, then went back into the residence, contrary to a police order.

It was not an abuse of discretion for the trial court judge to refuse the appellant's request for a self-defense instruction. The court found that the appellant did not meet his burden of showing that he had an actual belief that he was in imminent danger for the reasons that he could not have had such a belief when he was in control of the gun holding it over the victim, he did not retreat when he had control of the gun, he may have been the aggressor, and he used an unreasonable amount of force by shooting the victim in the chest. *State v. Aeropajito Castro Vazquez*, Ct. App. 4/16/02, Minnesota Lawyer, 4/22/02, p. A-35.

■ **SEARCH AND SEIZURE: CONTAINER: TRANSPARENT PILL VIAL: PLAIN VIEW: CONSENT.** Police stopped the appellant for speeding. After discussing the offense with the appellant, the police officer noted two unopened 12-packs of beer in the back seat. In addition, appellant revealed that his newly purchased vehicle was uninsured and that his license was revoked. When asked, the appellant denied consuming alcohol, but he gave the police officer permission to look for "open containers" in the vehicle. In conducting the search, the police officer looked under the driver's seat and found a transparent pill vial with tape wrapped around it. The police officer illuminated the untaped bottom side of the vial with a flashlight and observed that it contained a powdery substance and a pebble-sized rock. Based on his training, the police officer believed that this was a controlled substance. Appellant denied ownership.

Held, this was a lawful search of the pill vial for the dual reasons of consent and plain view. Because of the appellant's consent, the police officer had a lawful right of access to the object. Furthermore, the fact that the pill vial was transparent is critical in the plain view doctrine: "... viewing the methamphetamine through its container was equivalent to viewing the methamphetamine itself." *State v. Corey Lowell Zimmer*, Ct. App. 4/16/02, Minnesota Lawyer 4/22/02, p. A-36.

■ **APPEALS: LOTHENBACH: HARMLESS ERROR.** In a juvenile proceeding, the trial court held that the juvenile's statement did not violate the *Miranda* rule. The juvenile preserved the suppression issue for appeal by waiving his right to a contested hearing and submitting the case on stipulated facts, according to Lothenbach. On appeal, the Court of Appeals found a *Miranda* violation; however, the Court of Appeals concluded that the error was harmless beyond a reasonable doubt and affirmed the delinquency adjudication.

The Supreme Court holds that the harmless error review doctrine should not be applied to trials on stipulated facts. There is no way for

a reviewing court to tell that the verdict is “surely unattributable to the error,” which is the harmless error standard. *State v. Day*, 619 N.W.2d 745, 750 (Minn. 2000). Because evidence is not fully developed in a stipulated fact trial, harmless error cannot apply. The Supreme Court rejects the state’s warnings against creating “unlimited interlocutory review of pretrial evidentiary hearings.” The adjudication is reversed and the case remanded for further proceedings. *In re R.J.E.*, S.Ct. 4/25/02, Minnesota Lawyer 4/29/02, p. A-3.

— FREDERIC BRUNO  
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## ELDER LAW

### LEGISLATIVE LAW

■ **ANNUITIES AND BURIAL EXPENSES.** The Minnesota Legislature passed S.F. 2630 and H.F. 2862, which make changes to Minn. Stat. § 256B.056 subd. 3, 256B.057 subd. 9, 256B.059 subd. 1, 3 and 5, and 256B.0595 subd. 1, 2 and 4. In summary, the changes affect beneficiaries for prepaid burial funds and annuities, and they change the way that annuities are valued for the Community Spouse Asset Allowance (effective July 1, 2002). They also restrict private annuities and the timing of payments from annuities (effective March 1, 2002). Finally, the amount of uncompensated transfer that does not create a period of ineligibility will change from \$500 to \$200 monthly, effective July 1, 2002. Until the Department of Human Services issues a Bulletin on the changes, it is not clear how they will be interpreted or implemented. More information is available at [www.revisor.leg.state.mn.us](http://www.revisor.leg.state.mn.us).

### JUDICIAL LAW

■ **STATE LIEN PROVISION PRE-EMPTED.** Troy Hoff was disabled in a motor vehicle accident. His mother, Joan Martin, applied for Medical Assistance on his behalf and executed an assignment of “any rights available to me under automobile or private health care coverage and any rights to payment for medical care from any third party.” The personal injury action settled for \$220,000, and the state sought to place a \$58,500 Medical Assistance lien on the proceeds. The Minnesota Supreme Court applied the plain meaning to the federal anti-lien provision that prohibits states from imposing a lien on property during the person’s lifetime (42 U.S.C. 1396p(a)(1)), together with the federal laws that mandate that recipients assign their rights to payment for medical care (42 U.S.C. 1396k), and that states must recover the costs of care from potentially liable third parties for health care items or services (42 U.S.C. 1396(a)(25)(H)). The Court found harmony in these three laws by determining that the states may seek recovery against causes of action for medical expenses only. The Court gave Minnesota statutes a limited interpretation consistent with its interpretation of federal law. The Court applied this analysis to the lien rights, assignment rights, and subrogation rights of the state. Minn. Stat. § 256B.042, § 256B.056 subd. 6 and § 256B.37 subd. 1. *Joan Martin, guardian ad litem for Troy Hoff vs. City of Rochester*, C3-00-398 (March 21, 2002).

■ **ATTORNEY FEES FOR DEFENSE OF CONSERVATOR.** Conservatorship was challenged by a petition to appoint a successor conservator. The attorney representing the original conservator is entitled to recover reasonable costs and fees from the conservatee’s estate, unless the conservator did not act in good faith in defending against the petition. *In Re: The Conservatorship of Pauline Miller*, C4-01-1697 (April 16, 2002).

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## EMPLOYMENT & LABOR LAW

### LITIGATION

■ **ACADEMIC AFFAIRS.** A pair of teachers were rebuffed recently by the Minnesota Court of Appeals in claims relating to their employment. In *Thomas v. Independent School District No. 2142, St. Louis County*, 2002 WL 264586 (Minn. App. 2002), the court held that a tenured public school teacher who retired and then was given a “probationary” contract was not entitled to “continuing” contractual rights under the Minnesota Teacher Tenure Law, Minn. Stat. § 122A.40 subd.7. The court reasoned that, after retirement, a teacher no longer had any tenure rights and, therefore, had to “start over” as a probationary employee. Accordingly, the School District’s non-renewal of his probationary contract was upheld.

■ In *Moxness v. Minneapolis Teachers’ Retirement Fund Association*, 2002 WL 264603 (Minn. App. 2002) (unpublished), the court upheld the denial of permanent disability benefits for a Minneapolis teacher who was on a medical leave of absence due to a number of afflictions. Although the School District did not comply with all the procedural requirements of the denial of the claim, there was sufficient evidence from the School District’s examining physician that the teacher was not permanently disabled within the meaning of the Teacher Disability statute, Minn. Stat. § 354.011 subd.14.

■ The U.S. Supreme Court ruled against employees in a pair of cases from this jurisdiction. In *Raygor v. Regents of the University of Minnesota*, 122 S.Ct. 999 (2002), the Court held that the supplemental jurisdiction statute, 42 U.S.C. § 1367, does not apply to toll the statute of limitations for age discrimination claims under state law brought in federal court. The Court ruled that the sovereign immunity doctrine under the 11th Amendment bars tolling of the limitations period. In *Ragsdale v. Wolverine Worldwide*, 122 S.Ct. 1155 (2002), the Court, in a case from the 8th Circuit, held that an employee is entitled to a maximum of 12 weeks of leave under the Family Medical Leave Act and any prior leave counts towards that period, even if not specifically denominated as FMLA leave.

■ **DATA PRACTICES FEES.** Successful claimants who obtained access to their own promotional examinations constitute an “aggrieved person” under the meaning of the Government Data Practices Act statute and, therefore, may be entitled to a discretionary fee award from the Court. In *Wiegel v. City of St. Paul*, 639 N.W. 2d 378 (Minn. 2002), the Supreme Court held that the claimants, a pair of fire fighters, police officers, and their respective unions were entitled to data about their respective tests because that information constituted “private

data on individuals” under the Data Practices Act. Since they were entitled to the information as a “matter of right,” they constituted “aggrieved persons,” and may seek a fee award, in the discretion of the trial court. The case, therefore, was remanded for determination of an attorneys’ fee award.

■ **EMPLOYMENT CONTRACTS.** A machine operator who breaches a written employment contract by quitting before examination of the agreement is liable to the employer for lost profits. In *Haff v. Augeson*, 2002 WL 378172 (Minn. App. 2002) (unpublished), the Court of Appeals held that the employee may be required to compensate his ex-employer for money the employer lost due to work that would not be performed until a replacement operator was hired.

Promises of long-term employment were deemed by the appellate court too imprecise to constitute a contract or to invoke promissory estoppel on behalf of a discharged employee in *Hecht v. Interstate Power Co.*, 2002 WL 484992 (Minn. App. 2002) (unpublished). Statements that the employee had a job “for the rest of his career,” that the job could “not be impacted by [a] merger,” and that the employee “will always have [job] security” were deemed “too vague to support a contract of permanent employment” or promissory estoppel.

■ **UNEMPLOYMENT COMPENSATION.** Crude language, physical altercations, and veiled threats of violence resulted in denial of unemployment compensation benefits for discharged employees in a pair of recent cases. In *Burset v. Albinson Reprographics LLC*, 2002 WL 717178 (Minn. App. 2002) (unpublished), the Court of Appeals held that an employee who used “foul and abusive” language directed to a co-worker could not receive unemployment benefits. In *West v. Copper Sales, Inc.*, 2002 WL 418214 (Minn. App. 2002) (unpublished), an employee was disqualified from benefits after being fired for jabbing a co-worker during an altercation and then stating that someone might “end up shooting” him.

Meanwhile, the Supreme Court heard and will soon rule upon two cases involving the “misconduct” provision of the unemployment compensation statute, Minn. Stat. § 268.095 subd.6(1). In *Houston v. International Data Transfer Corp.*, No. C1-00-2151 and *Schmidga v. FilmTec Corp.*, No. C8-01-4, argued concurrently earlier this year, the issue is what constitutes disqualifying “misconduct,” which the statute describes as “any intentional conduct . . . that disregards the standards of behavior that an employer has the right to expect of the employee or disregards the employee’s duties and obligations to the employer.” The appellate court upheld decisions of the Department of Economic Security rejecting benefits in both cases last summer, 2001 WL 856262 and 2001 WL 800048, respectively.

