



## NOTES & TRENDS

### CIVIL LITIGATION

#### JUDICIAL LAW

• **MOTIONS FOR SANCTIONS MUST BE BROUGHT SEPARATELY.** The Court of Appeals, in two recent cases (one published and one unpublished), has reiterated the requirements of Rule 11 and Minn. Stat. §549.211 that a party seeking sanctions must strictly follow the requirement of bringing that request in a separate motion. In both cases, a party sought attorneys fees as a sanction for the assertion of an alleged frivolous position. However, in neither case was the sanction sought as a stand-alone motion, but rather the request for sanctions was incorporated into a motion brought on the merits of the case. In its published case, the court explicitly rejected the moving party's argument that it substantially complied with the statutory procedural requirements (including a 21-day period in which the nonmoving party can withdraw the offensive motion or claim) by briefing their request 28 days in advance of the hearing, in connection with a summary judgment motion. The court held that "applying the doctrine of substantial compliance in this case would ignore the unambiguous, mandatory statutory requirement that a motion for sanctions be made separately from other motions or requests." *Dyrdal v. Golden Nuggets, Inc.*, 2003 WL 22952114, A03-214 and A03-215 (Minn. App. 12/16/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0312/opa030214-1216.htm>. See also *County of Douglas v. Douglas County Abstract*, A03-566 (Minn. App. 11/25/03) (unpublished). <http://www.lawlibrary.state.mn.us/archive/ctapun/0311/opa030566-1125.htm>

• **SERVICE VIA FAX AND MAIL; TIME FOR RESPONSE.** How many days do you have to respond, when the opposing party serves you with a document via facsimile *and* mail on the same day? The Court of Appeals clarified that you look to the shorter time period calculated under Rule 6.05. The court explained that Rule 5.02 governs how service may be effected. It expressly provides for service via facsimile. Looking to prior case law and the commentary to Rule 5.02, the court held that service by facsimile is "an established and secure practice of service." It is "complete upon completion of the facsimile transmission." When counting the response time, only in cases of service by mail is the recipient allowed to add three extra days to respond. Otherwise, Rule 6.05 provides that no additional time is allowed for service that is completed by 5:00 p.m. For service by any means other than mail, if the document is served *after* 5:00 p.m., then the recipient has *one extra day to respond*. In the case of service by mail and fax on the same day, when the fax transmission is completed on the date of mailing, the recipient is not entitled to extra time to respond (unless the fax is received after 5:00 p.m.). The court's opinion did not address the situations where the fax is not actually received or the fax transmission is completed a day after mailing, as those situations were not posed by the case. *In re the Marriage of Dawn Marie Kloncz*, 670 N.W. 2d 618 (Minn. App. 10/28/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/opa030549-1028.htm>

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### CRIMINAL LAW

#### JUDICIAL LAW

• **SENTENCE; EXCESSIVE DEPARTURE; UNCHARGED OFFENSE; STATUTORY FACTORS.** Appellant pled guilty to first-degree criminal sexual conduct, involving genital-to-genital contact, but no penetration. Under the guidelines, this subdivision of first-degree criminal sexual conduct is a severity level seven offense, with a presumptive executed sentence of 48 months. However, Minn. Stat. §609.342 subd. 2(b) (2000) lumps this type of first-degree criminal sexual conduct together with all other types, with the net effect of a statutory presumptive sentence of 144 months. The court notes that the low end of the presumptive range for a second-degree unintentional murder is 144 months.

The conduct of the appellant involved a three-year-old child who was enrolled in a day care program operated by the appellant's wife in the family home. The charge alleged only one incident of such conduct; however, during the guilty plea, the appellant admitted that he had done it once before, in the same manner, and within the same month. The state did not charge the appellant with the earlier incident, but did refer to it in the probable cause portion of the complaint.

The plea agreement called for a cap on the state's request for time at 180 months, while the appellant was free to argue for a dispositional or durational departure. The appellant was given 180 months, with the trial court citing the following reasons for departure: multiple incidents of abuse, violation of position of trust, and particular vulnerability of the victim due to age.