#### LEGISLATION

Several employment-related bills are pending in Congress.

- In the Senate, proposed legislation would require employers with more than 100 employees to pay for basic health insurance for their workforces.
- The Senate also is weighing legislation to limit the amount of overtime nurses could be required to work. A similar measure also has been introduced in the House.
- Lawmakers are also considering expanding the coverage of the Family and Medical Leave Act to employers with only 25 employees. Currently, employers must have 50 or more employees to be covered. Congress also is considering an amendment to the FMLA requiring 24 hours’ leave per year for “parenting activities.”
- In another measure currently before the Senate, which could possibly reach a floor vote this year, the minimum wage would be increased to \$6.65 per hour.

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#### ENVIRONMENTAL LAW

##### JUDICIAL LAW

■ **CLEAN AIR ACT; AMBIENT AIR QUALITY STANDARDS.** On remand from the U.S. Supreme Court, the Court of Appeals for the District of Columbia Circuit recently rejected all remaining challenges to the national ambient air quality standards (NAAQS) for ozone and fine particulate matter as revised by the EPA in 1997. Various parties, including business and environmental groups and several states, challenged the validity of the revised NAAQS immediately after they were adopted. All but a few of the challenges were addressed in earlier decisions of the U.S. Supreme Court and Court of Appeals for the District of Columbia Circuit. At issue in this appeal were the challengers’ arguments that the NAAQS for ozone and fine particulates were invalid because the EPA failed to establish them in accordance with guidelines prescribed by the Clean Air Act. The Court of Appeals rejected each of the challengers’ arguments, holding that the EPA’s adoption of the disputed standards was neither arbitrary nor capricious. *Am. Trucking Ass’ns v. EPA*, 283 F.3d 355 (D.C. Cir. 2002).

■ **CLEAN AIR ACT; EMISSIONS LIMITS.** A final rule signed by EPA Administrator Christine Whitman on March 5, 2002 gives industries 24 additional months to submit applications for permits that would require them to meet technology-based emissions limits for hazardous air pollutants. The EPA missed a November 15, 2000 statutory deadline for setting nationwide standards based on maximum achievable control technology (MACT). The missed deadline triggers the so-called “MACT hammer” under Section 112(j) of the Clean Air Act, which requires owners and operators of major sources to apply for permits that would establish MACT-equivalent emissions limits on a case-by-case basis by May 15, 2002. The EPA’s new rule amends the permit requirements such that owners and operators need only submit basic information about the facility by May 15, 2002. Detailed emissions information is not due until May 15, 2004, by which time the EPA expects to establish nationwide MACT standards. 67 Fed. Reg. 16,582 (April 5, 2002) (to be codified at 40 C.F.R. pt. 63).

■ **CLEAN WATER ACT; PULP AND PAPER MILL DISCHARGES.** The U.S. Court of Appeals for the District of Columbia Circuit recently

affirmed effluent limitations for pulp and paper mills adopted by the EPA under the Clean Water Act. In 1998, the EPA promulgated a final rule limiting the discharge of toxic pollutants from the bleached papergrade kraft and soda subcategory of pulp and paper mill processes. Environmental groups challenged the rule as too lax on grounds that the EPA wrongly rejected cleaner technology as too costly. Industry groups argued that EPA exceeded its authority in adopting standards that are too stringent. The D.C. Circuit upheld the discharge limitations on grounds that EPA's adoption of the rule was neither arbitrary nor capricious. *Nat. Wildlife Fed. v. EPA*, Nos. 99-1452, 99-1454 through 99-1456, 2002 WL 596830 (D.C. Cir. April 19, 2002).

■ **CERCLA; PASSIVE DISPOSAL.** On April 1, 2002, the U.S. Supreme Court declined to consider whether "disposal" under CERCLA includes passive migration of contaminants through soil. In this case, the Court refused to review a ruling by the U.S. Court of Appeals for the 9th Circuit that a former owner of property could be liable for passive migration only if the contaminants originated from a container. In a similar decision in 1992, the Supreme Court refused to review a ruling by the U.S. Court of Appeals for the Fourth Circuit that "disposal" under CERCLA does include passive migration. *Carson Harbor Village Ltd. v. Braley*, U.S., No. 11091 (April 1, 2002).

■ **PHOSPHORUS FERTILIZER RESTRICTIONS.** A bill signed into law by Gov. Ventura on April 19, 2002 will restrict the use of phosphorus fertilizers in Minnesota starting January 1, 2004. The law bans the application of phosphorus fertilizers in the Twin Cities metropolitan area unless a lack of phosphorus is demonstrated by soil tests. The use of phosphorus fertilizers will be permitted in limited quantities outside of the Twin Cities. Senate File No. 1555; House File No. 1524, Minnesota 82nd (2002).

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## FEDERAL PRACTICE

### JUDICIAL LAW

■ **EMPLOYMENT DISCRIMINATION; PLEADING WITH SPECIFICITY.** In *Swierkiewicz v. Sorema, N.A.*, 122 S. Ct. 992 (2002), the plaintiff filed an employment discrimination action in the Southern District of New York alleging violations of both Title VII and the ADEA. The district court granted the defendant's motion to dismiss on the basis that the plaintiff had not adequately pled a prima facie case because the facts alleged in the complaint did not support an inference of discrimination. The 2nd Circuit affirmed, finding that the plaintiff had failed to allege sufficient facts to make a prima facie case under the *McDonnell Douglas* burden-shifting test. The Supreme Court then granted certiorari to resolve a split in the circuits concerning the proper pleading standard in employment discrimination cases.

A unanimous Supreme Court held that the *McDonnell Douglas* prima facie case is an "evidentiary standard" rather than a "pleading requirement," and that the pleading requirements in employment discrimination cases are governed by the "short and plain statement" requirement of Fed. R. Civ. P. 8(a)(2). The Court held that the plaintiff's complaint easily met the Rule 8(a)(2) standard, in that it alleged discrimination on the basis of both age and national origin, and alleged other facts sufficient to give the defendant "fair notice of what [plaintiff's] claims are and the grounds upon which they rest."

This decision continues the Court's recent pattern of declining to impose heightened pleading requirements in cases not governed by Fed. R. Civ. P. 9(b). See e.g. *Leatherman v. Tarrant County Narcotics, Intelligence and Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160 (1993).

■ **MULTIPLE GRANTS OF CERTIORARI; JURISDICTION AND REMOVAL.** The Supreme Court recently granted certiorari in two cases which involve issues arising out of the federal courts' removal jurisdiction.

In *In Re Ford Motor Co./Citibank (South Dakota), N.A.*, 264 F.3d 952 (9th Cir. 2001), cert. granted, 122 S. Ct. 1063 (2002), the question presented is whether the cost to the defendant of complying with an injunction sought by a plaintiff class satisfies the amount-in-controversy requirement where the cost of compliance to the defendant would exceed \$75,000 for a single member of the class or the entire class? Following removal by the defendants premised on diversity of citizenship, the district court held that it lacked subject matter jurisdiction, and the 9th Circuit affirmed, finding that plaintiffs did not have a "common and undivided" interest in the injunctive relief that could be valued in excess of \$75,000.

In *Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065 (11th Cir. 2001), cert. granted, 122 S. Ct. 1062 (2002), the issue is whether the All Writs Act permits federal district courts to exercise removal jurisdiction under 28 U.S.C. § 1441 over lawsuits brought in state courts that might threaten the integrity of a federal court's rulings in ongoing complex litigation? Alleging federal question jurisdiction under the All Writs Act, 28 U.S.C. § 1651, the *Henson* defendants removed a Louisiana state court action to federal court and obtained a dismissal of that action following a transfer to the district where the prior federal action had been pending. The 11th Circuit reversed, finding that while the district court was empowered under the All Writs Act to enjoin the Louisiana action, the All Writs Act did not provide a basis for removal jurisdiction.

The 11th Circuit opinion does note the current split of opinion on this issue, with the 2nd, 3rd, 6th and 8th Circuits permitting removal under this or similar circumstances, and the 9th and 10th Circuits previously finding otherwise.

### OTHER NOTEWORTHY DECISIONS

■ In *Advanced Communication Design, Inc. v. Premier Retail Networks, Inc.*, 186 F. Supp. 2d 1009 (D. Minn. 2002), Judge Doty denied the defendant's motion to vacate an entry of default and granted plaintiff's motion for a partial default judgment based on a finding that the defendant's default was "the result of intentional conduct."

■ In *Uni-Systems, Inc. v. Delta Air Lines, Inc.*, 2002 WL 505914 (D. Minn. Mar. 28, 2002), Judge Tunheim rejected the plaintiff's objections to the Clerk's Cost Judgment. In rejecting plaintiff's numerous costs requests, Judge Tunheim collected much of the federal law on this infrequently litigated topic. Accordingly, the opinion provides a concise synopsis on the current state of the law on the taxation of

costs under 28 U.S.C. § 1920.

■ In *Glover v. Standard Federal Bank*, 283 F.3d 953 (8th Cir. 2002), the 8th Circuit devoted a footnote to that fact that it had “been inundated with communications from counsel . . . under the guise of Fed. R. App. P. 28(j),” but that “most of [the] myriad upon myriad of filings violate[d] both the language and the spirit of the rule.” However, the court elected to “leave to another day the question of sanctions for this type of violation.” This footnote would appear designed to put counsel in future cases on notice that supplemental submissions that do not comply with Fed. R. App. P. 28(j) may well lead to the imposition of sanctions.

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## PROBATE AND TRUST LAW

### JUDICIAL LAW

■ **ATTORNEY FEES EXCESSIVE.** Where a law firm retained by the personal representative of an estate recovered \$30,000 wrongfully taken by the deceased’s property caretaker, the District Court awarded the law firm \$12,530 in attorney fees and \$1,199 in costs. This was less than half of the amount claimed, based on the court’s findings that the fees and costs requested were disproportionate to the amount recovered and the complexity of the case. The Court of Appeals affirmed. *In Re: Estate of Connelly*, CX-01-1476 (Feb. 26, 2002).