The Court of Appeals reversed the trial court's sentence, and imposed the presumptive 144-month sentence under §609.342. It was improper for the trial court to consider offenses that are not part of the charge, and of which the defendant was not convicted. Such use of prior uncharged sex

offenses as the basis for departure amounts to improper sentencing. Similarly, the victim's age was an improper basis for departure because that fact is already taken into account by the Legislature, which has set "absolute vulnerability" for the offense at age 13. The court distinguished a prior case in which the age of a ten-month-old victim was an aggravating factor, because in 1982 prison terms were relatively short and the protections now in existence for the public — such as DNA sampling, sex offender registration, conditional release, and possible civil commitment — were not then in place and should now be considered in reviewing upward durational departures. **Richard W. Taylor v. State of Minnesota**, C5-02-746 (Minn. 11/06/03).

<http://www.lawlibrary.state.mn.us/archive/supct/0311/op020746-1106.htm>

- **SENTENCE; RESTITUTION; UNRELATED DAMAGE; FOSTER CARE.** In a conviction for criminal sexual conduct, the district court ordered restitution in the amount of \$630 for personal property allegedly destroyed by the appellant. Because the record is devoid of any evidence related to this destruction, the district court abused its discretion by awarding this amount for undocumented damages unrelated to the appellant's crime. However, the award of restitution to the county for foster care is affirmed, with remand directions requiring the district court to apply the provisions of Minn. Stat. §260C.331, subd. 1(a)(1)(c), which requires a determination into the obligor's ability to pay, and the use of a fee schedule established by the responsible social service agency and approved by the commissioner of public services. **State v. Terry Burnie Wilkens**, CX-02-2136 (Minn. App. 12/02/03), <http://www.lawlibrary.state.mn.us/archive/ctappub/0312/op022136-1202.htm>

- **SENTENCE; DOWNWARD DEPARTURE; MAJOR MENTAL ILLNESS.** Appellant intentionally swerved his car into a car in oncoming traffic, killing the passenger and his wife instantly. A Rule 20 examination was performed, but the trial court rejected the mental illness defense. However, the court found that the mental condition was a substantial and compelling factor justifying a downward departure, and sentenced the appellant to an executed term of 75 months, instead of the presumptive 150 months. The record showed that the appellant was suffering from paranoid schizophrenia and delusional paranoia. After being exposed to toxic chemicals while training with his army reserve unit, the appellant was eventually diagnosed with psychotic delusions.

Held, the sentence of the court is upheld. Contrary to the appeal of the state, the expert psychological evidence that at all relevant times the appellant suffered from the psychosis of paranoid schizophrenia is uncontroverted. This was a substantial and compelling factor in justifying a downward durational departure. The court also rejects the state's position that the severity of the offense should be determined as an aggravating or mitigating factor: the appellant's convictions for felony second-degree murder and criminal vehicular homicide already take into consideration the death of the appellant's wife, and the district court may not use an element of the offense to support a departure. **State v. Cory Thomas Martinson**, A03-1079 (Minn. App. 12/09/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0312/opa031079-1209.htm>

- **MIRANDA; HARMLESS ERROR STANDARD; DECISION ON REMAND.** After the Supreme Court reversed the child's conviction because the child's confession was admitted in violation of *Miranda*, the Supreme Court remanded the case to the Court of Appeals for a determination of whether the admission of T.J.C.'s statement in the adjudication proceeding was harmless. Under *State v. Juarez*, 572 N.W.2d 286 (Minn. 1997), the central question becomes a determination as to whether the admission of the statement was harmless beyond a reasonable doubt. The Court of Appeals finds that the verdict rendered is surely unattributable to the error in light of the eye witness testimony of the victim's mother, testimony by the child's sister, live testimony in court by the child, and a videotaped interview of the child discussing the incident. **In re T.J.C.**, C3-02-1622 (Minn. App. 11/10/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0311/op021622-1110.htm>

- **DWI/IMPLIED CONSENT; MINN. STAT. §609.035 SUBD. 2(G) UNCONSTITUTIONAL; CONSECUTIVE SENTENCE IMPROPER.** The appellant was convicted of driving after cancellation and aggravated DWI. Minn. Stat. §609.035 subd. 2(g) states that if an offender is convicted of both aggravated DWI (under the old statute §609.129) and driving without a valid license under §171.24, the court "shall sentence the offender to serve consecutive sentences, notwithstanding the fact that the offenses arose out of the same course of conduct."

The Court of Appeals, citing *State v. Baker*, 590 N.W.2d 636 (Minn. 1999) holds that §609.035 subd. 2(g) is unconstitutional by mandating consecutive sentences —effectively creating a two-year sentence for a single behavioral incident — while continuing to label the crimes as gross misdemeanors. Such a stacking of sentencing deprives the defendant his constitutional right to a 12-person jury. Any crime drawing a sentence over one year is deemed to be a felony, and Minnesota's Constitution guarantees 12-person juries to those charged with felonies. **State v. Archie B. Blooflat**, C0-02-2095 (Minn. App. 11/18/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0311/opc0220951118.htm>

- **DWI/IMPLIED CONSENT; AGGRAVATED DWI; DRIVING AFTER CANCELLATION; NOT LESSER-INCLUDED OFFENSE.** Minn. Stat. §171.24 subd. 5, Driving After Cancellation, is not a lesser-includ-

ed offense of Minn. Stat. §169.129, Aggravated DWI. Accordingly, a defendant may be convicted of both offenses, even if the offenses arose out of the same course of conduct. *Blooflat, supra*.

• **DWI/IMPLIED CONSENT; REASONABLE REFUSAL; ADDISON'S DISEASE; BURDEN OF PROOF; EXCLUSION OF TESTIMONY; JURY INSTRUCTION.** At trial, the appellant presented a medical defense to both DWI and his reason for refusing the test: he suffered from Addison's disease, which produced symptoms of disorientation and confusion. Both the appellant and his mother testified to these issues. However, the court excluded the testimony of an emergency room physician who had not examined the appellant and was not qualified as an Addison's disease expert. During closing statement, the prosecution argued that no medical expert had given any testimony or opinion regarding whether the appellant had suffered an adrenal crisis or was intoxicated. There was no objection, at the time, to this comment in closing statement.

Held, it was not error for the prosecutor to comment on the appellant's failure to produce evidence on the medical issue. Pursuant to Minn. Stat. §169A.53, subd. 3 (c), appellant has the burden of persuasion on the affirmative defense of reasonable refusal.

To the extent that the jury could have taken the comment regarding lack of medical testimony as meaning that appellant had some burden to disprove the under the influence charge, such did not amount to misconduct in this case. Because the prosecutor had a right to comment on appellant's failure to produce evidence in connection with the defense of reasonable refusal, any misconduct spilling over to the under-the-influence charge was less serious, given the weight of other evidence against the appellant, and the fact that such a statement was limited to four lines in approximately 13 pages of argument.

Using a review standard of "very deferential," the district court's evidentiary ruling excluding the admission of the expert testimony was not an abuse of discretion.

Finally, the jury instruction used by the district court, unobjected to at the time, was not error. In the refusal portion of the instructions, the district court stated: "for example, a defendant's refusal is reasonable when the officer gives confusing and misleading information to the defendant regarding his rights or if the police have made no attempt to inform a confused defendant of his obligation to submit to testing. The law only requires that the police officer read the printed advisory consent form to the defendant." The Court of Appeals rejects the appellant's argument that the district court's use of an example excluded any possibility that a physical, medical or mental condition could also constitute a reasonable refusal. *State v. Grant Gregory Johnson*, C9-02-2144 (Minn. App. 12/16/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0312/op022144-1216.htm>

• **EVIDENCE; CONFESSION; INDEPENDENT CORROBORATION; PROBABLE CAUSE DISMISSAL.** Burglary victims reported to police that an acquaintance had been living there, and knew the location of a spare key. During the investigation, police verified that the appellant had previously stayed with the victim's family for a period of time, knew the location of the spare key, and, in checking school records, discovered that she had skipped school on the day of the burglary, and had later been arrested for shoplifting and in possession of \$300 cash. Following a police visit to her home, the appellant gave a written confession. The district court judge excluded the confession from its probable cause determination, finding that none of the facts and evidence was sufficient to corroborate the confession under Minn. Stat. §634.03.

The Court of Appeals holds that the dismissal of the petition for lack of probable cause is appealable, Minnesota Rules of Juvenile Procedure 21.04 subd. 1, notwithstanding, because when such an order involves an issue of law, a dismissal for lack of probable cause factually makes the order final and appealable.

The district court erred in reading Minn. Stat. §634.03 to require independent evidence to corroborate *the confession*, as opposed to corroborating the crime. Here, the *corpus delicti* was established independently of the appellant's confession: this evidence consisted of the victim's police report, the report of the officer responding to the scene, and the missing items. Finally, the district court erred in excluding the appellant's confession from its probable cause determination. *In re C.N.A.*, A03-773 (Minn. App. 11/18/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0311/opa030773-1118.htm>