■ **SETTLEMENT AGREEMENT.** In 1994, brother and sister settled claims regarding their parents’ estates and trusts. Brother was Personal Representative and trustee. In the agreement, sister reserved the right to pursue claims against accountants and attorneys, and the agreement required brother and sister to cooperate with each other in such litigation. However, sister did not realize that her claims could only be pursued if she was a trustee. Sister had herself appointed successor trustee, and brother challenged the appointment. The District Court determined that brother did not breach the cooperation clause, and the Court of Appeals agreed. The contract was ambiguous on this issue and did not specifically contemplate brother’s waiver of a legal right, and contract law precludes reading a waiver of a legal right into an ambiguous contract. *Witzman v. Wolfson*, C9-01-1405 (March 5, 2002).

■ **NO JURISDICTION.** A Florida trust was established by deceased parents, owning land located in Minnesota. Trust’s real estate attorney is located in Minnesota. Daughter is trustee. Son sued the trustee and the attorney in Minnesota district court, which dismissed his complaint for lack of subject matter jurisdiction. The Minnesota Court of Appeals agreed that his claims fall under the jurisdiction of the Florida courts which are administering the trust.

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## REAL ESTATE

### JUDICIAL LAW

■ **LAND USE.** The County Board of Adjustment (BOA) denied a landowner’s request for a variance from a shore land development ordinance. After the statute of limitations period to appeal the decision expired, landowner brought a declaratory-judgment action challenging the applicability and enforceability of the ordinance to her property. The Court of Appeals concluded that landowner’s claims arose out of the denial of the variance and should have been raised on appeal from the BOA’s decision, as a result the district court could not exercise subject-matter jurisdiction over this matter. *Carlson et al. v. Chermak et al.*, 2002 WL 264641 (Minn. App. 2/26/02).

■ **PRACTICAL LOCATION OF BOUNDARIES.** Landowner brought an action against neighboring landowners to determine the location of the boundary line between his property and the adjacent properties. The district court ruled on the location of the boundary lines and respectively awarded costs and disbursements. The Court of Appeals set aside the award of costs and disbursements finding that since no one was a prevailing party it could not justify such an award. Furthermore, while the district court has the authority to order the installation of judicial landmarks establishing the boundary line according to the judgment, the court is not required to order such a remedy. *Tarutis vs. Powers et al.*, 2002 WL 172692 (Minn. App. 2/5/02).

■ **DOCTRINE OF ACCRETION.** The legal description of landowner’s land states that the western property line terminates at the lake. When the lake receded thus removing the barrier between landowner’s parcel and an adjacent parcel, landowner brought an action asserting his ownership to the accreted parcel. The Court of Appeals found that landowner owns the accreted parcel because when a waterline is defined as a boundary line, that line remains the boundary line no matter how it may move or transform at least to the point where the boundary line reaches the boundary line of the adjacent parcel of land. *Forbes, as Trustee of the Revocable Trust of Gordon Forbes vs. Kocisak* 2002 WL 264576 (Minn. App. 2/26/02).

■ **MINNESOTA RECORDING ACT.** In 1972 the Grells executed a contract for deed with the Dunns. In 1978 Grells entered into a contract for deed with the Millers for an adjacent parcel of land. The legal descriptions of the parcels overlapped, consequently a six-acre parcel was subject to both contracts. Neither party recorded their contract for deed. Dunns recorded their warranty deed in 1982 and Millers recorded their personal representatives deed in 1998. The Court of Appeals awarded the disputed parcel to Dunns according to the Minnesota Recording Act §507.34, which is a race-notice statute. This statute provides that a subsequent purchaser of land for valuable consideration without notice of any prior interest maintains priority in the land if he records his interest before any other holders in interest. Finally, the attorney lien filed against the disputed parcel resulting from legal services rendered in the conveyance to the Millers did not provide Dunns with notice of the Millers’ interest in the parcel. *Dunn et al. vs. Miller et al.*, 2002 WL 264633 (Minn. App. 2/26/02)

■ **COMMON INTEREST COMMUNITY.** A unit owner in a CIC withheld association dues because he felt the homeowner’s association failed to properly maintain the lawn. The Court of Appeals held that even though §515B.3-107 provides that the association is responsible for the repair and maintenance of the common areas, it does not permit unit owners to withhold association dues for failure to perform such

obligations. *Ansari vs. Diamond Path Homeowner's Ass'n et al.* 2002 WL 206447 (Minn. App. 2/12/02)

■ **LANDLORD/TENANT.** Tenant lived in a HUD-subsidized apartment complex owned by landlord. Tenant did not report to the landlord her change in employment and increased income as required by the lease terms, consequently landlord brought an unlawful detainer action against tenant. The Court of Appeals held that according to HUD regulations, if landlord believes a tenant provided inaccurate information affecting her eligibility to rent or the rental amount, landlord must give tenant written notice of such allegation. If, after tenant is afforded an opportunity to explain, landlord determines tenant acted fraudulently, the lease may be terminated. Fraud is defined as "an intentional deception" and not inadvertent behavior. The court agreed that tenant fraudulently represented her income thus landlord properly terminated the lease. *Chancellor Manor, LP v. Qandid*, 2002 WL 172034 (Minn. App. 2/5/02).

■ **FORECLOSURE.** Mortgagors owned property subject to a mortgage foreclosure and a mechanic's lien foreclosure. A mechanic's lien claimant obtained a personal judgment against mortgagors. Mortgagors failed to redeem before the redemption period expired; a creditor redeemed the property. Mortgagors argued that the redemption by creditor should be vacated because of creditor's fraud. The Court of Appeals upheld the trial court decision to not vacate the redemption because when mortgagors failed to redeem the property from the foreclosure they did not have an interest in the property and thus lacked standing to challenge the validity of the redemption by creditor. *Prosch Bros. Inc. vs. Walker et al.* 2002 WL 206397 (Minn. App. 2/12/02).

■ **MANUFACTURED HOME PARKS.** The owner of a mobile home park provided residents with an eviction notice because he learned the residents did not inform him of two prior unlawful detainer actions in the rental application. Owner and residents entered into a stipulation where residents could continue to reside in the park if they agreed to repair their property and remove their rabbits. Owner notified all residents that it would strictly enforce the "no pet" rule in the lease which had not been previously enforced. When residents failed to remove their rabbits, owner notified them to vacate the park. The Court of Appeals found that the residents violated their stipulation and could be evicted without providing notice and a right to cure the default under §327C.09. *W.J. Properties, Inc. v. Schneider et al.* 2002 WL 206337 (Minn. App. 2/12/02).

■ **EMINENT DOMAIN.** Dale Properties (Dale) owns property at the intersection of I 694 and TH 5. Dale is limited to 30 feet of access at the northeast corner of the property. In September 1997, MnDOT closed an opening in the median along Highway 5 directly across from Dale's access point. The closure prevented westbound Highway 5 travelers from direct access to Dale, leaving only access to the eastbound lane of Highway 5. Dale petitioned the district court for writ of mandamus seeking to compel the state to initiate condemnation or pay damages arising out of the closure of the median crossover. Dale contended that the property no longer had reasonably convenient and suitable access to the highway and that the closure substantially impaired the value of the property amounting to a taking. The district court granted the state's motion for summary judgment on the basis that no compensable taking had occurred. On appeal, the Court of Appeals reversed in part concluding that the district court erred by failing to consider whether Dale's remaining access was reasonably convenient and suitable. On appeal, the Supreme Court reversed the Court of Appeals and reinstated summary judgment in favor of MnDOT, holding that the closure of the median crossover opposite Dale's access point was a noncompensable exercise of the state's police power because Dale lost traffic access in one direction, but retained access in the other direction. Anderson, Paul H. filed a concurring opinion in which Gilbert joined. *Dale Properties, LLC v. State of Minnesota*, No. C3 00 837 (Minn. S. Ct. Feb. 7, 2002).

■ **EMINENT DOMAIN.** In July 2000, the Richfield HRA commenced a quick take condemnation pursuant to Minn. Stat. § 117.042 (2000) to acquire real property owned by Walser Auto Sales (Walser). On January 19, 2001, the district court granted Richfield's petition and ordered the transfer of title to Richfield. Walser appealed and subsequently moved the district court for a stay to prevent Richfield from transferring title to Best Buy. The court denied the request for stay and that order was not appealed. On appeal, Walser asserted that the taking was not for a public purpose. Richfield cross appealed asserting that the challenge of the public purpose was mooted by reciprocal vesting at the time the property was transferred to Richfield or by subsequent changes to the property after judgment was entered by the district court. The Court of Appeals concluded that Walser's appeal was not moot and that the district court did not clearly err in granting Richfield's condemnation purpose. The Supreme Court first reviewed the mootness issue and concluded that the rule of reciprocal vesting only arises upon final termination of the proceeding. Here there was no final termination of the proceeding because the crux of the appeal, i.e., whether Richfield ever had the right to take and hold Walser's property, had not been finally resolved. Further, Minn. Stat. § 117.215 (2000), which provides that a condemning authority takes a fee simple interest without any right of reversion, applies only if property is taken for a public purpose. Second, the court rejected Richfield's argument that because physical changes to the property made it impossible to return Walser's property in the condition it existed prior to Richfield's acquisition of title the appeal is moot. The court reasoned that because Richfield may be compelled to return all or part of Walser's property it took in an unconstitutional manner, Walser's public purpose challenge is not moot.

As to the remaining issues, i.e., whether the taking was for a public purpose, the court was evenly divided. Therefore, the decision of the Court of Appeals stands. The Supreme Court affirmed the decision of the Court of Appeals as to the mootness issue. *The Housing and Development Authority in and for the City of Richfield v. Walser Auto Sales, Inc., et al*, No. C8 01 309 (Minn. S. Ct. Apr. 18, 2002).