• **EVIDENCE SPREIGL; CONSTRUCTION; MODIFICATION OF JIG; REQUEST BY DEFENSE.** Appellant was on trial for first-degree criminal damage to property. The state introduced into evidence several *Spreigl* incidents wherein the appellant engaged in similar conduct damaging vehicles. The district court denied the appellant's request to specifically instruct the jury that the *Spreigl* evidence be used to prove motive and identity, and to eliminate the use of CRIMJIG to .01 and 3.16. The CRIMJIG states that *Spreigl* evidence may be received for the "limited purpose of assisting and determining whether [defendant] committed those acts with which [he] is charged in the complaint." While the JIG generally undermines the case law concerning *Spreigl* evidence, its use has been tacitly approved in the case law. However, in this case, the Court of Appeals definitively holds that the JIG must be modified to delete the language concerning "whether defendant committed those acts with which he was charged in a complaint," and the trial court must give a limiting instruction that such *Spreigl* evidence is to be used only for one of the

typical *Spreigl* purposes. *State v. Paul Tracy DeYoung*, C6-02-2280 (Minn. App. 12/09/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0312/op022280-1209.htm>

• **CHILD SUPPORT NONPAYMENT; CONTEMPT ORDER PREREQUISITE; TIME PERIOD.** Recognizing that Minn. Stat. §609.375 subd. 2b is somewhat ambiguous, the Court of Appeals nonetheless concludes that this subsection is reasonably susceptible to an interpretation that the state is required to attempt to obtain a contempt order for failure to pay support during the exact time period specified in the criminal complaint. Hence, the Court of Appeals holds that the law covering felony nonpayment of child support requires the state, as a prerequisite to prosecution, to attempt to obtain a contempt order for failure to pay child support during the time period specified in the complaint. *State v. Larry Allen Nelson*, C4-03-229 (Minn. App. 11/18/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0311/opc030229-1118.htm>

• **COMMERCE CLAUSE; RESIDENT VERSUS NONRESIDENT LICENSE; MINNOW TRANSPORTATION.** Minn. Stat. §§97A.475, subd. 28(1) and 97C.501, subd. 4(a) discriminate against interstate commerce in violation of the Commerce Clause by opposing a differential license fee that favors resident minnow haulers and exporters over their nonresident counterparts. *State v. Gary M. Kolla*, A03-55 (Minn. App. 12/02/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0312/opa030055-1202.htm>

• **SEARCH AND SEIZURE; AUTOMOBILE STOP; BERTH TO EMERGENCY VEHICLE; AMBIGUOUS STATUTE.** A police officer stopped the appellant who was traveling the center lane of a three-lane one-way street. Appellant passed within three feet of the officer's squad car that was stopped in the right lane in connection with a previous stop. The officer interpreted Minn. Stat. §169.18, subd. 11 as requiring that there be one lane between the emergency vehicle and the driver.

Held, Minn. Stat. §169.18, subd. 11 is ambiguous: the phrase "a lane away" could mean either in the next lane or a full lane away. However, the court holds that a stop based upon a law enforcement officer's objectively reasonable interpretation of an ambiguous statute that has not been interpreted by an appellate court is valid. *State v. Matthew Philip Anderson*, A03-290 (Minn. App. 12/9/03).

• **TRIBAL LAW; SUBJECT MATTER JURISDICTION; MARIJUANA POSSESSION.** The state has authority to prosecute illegal drug possession on an Indian reservation pursuant to Public Law 280. The state of Minnesota has shown that the law prohibiting possession of marijuana, in this case, a fifth-degree possession charge under Minn. Stat. §152.025, subd. 2 (1), is criminal/prohibitory in nature. In this case, the appellant was an enrolled member of the Leech Lake Band of Ojibwe, and resided on the Leech Lake Reservation. Pursuant to a tip, the appellant's residence was subject to a search warrant issued by Cass County District Court. The court found that the band had entered into a law enforcement contract with a number of counties, including Cass County, authorizing the band to enforce laws within Leech Lake Reservation through the Leech Lake Department of Public Safety. *State v. Franklin William LaRose*, C5-03-93; C9-03-95 (Minn. App. 12/16/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0312/op030093-1216.htm>

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## EMPLOYMENT & LABOR LAW

### JUDICIAL LAW

• **DISCRIMINATION CASES.** The 8th Circuit Court of Appeals recently rejected three discrimination claims based on race, sexual harassment, and "same sex" harassment. In *Putman v. Unity Health System*, 348 F.3d 732 (8th Cir. 2003), comments made by a supervisor about a veteran African-American employee that he was "too prideful" and not "humble enough" were not actionable race discrimination in a lawsuit brought by the employee who was fired for insubordination. He was on a last-chance agreement due to prior insubordination. Since the statements were "facially race-neutral" and made five months before the employee was fired, the evidence shows that the employee was not terminated pretextually but for disobeying an order from his supervisor. <http://caselaw.lp.findlaw.com/data2/circs/8th/024105p.pdf>