■ **RELOCATION BENEFITS.** James Brothers Furniture (James) is a tenant of property owned by Minneapolis Gold and Silver Corporation (MG&S) in Robbinsdale. In 1993, to facilitate its redevelopment project, the Robbinsdale Economic Development Authority (REDA) purchased the MG&S property. REDA concedes that part of the MG&S property was used to accommodate its redevelopment project, but asserts that in 1999, it granted development rights in the MG&S property to a business for a different project. In May 1999, it gave a 90-day notice to James to vacate the property. James moved out and subsequently requested relocation benefits. REDA denied James relocation benefits on the theory that it was not a displaced person. Pursuant to an administrative appeal and a hearing, the hearing officer concluded that James was a displaced person but, at a later administrative hearing, limited James' claims for relocation benefits to \$12,433. In July, REDA adopted a resolution accepting the hearing officer's findings that the claim limiting the monetary amount of the claim, but

rejected the hearing officer's conclusion that relator was a displaced person. The Court of Appeals held that James was a displaced person under the Relocation Act and that the hearing officer's conclusion regarding hypothetical storage costs was reasonable, but that its decision that advertising and other administrative costs incurred as part of its inventory liquidation sale was unreasonable. Accordingly, the case was reversed and remanded for a determination of the proper amount of the relocation benefits. *In re Application for Relocation Benefits of James Brothers Furniture, Inc.*, No. C6 01 1359 (Minn. Ct. App. Apr. 16, 2002).

■ **OUTDOOR ADVERTISING.** Eller Media and the City of Mounds View (City) as relators seek review of MnDOT's denial of Eller Media's application to place six billboards on municipally owned property along Highway 10. To facilitate the billboard placement, the City passed an ordinance allowing billboards as a permitted use and later rezoned the property to the public facilities district. Eller Media obtained permission to build the billboards and sought permits from MnDOT to construct the billboards. A hearing before an Administrative Law Judge followed which recommended that the permits be approved. MnDOT issued an order, however, denying the permits on the grounds that the property was not a "business area" under Minn. Stat. § 173.08 and that the City zoning was not part of a comprehensive zoning plan and thus was inconsistent with 23 C.F.R. § 750.708. On appeal, the appellate court rejected MnDOT's interpretation that business area does not include municipal owned land. It also rejected MnDOT's interpretation that the rezoning action by the City was taken primarily to permit outdoor advertising concluding that the City was operating under a comprehensive zoning plan and that the commissioner's decision was not supported by substantial evidence. Reversed in part; affirmed in part; and remanded with instructions that MnDOT issue Eller Media the six requested permits. *In the Matter of the Denial of Eller Media Company's Applications for Outdoor Advertising Device Permits in the City of Mounds View, Minnesota*, Nos. C0 01 1695 and C5 01 1708 (Minn. Ct. App. Apr. 23, 2002).

■ **MORTGAGE PRIORITY.** Allied Mortgage owned two parcels of land in Mille Lacs County. It executed and delivered to the Bank of Elk River (Bank) a note for each property that was secured by mortgage. It did not enter into a written construction loan agreement. Shaw supplied lumber and other building materials and commenced in mechanic's lien foreclosure action against the property. Based on a stipulation, the district court found that the first actual and visible improvements to the property occurred in March 1998. For advances made before that date, the Bank had priority over Shaw, but for additional advances after that date, Shaw had priority. The judgment was entered and no party appealed. Subsequently, there were two mortgage foreclosure sales in which the Bank bid its full amount of mortgage indebtedness. Stewart brought a declaratory judgment action and the Bank recorded notices of intent to redeem, but did not actually redeem. The district court entered summary judgment in favor of Shaw and the Court of Appeals affirmed. The issue on appeals was whether, under Minn. Stat. Section 580.10 and 580.225, the junior portion of a split-priority mortgage must be satisfied before satisfying the mechanic's lien in the second-priority position. The Supreme Court affirmed, holding that intervening liens of record that occur when there are split-priorities on a mortgage are entitled to excess proceeds from the foreclosure sale after satisfaction of the senior portion of the mortgage. *Shaw Acquisition Company vs. The Bank of Elk River*. (Minn. S. Ct. Mar 7, 2002).

■ **ADVERSE POSSESSION.** In 1942, Tincher, the owner of an 80-acre parcel of farm land, deeded the north 40 acres (Hodgman parcel) to Sanders and the south 40 acres (Ebenhoh parcel) to Ebenhoh. That same year, Ebenhoh's father constructed a fence dividing the parcels. In 1993, a survey was conducted on the Hodgman parcel which concluded that the 1942 fence line was located approximately eleven feet north of the true boundary line dividing the two parcels. Ebenhoh brought an action claiming ownership of the eleven feet of property through adverse possession and boundary by practical location. The district court concluded that Ebenhoh failed to show exclusive, continuous, and hostile use of the disputed tract and therefore did not satisfy the elements of adverse possession. The Court of Appeals reversed, holding that Ebenhoh's use of the disputed tract was exclusive, continuous, and hostile even though Ebenhoh's father's use of the disputed tract may have been originally permissive. Reversed and remanded. *Ebenhoh vs. Hodgman*. (Minn. Ct. App. Apr 23, 2002).

■ **PROPERTY TAX.** K-Mart, operator of a retail store in Detroit Lakes, filed a petition challenging the county assessor's 1999 valuation of the property. K-Mart provided the county with a lease summary and a copy of pertinent sections of its former lease. The information disclosed that K-Mart's lease provided for an annual minimum rent, but also contained the provision known as a percentage rent clause. K-Mart did not provide other information specifying whether percentage rent was paid. Becker County filed a Motion to Dismiss, arguing that the income information was incomplete and insufficient under Minn. Stat. Section 278.05 Subdivision 6(a). The tax court agreed and dismissed the petition. On appeal, the Supreme Court held that the date of assessment is the relevant date for determination of the property status as income-producing property. It concluded that the property was income-producing property requiring compliance with Minn. Stat. Section 278.05 Subdivision 6(a). Further, the Court held that the Tax Court did not error in dismissing the petition for failure to provide the amount of rent it actually paid. *K-Mart Corporation vs. County of Becker*. (Minn. S. Ct. Feb 28, 2002).

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## TAX LAW

### JUDICIAL LAW

■ **AGGREGATION OF STOCK — STOCK HELD IN TRUST FOR WHICH DECEDENT EXERCISED POWER OF APPOINTMENT AGGREGATED WITH STOCK OWNED OUTRIGHT BY DECEDENT.** Decedent had testamentary power of appointment for a trust containing certain stock. Since this power gave decedent control over disposition of the trust property, the stock was aggregated with that stock owned by the decedent. The case was differentiated from *Estate of Mellinger v. Commissioner*, 112 T.C. 26 (1999) where the trust involved was a qualified terminable interest property trust in which the beneficiary did not have control over the ultimate disposition of the property in the trust. The family attribution rules were not relevant because here all of the stock was deemed to be held by the same person. *Estate of Aldo H.*

*Fontana, Richard A. Fontana and Joan F. Rebotarro Co-Executors v. Commissioner*, 118 T.C. No. 16 (March 28, 2002).

■ **FAILURE TO PAY TAXES — PARTNER'S ILLNESS IN A LAW FIRM AND HIS RELIANCE ON FIRM'S ACCOUNTANT WAS INSUFFICIENT TO ESTABLISH REASONABLE CAUSE.** There was sufficient evidence that the firm's partner was ill during the years in question, but the firm continued to run by the efforts of everyone else in the firm. The financial difficulties of the firm were also found to be due to lack of ordinary business care and prudence. The accountant did not have responsibility to pay the tax bills, and the court found the taxpayer was in a position to continue making the deposits and payments. *Van Camp & Bennion, P.S. v. United States of America*, 251 F.3d 862 (E.D. Wash. Jan 28, 2002).

■ **INDIAN GAMING — WAGERS ON INDIAN PULL-TAB GAMES ARE SUBJECT TO TAXATION.** The court held that wagers placed on pull-tab games are "state authorized," and therefore subject to taxation under sections 4401 and 4411 that tax Indian gaming activity and are not exempt under 25 U.S.C. §2791(d)(1). A reading of gaming activities under the Indian Gaming Regulation Act lead the court to make the determination that pull-tab games are authorized by federal law and are also authorized by the state. *Little Six, Inc. and Shakopee Mdewewakanton Sioux (Dakota) Community v. United States*, 280 F.3d 1371 (Fed. Cir. Feb. 19, 2002).

■ **DEPENDENCY EXEMPTION/CHILD TAX CREDIT — NEITHER PARENT ENTITLED TO EXEMPTION OR CREDIT FOR DAUGHTER WHO SPENT HALF OF THE YEAR WITH EACH PARENT.** The couple had more than one child, and the husband could not remember each day this particular child was with him. The mother's evidence indicated that the exact number of days the child spent with each was not easily determinable. The split custody was in the benefit of the child and not for tax purposes, thus making it easier to believe that the parents could not specifically remember each day the child was with each. *J.A. Rogers, T.C. Summary Opinion 2002-41* (April 18, 2002).

■ **ESTIMATE OF LOSSES — FAIRNESS AND REASONABLENESS OF INSURANCE COMPANY'S ESTIMATE ARE DETERMINED ON CASE-BY-CASE BASIS.** The 8th Circuit upheld the Tax Court's determination that the fairness and reasonableness of unpaid loss estimates is a factual question to be answered on a case-by-case basis. The company presented evidence that its estimates were selected by professional management, deemed reasonable by an actuary, and accepted without question by the Minnesota Department of Commerce. However, the Tax Court noted that the actuarial certification was obtained after the estimates had been set and a loss reserve representing a significant part of the estimates was not explainable by the taxpayer. *Minnesota Lawyers Mutual Insurance Company and Subsidiaries v. Commissioner of Internal Revenue*, No. 01-1522, 2002 WL 549743 (8th Cir. April 15, 2002).

■ **FEDERAL TAX LIENS — SUPREME COURT RULES THAT A LIEN CAN ATTACH TO PROPERTY THAT WAS EXEMPT UNDER STATE LAW FROM CREDITOR CLAIMS.** The Supreme Court held that although Michigan law exempted entireties property from creditor claims, Code §6321 is not dependent on state law. This case involved a transfer of most of the husband's, taxpayer's, interest in property to the wife. The Court stated that just because the husband could not alienate the property on his own did not mean he did not have an interest. It stated that Code §6321 was written broad enough to include these interests transferred here to the wife. Holding otherwise would create absurd results. *United States v. Craft*, 122 S.Ct. 1414, 89 A.F.T.R. 2d 2002-2005 (April 17, 2002).

■ **REPATRIATION INCOME — DEPOSITS OF A CONTROLLED FOREIGN CORPORATION TO AN AFFILIATED, DOMESTIC, CREDIT CARD BANK DEEMED DEPOSITS.** The Court of Appeals deemed that the deposits made by the controlled foreign corporation were not a repatriation of income, but were just deposits into a Code §956 qualified bank. The deposits were made to purchase certificates of deposits. The court interpreted §956 as including a bank engaged in ordinary banking activities and did not read a related-party prohibition in subpart (b)(2)(A) of the section. *The Limited, Inc. v. Commissioner of Internal Revenue*, No. 00-2245, 2002 WL 534121 (6th Cir. April 11, 2002).

■ **TRADEMARK DEVELOPER DETERMINATION — BASED ON THE ENTITY WHO BORE THE RELATED EXPENSES OF DEVELOPMENT AND NOT LEGAL OWNERSHIP.** The evidence indicated that the foreign subsidiary of the taxpayer was the entity that registered the trademark in many countries and was primarily responsible for the development costs and the risk of development. The 9th Circuit stated that these items should be given more weight according to the regulations for Code §482. The court did not deem an allocation of unpaid royalties to the taxpayer or an allocation of value from the trademark rights to the taxpayer appropriate. *DHL Corporation and Subsidiaries v. Commissioner of Internal Revenue*, No. 99-71580, No. 00-70008, No. 99-71592, No. 99-71695, 2002 WL 537981 (9th Cir. April 11, 2002).

■ **FAMILY REUNION FUND'S TAX-EXEMPT STATUS — REVOKED BECAUSE ALL INCOME CAME FROM INVESTMENT INCOME.** The fund was engaged in social and recreational activities specified in Code §501(c)(7), but all of the income came from investment activities. The court stated that this much from investment activities was beyond "any permissible limit." The court also rejected the taxpayer's arguments that the IRS was bound by its prior determination of the §501(c)(7) status because it had disclosed the investment activities. **THE SKILLMAN FAMILY REUNION FUND, INC. v. UNITED STATES OF AMERICA**, No. 3:00 CV 7500, 2002 WL 535810 (N.D. Ohio March 01, 2002).

■ **PASSIVE EXPENSES — S CORPORATION'S MANAGEMENT SERVICES PROVIDED TO OTHER RELATED PARTNERSHIPS WERE NOT DEDUCTIBLE AGAINST PASSTHROUGH INCOME.** The court found that the management fees paid to the S corporation related to the rental activities of the partnerships and had to be deducted from the income from the rental activities. The management fees paid to the S corporation could not be deducted from the management income passed through to the partners. The management fees were passive income, while the management fee income of the partnerships was nonpassive. *Hillman v. Commissioner*, 118 T.C. No. 17 (April 9, 2002).

■ **EMPLOYMENT TAXES - EMPLOYEE'S TERMINATION THAT IS COMPLETE AND INVOLUNTARY QUALIFIES THE PAYMENTS AS SUPPLEMENTAL UNEMPLOYMENT COMPENSATION BENEFITS.** The payments received by employees qualified as supplemental unemployment compensation benefits not subject to Social Security Act taxes or Railroad Retirement taxes because they were completely separated from the company. Those employees not fully terminated (i.e. on standby or recall) and those receiving a lump-sum payment were deemed to receive wages. The company received a refund for federal employment taxes paid under the Railroad Retirement Tax Act and the FICA. *CSX Corporation, Inc., CSX Transportation, Inc. v. The United States*, No. 95-858T, 2002 WL 500274 (Fed. Cl. April 1, 2002).

■ **ATTORNEY-CLIENT PRIVILEGE — IRS SUMMONS SERVED ON AN ACCOUNTING FIRM ENFORCED.** The merger of two family-owned cor-

porations raised concerns with the IRS about a possible disguise of a gift from the parents to the children. The IRS decided to issue summons to the accountants of one of the entities. The court did not agree with the plaintiffs that the accountants were hired as “necessary, or at least highly useful” for the transactions between the client and the lawyer as indicated by *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). The court here did not deem this communication between the accountant and the law firm as indispensable in providing the legal advice necessitating the attorney-client privilege. *Cavallaro v. United States*, 284 F.3d 236 (1st Cir. April 1, 2002).

■ **ENERGY CREDIT — DENIED DUE TO CONDITIONS OF AGREEMENT NOT SATISFIED AND NO ALLOCATION OF INCOME.** The taxpayer was denied an energy credit under a partnership agreement because the agreement had certain requirements that were not satisfied in the year in question. The taxpayer had failed to meet the requirements of the agreement in the year in question and also the taxpayer did not report any income allocation from the partnership. The evidence presented for the income allocation from the partnership was not satisfactory to the Tax Court and the energy credit was denied. *William L. Richter v. Commissioner*, T.C.M. 2002-90 (April 5, 2002).

■ **PENALTY FOR EARLY DEDUCTION FROM IRA — AIDS WAS NOT A DISABILITY BECAUSE TAXPAYER COULD HAVE HAD SUBSTANTIAL GAINFUL ACTIVITY.** The taxpayer had to pay the 10 percent additional tax for early distribution from an IRA because he was still able to engage in substantial gainful activity. The taxpayer confirmed that he had AIDS in a year subsequent to the year at issue and did not provide any evidence that this condition could have existed during the year at issue. The taxpayer also stated that he would have worked in the year at issue if he had found the right type of company. The Tax Court noted that the advice of an IRS employee did not have the effect of law. *Gregory Scott West v. Commissioner of Internal Revenue*, Docket No. 2784-00S (T. C. April 1, 2002) (may not be treated as precedent).

■ **INDIAN GAMING TAX — U.S. SUPREME COURT DENIED CERT ON MINNESOTA CASE HOLDING THAT STATES CAN TAX PER CAPITA PAYMENTS FROM RESERVATION GAMING ACTIVITY.** The Supreme Court denied review of the Minnesota Supreme Court ruling that the state could tax reservation gaming activity income for members residing off the reservation without violating the federal Indian Gaming Regulatory Act (IGRA) and without violating the Equal Protection Clause of the U.S. Constitution nor the tribe's right to self-governance. TAXDAY 03/19/2002, Item #S.2. Jefferson, U.S. Supreme Court, Dkt. 01-1037, petition for certiorari denied March 18, 2002.

■ **MN FINE NOT EXCESSIVE.** The appellant was assessed personally by the Commissioner after a judgment against his company was not satisfied. The appellant's company was found liable for entering into an employment relationship with a taxpayer to circumvent the Commissioner's efforts to collect taxes from the taxpayer. The court looked at the various factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) to determine that the fine was remedial and not punitive; therefore the fine was not excessive under the 8th Amendment Excessive Fines Clause. The court stated that even if it had been punitive, the fine was not excessive. *James L. Wilson v. Commissioner of Revenue*, No. 6918 (Minn. T.C. January 8, 2002).

■ **DEPENDENCY EXEMPTIONS — TAXPAYER ALLOWED TO CLAIM CHILDREN AS DEPENDENTS WHEN FATHER FAILED TO MEET CONDITIONS OF DIVORCE.** The divorce decree allowed for the father, non-custodial parent, to claim exemptions for the children provided he was current with the child support. Since the father failed to pay child support, the custodial parent was able to claim the children as dependents and get the dependency exemption and also the child tax credit. *Karen Ann Cicchini v. Commissioner of Internal Revenue*, T.C. Summary Opinion 2002-24 (March 26, 2002) (may not be treated as precedent).

■ **DISCOVERY REQUESTS — TAXPAYER REQUIRED TO PRODUCE TRANSCRIPTS COVERED BY PROTECTIVE ORDER FROM PRIOR CASE TO THE IRS WITH NO MODIFICATION OF THE ORDER.** The transcripts were from a previous settled case. The Tax Court determined that a modification of a protective order did not warrant the expenses incurred in doing so, and it stated that the information was that which would be discoverable under the present case anyway. The Tax Court also noted that the terms of the protective order regarding protection of business information was already required from the IRS and the taxpayer. *Melea Limited v. Commissioner*, 118 T.C. No. 12 (March 22, 2002).

■ **WRONGFUL LEVY- CLAIMS MUST BE AGAINST THE IRS AND NOT THE PARTY WHO IS SERVED THE NOTICE.** The Tax Court dismissed a pro se taxpayer's claim against his insurer for sending the taxpayer's pension payments to the IRS at the request of a levy notice. *Charles Raymond Dietz, Sr. v. Connecticut General Life Insurance Company*, 179 F. Supp 2d 532 (D. Md. January 17, 2002).

■ **MAINTENANCE PAYMENTS — DEDUCTION ALLOWED EVEN THOUGH THE SEPARATION AGREEMENT WAS NOT CLEAR.** The separation agreement granted non-modifiable maintenance payments to the ex-spouse and doubt existed as to whether the payments would terminate at death. If the payments did not terminate at death, the deduction would not be allowed. The court held that the state law did not interpret this language as the payments not stopping at death, and therefore it granted the deduction. *Ewald W. Altmann and Betty Jean Altmann v. United States of America*, 89 A.F.T.R. 2d 2002-485 (E.D. Mo. September 30, 2001).

■ **PARTNERSHIP LIABILITY FOR EMPLOYMENT TAXES.** The general partner entered into a transaction with the debtor partnership and failed to pay employment taxes for some employees. The IRS argued that the general partner's actions bound the partnership and the partnership should be liable for the taxes, but the court did not agree. The court stated that in this type of transaction, the debtor partnership is not treated as a partner and is not liable for the liabilities of the general partner. *In re Sewickley Hospitality, Ltd., Debtor*, 89 A.F.T.R. 2d 2002-1289 (Bankr. S.D. Tex. January 22, 2002).

■ **UNAUTHORIZED DISCLOSURE OF INFORMATION BY IRS — NO PUNITIVE DAMAGES AWARDED BECAUSE NO ACTUAL DAMAGES OCCURRED.** A certified public accountant received transcripts for taxpayers that were not his clients, and these in turn sought damages for this disclosure. The plaintiffs did not allege any actual damages, and the court found that the §7431 does require actual damages to exist as a condition for receiving punitive damages. The plaintiffs were only entitled to \$1,000 per unauthorized disclosure, and there was only one unauthorized disclosure here per taxpayer. *Debra Sue Callies, v. United States*, No. 00-CV-0708-PHX-PGR, 2002 WL 373458 (D. Ariz. January 24, 2002).