A series of events that constituted harassment were not sufficiently "severe or pervasive" to warrant a claim of sex harassment by a public sector employee in *Tuggle v. Mangan*, 348 F.3d. 714 (8th Cir. 2003). The conduct by management included making gender-related comments and unwanted sexual advances, a humiliating photograph and jokes about the claimant's anatomy, and inferior work assignments. Although this pattern of behavior "clearly" was harassing and "inappropriate," it was not sufficiently egregious to constitute an actionable hostile work environment for purposes of a sex harassment claim. <http://caselaw.lp.findlaw.com/data2/circs/8th/023137p.pdf>

Similarly, in *McCouan v. St. John's Health System, Inc.*, 2003 WL 22658188 (8th Cir. 2003), a male employee who was subjected to inappropriate conduct of a gross, crude, and lewd sexual nature by a male supervisor could not pursue a claim for "same sex" harassment. The crude behavior was

not “probative of gender discrimination” in the absence of evidence that the supervisor was a homosexual and motivated by sexual desire or by a general hostility to the presence of males in the workplace. While the conduct was “inappropriate and vulgar,” it was not sexual because it was not shown to be directed to the subordinate “based on sex.”

• **UNEMPLOYMENT CASES.** A pair of employees who were fired for failing to call-in when missing work were denied unemployment compensation benefits. An employee’s contention that her “flexible schedule” justified not calling in when she missed three days of work was rejected by the Court of Appeals in *Williams v. Catholic Charities of St. Paul, Minneapolis*, 2003 WL 22784569 (Minn. App. 2003) (unpublished). Her deliberate failure to call the employer when absent or respond to messages from the employer constituted disqualifying “misconduct.”

<http://www.lawlibrary.state.mn.us/archive/ctapun/0311/opa030235-1125.htm>

Similarly, an employee who disobeyed his company’s call-in policy when repeatedly absent or late was barred from benefits in *Honeyford v. Brown & Bigelow*, 2003 WL 22787239 (Minn. App. 2003) (unpublished). His failure to satisfy the employer’s attendance policies were his own fault and constituted “misconduct.” <http://www.lawlibrary.state.mn.us/archive/ctapun/0311/opa030388-1125.htm>

#### LEGISLATION

The language of the Minnesota Unemployment Compensation statute has been tightened, making it more difficult for employees to be eligible for benefits if they have been discharged for “misconduct.” Effective August 1, 2003, the statutory term under Minn. Stat. §268.095, subd. 4, that disqualifies employees from receiving benefits has been modified to bar those who are committing any “intentional, negligent or indifferent conduct ... that evinces a serious violation of the standard of behavior [the employer] might have the right to reasonably expect.” But it specifically excludes the prohibition for “a single incident that does not have a significant adverse impact on the employer,” reinvoking a form of the “hot-headed” defense that was deemed removed from the statute in *Isaac v. Alamo-Rent-A-Car*, 590 N.W.2d 137 (Minn. App. 1999).

#### LOOKING AHEAD

The U.S. Supreme Court will decide whether the Federal Age Discrimination in Employment Act (ADEA) covers “reverse” discrimination against younger employees. In *General Dynamics Systems, Inc. v. Cline*, No. 02-1080, the Court will determine whether employees over 40 may sue under the ADEA because older employees, those over 50, at the company where they work, are entitled to more favorable retirement benefits. About five states have ruled that their state age discrimination laws extend to bias against younger employees. The Minnesota courts have not passed upon the issue under the state Human Rights Act, which does not have any age threshold, unlike the 40-year old standard in the federal law.

In another employment case this term — *Raython v. Hernandez*, 2003 WL 22843597 (2003), the Court sidestepped deciding if an employer’s policy against rehiring discharged personnel violates the Americans with Disabilities Act (ADA) when applied to a bar rehiring a former employee who was fired for misconduct attributable to drug abuse and then successfully completed a drug rehabilitation program. The Court, by a 7-0 ruling, held that the company had a “legitimate, nondiscriminatory reason for refusing to rehire” the employee and remanded the case for the lower court to decide if the employee can show the reason was pretextual. The ADA issue was not addressed and may await determination in some future case.