■ **INSTALLMENT AGREEMENTS — COUNTERCLAIM FOR UNLAWFUL COLLECTION ALLOWED IF AN ORAL AGREEMENT WITH THE IRS**

**WAS NOT FOLLOWED.** Taxpayer entered into an installment payment agreement and informed the IRS representative at that time that his pension amount would be decreased. The taxpayer was informed by the representative that his payment would decrease accordingly. When the taxpayer's pension amount was reduced, the taxpayer also reduced the amount of the installment payments, and the IRS terminated the installment agreement. The court stated that if the oral agreement had taken place, the IRS could not terminate the agreement, and the court allowed the taxpayer to bring forth the counterclaim for unlawful collection. *United States of America, v. M. Robert Ullman*, 88 A.F.T.R. 2d 2001-6773 (E.D. Pa. January 29, 2002).

■ **UNRELATED BUSINESS INCOME — TAX-EXEMPT STATE POLICE ORGANIZATION HAD SIGNIFICANT CONTROL OVER PUBLICATION OF MAGAZINE THUS INCOME TAXED.** The Arkansas State Police Association (ASPA) and a publication company entered into agreements to publish a magazine. While the publishing company took care of most of the costs and ASPA primarily received percentages of the advertising income, ASPA exercised significant control over the publication of the magazine. The court found that this control was important in illustrating that the organization was not just "lending" the name to the publication and found the income not to be nontaxable royalty income. *Arkansas State Police Association, Inc. v. Commissioner of Internal Revenue*, 282 F.3d 556 (8th Cir. March 6, 2002).

■ **BANKRUPTCY — THREE-YEAR LOOK-BACK PERIOD TOLLS STATUTE OF LIMITATIONS.** The U.S. Supreme Court stated that if the automatic stay prohibits the IRS from taking any action during a bankruptcy proceeding, this stay also tolls the three-year look-back period when another bankruptcy petition is filed. The taxpayers had originally filed a Chapter 13 petition that tolled this period and subsequently filed a Chapter 7 petition. The tax year at issue was not dischargeable in the Chapter 7 petition. *Cornelius P. Young, et ux., Petitioners v. United States*, 122 S.Ct. 1036 (March 4, 2002).

■ **MINNESOTA USE TAX — FUEL CONSUMED IN INDUSTRIAL PRODUCTION OF GOODS TO BE SOLD ULTIMATELY AT RETAIL IS EXEMPT.** The Minnesota Supreme Court upheld the Tax Court's ruling that the fuel consumed by the compressors was exempt from use tax. While the consumption of natural gas for fuel for the compressors was a transaction that qualified for the use tax, the use of the compressors was a necessary part of the natural gas production process that qualified for the industrial production exemption. *Great Lakes Gas Transmission L.P. v. Commissioner of Revenue*, 638 N.W.2d 435 (Minn. January 31, 2002).

■ **RECIPROCAL GIFTS — TRANSFER OF STOCK IN FAMILY-OWNED BUSINESSES TO FAMILY MEMBERS.** The IRS disallowed gift exclusions for donor and charged donor's estate on the basis that these were reciprocal gifts. The donor and his brother were part owners of two family-owned businesses and decided to do several transfers within each other so that each company was eventually owned by one family. The tax court determined that these transfers between the families were of approximately the same value and sustained the deficiency. The 8th Circuit affirmed the tax court's decision that the gifts of stock were interrelated by applying the reciprocal trust doctrine. *Estate of Robert V. Schuler, Deceased; Jay Schuler and Thomas Schuler, Co-Personal Representatives v. Commissioner of Internal Revenue*, 282 F.3d 575 (8th Cir. March 7, 2002).

■ **BANKRUPTCY — NO JURISDICTION TO DETERMINE THIRD-PARTY CREDITOR'S TAX LIABILITY.** Jurisdiction was lacking over the government's motion to determine the personal tax liability of a creditor of a health care agency because the defendant in the adversary proceeding was not a debtor. The government sought to determine the personal tax liability of a lender who supplied funds to the debtor to pay wages of the debtor's employees. Government alleged that the debtor had actual knowledge that the debtor did not intend to pay the withholding taxes. Bankruptcy court determined it lacked jurisdiction to determine the Code Sec. 3505 liability of a nondebtor because neither party to the adversary proceeding was a debtor under any chapter of the Bankruptcy Code. (*In re Numed Home Health Care, Inc.*, BC-DC FLA., 2002TAXDAY, 05/01/2002, Item #J-3).

■ **SEIZURE OF PROPERTY — NOTICE OF INTENT TO LEVY SENT BY CERTIFIED MAIL WAS SUBSTANTIAL COMPLIANCE.** The government's seizure and sale of taxpayer's real property that was subject to tax liens was proper and purchaser was granted quiet title to the property. Although service of the notices of levy and auction by certified mail was improper under Code Sec. 6335, the taxpayer received actual notice of the seizure and sale and was afforded ample opportunity to be present at the tax sale and bid on the property. Thus taxpayer could show no prejudice by the government's failure to serve the notices personally. (*Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, Inc.*, DC MI, 2002-1 USTC 50,384)

■ **ATTORNEYS FEES — ESTATE ENTITLED TO AWARD OF FEES.** The estate's executor elected pursuant to former Code Sec. 221 to have an employee stock ownership plan (ESOP) pay a portion of the estate tax liability. After the ESOP failed to pay the tax, the IRS sought to collect from the estate arguing that Sec. 2210 only discharged the executor of personal liability and that the estate remained liable. The court found the government's interpretation lacked substantial justification. (N.R. Wilkes, Jr., CA-11, 2002-1 USTC 60,438)

#### ADMINISTRATIVE LAW

■ **MINNESOTA DEP'T OF REVENUE CLOSES OFFICES IN RESPONSE TO BUDGET CUTS.** In response to budget cuts, the Minnesota Department of Revenue is closing its Bloomington, Maplewood, Albert Lea, Bemidji, and Worthington offices. In addition, the Department will eliminate its toll-free numbers, reduce staff, and reorganize its divisions. News Release, Minn. Dep't of Revenue, Revenue Department eliminates toll-free phone numbers, closes offices (Mar. 20, 2002).

■ **MINNESOTA EXTENDS TRANSITION PERIOD FOR SALES AND USE TAX ON CONSTRUCTION MATERIAL DELIVERY CHARGES.** The Minnesota Department of Revenue issued Revenue Notice No. 02-05, which revises Revenue Notice 01-11, dealing with the sales and use tax treatment of delivery charges for construction materials. Contracts must have been executed before January 1, 2002, and the delivery of the construction materials must occur on or before June 30, 2002 to qualify under the grandfather clause, which exempts delivery charges from sales tax. Minn. Dep't of Revenue Notice No. 02-05 (Feb. 11, 2002).

■ **REFILING NOTICE OF FEDERAL TAX LIEN MAY VIOLATE AUTOMATIC STAY.** Generally, refileing a notice of federal tax lien during bankruptcy does not violate the automatic stay. However, when the refileing constitutes an original filing the automatic stay is violated. This

occurs when, e.g., the taxpayer has purchased real property in a different county than where the original lien is filed and the IRS does not attempt to refile the lien in the new county until after the taxpayer has filed a bankruptcy petition. CCA Ltr. Rul. 200215052 (Apr. 15, 2002).

■ **REQUESTING THE TAXPAYER TO SIGN FORM 872 DOES NOT VIOLATE THE AUTOMATIC STAY.** In a letter ruling, the IRS stated its position that requesting a taxpayer who owes pre-petition taxes in a Chapter 7 proceeding to sign a Form 872, extending the time to assess pre-petition taxes, does not violate the automatic stay. Bankruptcy Code Section 362(b) excepts from the automatic stay “the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment.” The IRS views a request to sign and the signing of Form 872 as part of the assessment process. Ltr. Rul. 200210032 (Mar. 12, 2002).

■ **IRS POSTS REVISED “PRACTICE BEFORE THE IRS” PUB.** The IRS has posted revised Publication 947, Practice Before the IRS and Power of Attorney, to its website. The publication contains information on representation of taxpayers before the IRS and important changes, including rules regarding third-party designees and oral authorizations. The IRS web address is [www.irs.gov](http://www.irs.gov).

■ **CLOSING LETTER DOES NOT BIND GOVERNMENT FROM ACTING ON A CASE.** Chief Counsel advised that a closing letter issued by the Service Center did not bind or estop the government in a pending Tax Court case. The Service Center sent a favorable closing letter to the taxpayer after the taxpayer had filed a petition in the Tax Court. Although the letter advised that the case would be favorably closed and that District Counsel would contact the taxpayer regarding the final closing, the government argued that the Service Center erroneously sent the letter. Closing letters are not binding on the Commissioner. Although they may be binding if the elements of equitable estoppel are met, the Commissioner is still not precluded from arguing a mistake of law if the letter is issued improperly. CCA Ltr. Rul. 200210007 (Nov. 5, 2001).

■ **IRS CHANGES LITIGATING POSITION WITH RESPECT TO CAPITALIZATION OF SOME TRANSACTION COSTS.** The Chief Counsel announced a change in the IRS litigating position with respect to the capitalization under section 263(a) of certain transaction costs related to intangible assets or benefits. Namely, the IRS “will not assert that certain employee compensation, fixed overhead, or de minimis transaction costs must be capitalized under section 263(a).” The Chief Counsel’s announcement comes after an advance notice of proposed rulemaking was released on January 24, 2002 with respect to this issue. The change in the litigation position is due to the Service’s belief that it would be inefficient to litigate these issues while proposed rulemaking is in progress. Chief Counsel Notice, CC-2002-021 (Mar. 15, 2002).

■ **IRS CAN’T KEEP PACE WITH OFFER IN COMPROMISE PROGRAM.** The IRS has been unable to keep pace with its Offer in Compromise program, despite the agency’s efforts to increase staffing levels and employ new initiatives. Between 1997 and 2001 the number of unresolved offers increased from 32,300 to 94,900. In addition, the time it takes the IRS to process an offer has grown to 312 days. The Offer in Compromise backlog was exposed in a recent GAO report titled, GAO Report: IRS Should Evaluate the Changes to its Offer in Compromise Program. TAXDAY, Item #M.1 (Mar. 28, 2002).

■ **RECEIVER HELD PERSONALLY LIABLE FOR UNPAID TAX CLAIM IN INSOLVENCY PROCEEDING.** Chief Counsel advised that a receiver can be held personally liable under 31 U.S.C. § 3713(b) for failing to pay the government’s claims first in an insolvency proceeding. A state court appointed the receiver to liquidate and distribute the debtor’s assets. The receiver distributed the assets under the mistaken belief that a creditor bank’s liens had priority over the IRS’s liens. Chief Counsel determined that the receiver must ensure that the government is paid first even when the IRS fails to timely object to the distribution. CCA Ltr. Rul. 200210063 (Jan. 31, 2001).

■ **NEW REGS MODIFY TAX SHELTER DISCLOSURE AND PROMOTER REGISTRATION REQUIREMENTS.** The Treasury Department announced that it will issue new regulations under Sections 6011, 6012, and 6111, in response to problems with the interpretation of current tax shelter regs. Amended disclosure requirements will include a broader range of transactions and will eliminate all exceptions. In addition, the definition of tax shelter “promoters” will now include “advisors,” which will close a loophole in the previous definition of promoter. Finally, the new regs will contain harsher administrative penalties. TAXDAY, Item #T.1 (Mar. 21, 2002).

■ **IRS ADOPTS FINAL REGS ON DETERMINING BASIS OF PARTNER’S INTEREST UNDER SECTION 705.** The IRS has adopted final regulations related to determining a partner’s basis under Section 705. In addition, the IRS has issued proposed regulations applying principles similar to the final regulations. The final regulations deal with situations where a corporation acquires an interest in a partnership that holds stock in the corporation. The final regulations went into effect on March 29, 2002 and apply to sales or exchanges of corporate stock occurring after December 6, 1999. TAXDAY, Item #I.2 (Mar. 29, 2002).

■ **NATIONAL TOBACCO GROWER SETTLEMENT PAYMENTS TAXABLE AS ORDINARY INCOME.** Payments from the National Tobacco Settlement Trust are taxable as ordinary income to their recipients. Tobacco companies make the payments as part of the National Tobacco Grower Settlement. The settlement then makes payments to tobacco farmers and others associated with tobacco production to compensate for the decreased demand for tobacco. Taxpayer-recipients receive Form 1099-MISC and must report the amount as income. I.R.S. News Release IR-2002-28 (Mar. 6, 2002).

■ **LAWSUIT DAMAGES WERE WAGES SUBJECT TO EMPLOYMENT TAXES; UNION LIABLE FOR WITHHOLDING AND PAYMENT.** A recently released Letter Ruling found that damages awarded to employees in a breach of contract action constituted remuneration for employment and were therefore subject to employment taxes. The damages were for lost wages and employee benefits. The IRS found the employees’ union was the statutory employer under Section 3401(d) and was liable for withholding and payment of the employment taxes. Ltr. Rul. 200214001 (Oct. 19, 2001).

■ **COUNTRY CLUB DISCOUNTS WERE CONSTRUCTIVE DIVIDENDS TO CLUB’S SHAREHOLDERS.** The IRS deemed as constructive dividends to shareholders of a country club discounts received for food and beverage purchases, golf memberships, cart rental fees, and range fees. As such, the amounts were includible in the gross income of each shareholder to the extent fair market value exceeded the amount paid by the shareholders. Ltr. Rul. 200215036 (Jan. 11, 2002).

■ **SEPT. 11 CAUSES IRS TO RELAX SOME SUBSTANTIATION REQUIREMENTS FOR CHARITABLE CONTRIBUTIONS.** In response to the September 11 terrorist attacks, the IRS has decided to relax substantiation requirements for charitable contributions of \$250 or more made after September 10, 2001 and before January 1, 2002. Those taxpayers now have until October 15, 2002 to obtain written acknowledgment from the charitable organization or demonstrate evidence of a good-faith effort to obtain it. This is in contrast to the usual requirement that taxpayers making contributions must have a contemporaneous, written acknowledgement from the organization. TAXDAY, Item #I.3 (Mar. 28, 2002).

■ **TAXPAYER ADVOCATES MAKE UNAUTHORIZED CHANGES TO TAXPAYER ACCOUNTS.** A recent report by the Treasury Inspector General for Tax Administration found that employees in the IRS Taxpayer Advocate's office made unauthorized changes to taxpayers' accounts. While the Taxpayer Advocate Service does have some authority to adjust accounts, the report found that accounts were amended by employees without the power to do so. The Taxpayer Advocate Service is taking corrective action. TAXDAY, Item #T.2 (Apr. 3, 2002).

■ **IRS UPDATES "THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS."** The IRS has updated its web document "The Truth About Frivolous Tax Arguments," adding recent case law and responding to an additional frivolous argument. The IRS addresses frivolous arguments about not paying taxes or filing returns by providing a summary of 20 contentions and their legal standing. This document is available at the IRS website, [www.irs.gov](http://www.irs.gov).

■ **FAILURE TO ITEMIZE COST TAXPAYERS \$1 BILLION.** In a recent study, the General Accounting Office estimated that claiming the standard deduction in lieu of itemizing cost taxpayers \$1 billion in 1998. Taxpayers utilizing the help of tax professionals accounted for half of the returns that resulted in overpayment. U.S. Gen. Accounting Office, Tax Deductions: Further Estimates of Taxpayers Who May Have Overpaid Federal Taxes by Not Itemizing, GAO-02-509 (Apr. 11, 2002); TAXDAY, Item # M.1 (Apr. 12, 2002).

■ **IRS COMBATS OFFSHORE CREDIT CARD TAX EVASION SCHEMES.** The IRS has taken steps to combat offshore arrangements involving U.S. participants holding credit cards in tax-haven countries. The Service has issued "John Doe" summonses to major credit card companies requesting limited information about the participants. In addition, the IRS has proposed adding a civil penalty to the criminal penalties already in place for failing to file a Form TD 90-22.1, "Report of Foreign Bank and Financial Accounts." Treas. Dep't News Release PO-2032 (Mar. 25, 2002).

■ **IRS OUTLINES PROCEDURES FOR AUTOMATIC WAIVER OF 60-MONTH BVAR OF CONSOLIDATE RETURNS.** The IRS has issued a revenue procedure that describes the procedures for granting certain taxpayers an automatic waiver of the requirement contained in Code Sec. 1504 that a corporation that ceased to be a member of a consolidated group may not be included in any consolidated return filed by the group before the 61st month beginning after the first tax year in which the corporation ceased to be a member. (Rev. Proc. 2002-32)

■ **IRS ISSUES REGULATIONS RELATING TO THE REPORTING OF INTEREST PAYMENTS ON QUALIFIED EDUCATIONAL LOANS.** The final regs reflect changes to the law made by the Taxpayer Relief Act of 1997 and provide guidance to payees receiving interest payments on qualified education loans. The proposed regulations provide guidance to eligible educational institutions that enroll any individual in issuing tuition payment statements. (T.D. 8992; NPRM REG-161424-01, NPRM REG-105316-98)

■ **TRUSTS FOR BENEFIT OF FINANCIALLY DISABLED QUALIFY AS CHARITABLE REMAINDER UNITRUSTS.** The IRS has concluded that in three situations a trust may qualify as a charitable remainder trust under Code Sec. 664 if the unitrust amounts will be paid for the life of a financially disabled individual to a separate trust that will administer the payments on behalf of that individual and upon the individual's death and will distribute the remaining assets either to the individual's estate or are subject to the individual's general power of appointment. (Rev. Rul. 2002-20)

■ **IRS ISSUES FINAL REGULATIONS RELATING TO QUALIFIED COVERED CALLS.** The new rules address concerns created by the introduction of new financial instruments several years after the enactment of the qualified covered call rules and provide guidance to taxpayers writing equity call options. (T.D. 8990)

■ **IRS WARNS OF IDENTITY AND FINANCIAL THEFT SCAMS.** The IRS issued a warning of a fraudulent scheme that uses fictitious bank correspondence and IRS forms in effort to get taxpayers to disclose their personal and banking data. (IR-2020-55)

#### LEGISLATION

■ **PRESIDENT BUSH SIGNS ECONOMIC STIMULUS BILL.** On March 9, President Bush signed the Job Creation and Worker Assistance Act of 2002 (H.R. 3090). The bill contained tax-related provisions from prior, unsuccessful bills. Among other items, it allows 30 percent expensing of the value of certain capital assets for 36 months, extends the work opportunity tax credit and tax credit for electric vehicles, extends the net operating loss carry back period from two to five years, and provides tax benefits for the reconstruction of New York City. TAXDAY, Item #W.1 (Mar. 11, 2002).

■ **HOUSE PASSES CLERGY HOUSING ALLOWANCE CLARIFICATION BILL OF 2002.** In an attempt to thwart possible action in a case before the 9th Circuit, the House passed 408-0 a bill sponsored by Representative Jim Ramstad, R-Minn., that clarifies the Section 107 rental allowance for members of the clergy. H.R. 4156 makes clear that the rental allowance income exclusion may not exceed the fair rental value of the home plus utilities. H.R. 4156, 107th Cong. (2002); TAXDAY, Item #C.4 (Apr. 18, 2002).

■ **CONGRESSIONAL HEARING ADDRESSES IRS COLLECTION ACTIVITIES.** On April 15, the House Government Reform Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations questioned the IRS's poor performance in collecting delinquent tax debt. The debate included discussion of privately contracting collection activities and the IRS's resource limitations in collecting tax debts. TAXDAY, Item #C.2 (Apr. 16, 2002).

■ **HOUSE REJECTS, THEN PASSES, TAXPAYER BILL OF RIGHTS.** In a 205-219 vote, members of the House of Representatives rejected the Taxpayer Protection and IRS Accountability Bill of 2002. The main objection to H.R. 3991 was a provision amending I.R.C. § 527, which would exempt some political groups from federal reporting requirements. Certain non-controversial items contained in the bill were passed

## TORTS & INSURANCE

### JUDICIAL LAW

■ **TRAMPOLINE OWNER OWES NO DUTY OF CARE TO INJURED PERSON.** Twelve-year old Tiffany was visiting her aunt's house with her mother. After obtaining her mother's permission, Tiffany went to play on the aunt's backyard trampoline. Tiffany was injured and sued.

The district court granted summary judgment to the aunt, holding that the aunt had no duty of care to Tiffany, and that Tiffany primarily assumed the risk of injury.

The Court of Appeals affirmed. As to the duty of care, the Court of Appeals applied the general rule that, when a parent is present, the responsibility to provide for a child's care and safety rests with the parent, not a third party. *Citing Sunnarborg v. Howard*, 581 N.W.2d 397, 399 (Minn. Ct. App. 1998) *review denied* (Minn. Sept. 22, 1998).

The Court also found the doctrine of attractive nuisance did not give rise to a duty of the trampoline owner because one of the elements of the attractive-nuisance doctrine is knowledge of child trespassers; here, the child was a permitted entrant, not a trespasser.

The Trial Court and the Court of Appeals found that Tiffany primarily assumed the risk. The facts of the case revealed that Tiffany 1) had knowledge of the risk, 2) appreciated the risk, and 3) voluntarily chose to chance the risk. *See Andren v. White-Rodgers Co.*, 465 N.W.2d 102, 104-05 (Minn. Ct. App. 1991), *review denied* (Minn. Mar. 27, 1991). *Warman v. Gaber*, unpublished opinion, Minnesota Court of Appeals File No. C3-01-1755.

■ **REIMBURSEMENT OF DEFENSE COSTS.** Appellant insurance company initiated this action against two respondent insurance companies, seeking reimbursement for defense costs incurred in defending lawsuits against their common insureds.

In a lengthy and complicated opinion, the Court of Appeals held that:

1. A properly-executed loan receipt agreement provides an insurer standing to seek reimbursement from another insurer for defense costs paid to an insured;
2. In determining whether there was coverage for a claim under a policy, the claims asserted and the insurance policy language must be read in light most favorable to finding coverage, with any ambiguity construed in favor of the insured;
3. An insured's "reservation of rights" does not excuse the insured's duty to defend under such reservation, should such a duty exist, and the insurer who fails to defend an insured does so at its own peril;
4. An insurer who fails to defend an insured when a duty exists commits a breach of the insurance contract that may excuse the insured's non-compliance with the other provisions of the insurance contract subsequent to the breach.

*Home Insurance Company, et al. v. National Union Fire Insurance of Pittsburgh and Traveler's Insurance Company*, Minnesota Court of Appeals File No. C1-01-1429.

■ **DEDUCTION OF COLLARAL SOURCE BENEFITS.** Appellant Lee sued respondent Hunt for injuries Lee sustained in a motor vehicle accident. Lee's no-fault insurer paid \$15,669.78 in medical expense benefits before the case was set for trial. Hunt conceded negligence and trial commenced on the issue of damages. The jury awarded Lee damages of \$32,000, which included past medical expenses paid by Lee's no-fault insurer.

Nearly two months after the judgment, Hunt's attorney moved to amend the judgment, pursuant to Minnesota Statute § 65B.51, subd. 1, of the Minnesota No-Fault Act, by deducting no-fault collateral source benefits. Lee's attorney opposed the motion, arguing that Minnesota Statute § 548.36, the collateral source statute, imposed a 10-day deadline from the date of entry of judgment on filing the motion to determine collateral source benefits.

The District Court granted Hunt's motion to deduct the collateral source benefits paid, holding that the 10-day deadline did not apply to a motion brought pursuant to the No-Fault Act.

The Court of Appeals reversed, finding that the 10-day limitation as set forth in Minnesota Statute § 548.36 applies to motions to deduct collateral source benefits brought under Minnesota Statute § 65B.51, subd. 1. *Lee v. Hunt*, Minnesota Court of Appeals, File No. C9-01-1730.

■ **PRESUMPTION OF OWNERSHIP OF MOTOR VEHICLE IN DECLARATORY JUDGMENT ACTION.** Paul Solum drove an uninsured pickup truck when a collision occurred with a vehicle driven by Adam Kraus. David Stoen was a passenger in the Kraus vehicle. Stoen sued Solum and Kraus. American National General Insurance Company (American) insured other vehicles owned by Paul Solum and Solum sought general liability coverage from American. American's investigation found that a 1995 title to the uninsured pickup truck had been transferred from Paul's adult son Daniel Solum to Helen Solum, Daniel's mother and Paul's wife.

American brought this declaratory judgment action. Solums claimed they deserved liability coverage under the policy because the pickup truck was owned by Daniel and therefore the owned vehicle exclusion did not apply. American asserted that the Solums were not entitled to coverage because Helen Solum owned the pickup and the exclusion applied. The exclusion prevented coverage from applying for use of a vehicle other than the insured's car which is owned or furnished or available for regular use by the policyholder or a relative. The jury concluded that Daniel was the owner of the pickup and that American did provide coverage for Paul Solum for damages arising out of

the January 31, 1997 accident.

The Court of Appeals reversed. The trial focused on what extrinsic evidence could be introduced to rebut the presumption of ownership created by the Certificate of Title listing Helen Solum as the owner.

The Minnesota Supreme Court affirmed, noting the Solums were attempting to dispute the validity of the title they perfected in Helen Solum. It found, despite some inconsistencies in the filing of the Certificate of Title, that the Solums intended title to be vested in Helen Solum and that compliance with the transfer provisions in Minnesota Statute § 168A.10, established a conclusive presumption of ownership in Helen Solum, who is named on the vehicle's Certificate of Title. Thus, the Court reasoned that extrinsic evidence may not be used to challenge title. *American National General Insurance Company v. Solum*, Minnesota Supreme Court, dated April 18, 2002. Court File No. C8-00-2082.

■ **COVERAGE FOR DAMAGE TO REAL PROPERTY OF THIRD PARTY.** Thommes & Thomas Land Clearing (Thommes) is a partnership in the business of clearing and grubbing land for construction projects. Thommes entered into a subcontract to clear and grub land for commercial development by HHA Development, Inc. (HHA). The Krajewskis owned property adjacent to the HHA property. Thommes cleared and grubbed approximately one-half acre of the Krajewskis' land, damaging grass, a number of trees, shrubs and other plants. That land was not part of the HHA property and Krajewskis did not consent to this action. The Krajewskis brought an action against Thommes among others for damage done to their property. Thommes tendered defense to its commercial general liability carrier, Milwaukee Insurance Co. (Milwaukee). Milwaukee declined to either defend or indemnify Thommes, claiming that exclusions of the policy excluded damages to the Krajewski's property from coverage.

The District Court ruled that the insurance policy clearly excluded coverage for the actions of Thommes in clearing the wrong property. In particular, there was an exclusion which stated insurance did not apply to "property damage to that particular part of any property that must be restored, repaired or replaced because [Thommes's] work was incorrectly performed on it."

The Court of Appeals reversed the District Court, holding that Milwaukee had an obligation to defend and indemnify Thommes. Milwaukee then appealed to the Supreme Court, arguing that the Court of Appeals erred in finding coverage. Milwaukee argued that the Court of Appeals improperly focused on the business risk doctrine and ignored the plain language of the policy. The "business risk doctrine" as explained by the Court of Appeals, states that the risk that an insured's product will not meet contractual standards is a business risk not covered by a general liability policy. In contrast, harm to the property of a third party caused by the insured's defective work is not excluded from coverage.

The Supreme Court affirmed the Court of Appeals, concluding that the exclusions relied upon by Milwaukee were ambiguous, and must be construed against Milwaukee and in favor of coverage. Justice Page, writing for the majority, further noted that the result in favor of coverage was consistent with the underlying purpose of commercial general liability policies to provide coverage for the risk of tort liability to third parties.

Justices Stringer, Blatz and Anderson dissented. They would reverse the Court of Appeals because the clear language of the insurance policy excluded coverage. *Thommes v. Milwaukee Insurance Company*, Minnesota Supreme Court filed April 18, 2002. Court File No. C9-00-1393.

■ **TIME COMPUTATION FOR INSURANCE CANCELLATION NOTICES.** The Knutsons had an auto insurance policy with Milbank Insurance Company (Milbank). Milbank notified Knutsons in September of 1993 that their premium was due on October 26, 1993. Milbank, however, had not received payment by November 10, 1993 when it sent the Knutsons a notice of cancellation, telling them that their policy would be cancelled as of 12:01 a.m. on November 22, 1993 unless payment was received before that time. Minnesota Statute § 65B.15 requires at least ten days' notice before canceling an automobile insurance policy.

Milbank did not receive payment from the Knutsons until December 8, 1993, six days after Debra Knutson's car accident where Respondent Royal Jorgensen was injured. Because the policy had been cancelled, Milbank sent the Knutson's a refund of their premium on December 13, 1993.

Milbank moved for summary judgment, arguing that there was no coverage on the date of the accident because the insureds had been sent a cancellation notice. Jorgensen moved for partial summary judgment on the ground that the notice of cancellation was void. The District Court concluded that the cancellation notice was void because Minn. Stat. § 645.15 (2000) applies to insurance policy cancellation notices. Minnesota Statute § 645.15 states:

Where the performance or doing of any act, duty, matter, payment or thing is ordered or directed, and the period of time or duration for the performance or doing thereof is prescribed and fixed by law, the time, except as otherwise provided in sections 645.13 and 645.14, shall be computed so as to exclude the first and include the last day of the prescribed or fixed period or duration of time. When the last day of the period falls on Saturday, Sunday or a legal holiday, that day shall be omitted from the computation.

Minnesota Court of Appeals affirmed. It concluded that a 10-day notice of cancellation found in Minn. Stat. § 645.05 (2000) is a "period of time" that is "prescribed and fixed by law." It found that the notice of cancellation sent on November 10, 1993 could not have provided for cancellation before 12:01 a.m. on November 23, 1993. Therefore, the Milbank's Notice of Cancellation was ineffective and the Knutsons continued to be insured at the time of the accident. *Jorgensen v. Knutson and Milbank*, Minnesota Court of Appeals (published) filed April 16, 2002. Court File No. C8-01-1685.

— Thomas Baudler  
— Lee Bjorndal  
Baudler, Baudler Maus & Blahnik PA