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### ENVIRONMENTAL LAW

#### JUDICIAL LAW

• **ATTORNEYS FEES; NO AWARD WHERE NO RELIEF UNDER CWA.**

The 8th Circuit Court of Appeals reversed an award of attorneys’ fees to the Sierra Club following the trial on the latter’s lawsuit against the city of Little Rock, Arkansas. The Sierra Club filed suit under the Clean Water Act against Little Rock and the Little Rock Sanitary Sewer Committee, the party to whom the city delegated responsibility for its sanitary sewer collection system. The Sierra Club alleged that the city and the Sewer Committee violated the Clean Water Act and their respective National Pollutant Discharge Elimination System (NPDES) permits by allowing untreated sewage from the collection system to overflow into nearby rivers and streams, by failing to create a comprehensive master planning process as required under their permits, and by creating imminent and substantial endangerment to the environment by virtue of the overflows in violation of the Resource Conservation and Recovery Act (RCRA).

The Sierra Club and the Sewer Committee entered into a settlement agreement regarding the collection system overflows, and the Sierra Club discharged the remaining claims against the Sewer

Committee. The Sierra Club prevailed in summary judgment against the city on its claim that the city violated the act and its permit through the overflows. The district court, however, refused to award the Sierra Club any relief; instead, it simply found that the city was in violation of its permit. The city went on to defend itself successfully at a bench trial regarding the comprehensive master planning process and RCRA claims.

Following the district court's decision, the Sierra Club moved for an award of attorneys fees against the Sewer Committee and the city. The city countered by moving to recover the expert witness fees it incurred in its defense of the comprehensive master planning process claim. The district court denied the city's motion and awarded the Sierra Club the full amount of attorneys fees sought against the Sewer Committee and half of the amount it sought against the city. The city appealed both decisions.

The Court of Appeals reversed the award of fees to the Sierra Club but upheld the district court's decision to deny the city its expert witness fees. The Court of Appeals found that an award of attorneys fees to the Sierra Club was inappropriate, given the language of the Clean Water Act. The act allows a court to award "costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. §1365(d). The district court merely found the city in violation of its permit and did not award the Sierra Club any relief. The legal relationship between the parties did not change as a result of the district court's action, nor did the district court issue an order enforceable by the Sierra Club against the city. Thus, the Court of Appeals held that the Sierra Club did not "prevail" under the statute. The Court of Appeals affirmed the denial of expert witness fees to the city, however. It upheld the standard used by the district court in determining whether to award fees to a prevailing defendant; namely, whether the claim brought was frivolous, unreasonable, without foundation, or brought in bad faith. Because it agreed with the district court that the Sierra Club's comprehensive master planning process claim was none of those, it upheld the denial of the city's fees request. *Sierra Club v. City of Little Rock* 351 F.3d 840 (8th Cir. 2003).

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## FEDERAL PRACTICE

### JUDICIAL LAW

• **MATTERS OUTSIDE PLEADINGS; CONVERSION OF MOTION TO DISMISS TO MOTION FOR SUMMARY JUDGMENT.** *BJC*, the owner of a health insurance company, sued Columbia, a reinsurer, for the alleged breach of a premium guarantee contract. Columbia moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), and attached to its motion copies of what it claimed were the only three documents that might provide the basis for *BJC*'s claim. The district court relied on the documents in granting Columbia's motion to dismiss, and *BJC* appealed, arguing that the district court had erred in considering matters outside the pleadings in the context of a motion to dismiss.

Several 8th Circuit decisions hold that a plaintiff cannot avoid a motion to dismiss by failing to attach to a complaint documents on which it relies. Not surprisingly, Columbia cited this line of cases, arguing that the documents in question were "necessarily embraced" by the complaint. However, the 8th Circuit held that the documents were "matters outside the pleading" because their significance was disputed, and because those documents were not necessarily the only documents relevant to the dispute. The 8th Circuit also found that the district court's consideration of the documents was not harmless error, because *BJC* "was never given notice nor an opportunity to discover or to provide additional evidence." Accordingly, the district court's decision was reversed and the case was remanded.

It is difficult to reconcile this decision with the 8th Circuit's decision in *Silver v. H & R Block, Inc.*, 105 F.3d 394 (8th Cir. 1997) and its progeny, except that in those cases, the authenticity and relevance of the documents were apparently undisputed. Nevertheless, this latest 8th Circuit decision may have complicated rather than clarified the governing law in this area. *BJC Health System v. Columbia Casualty Co.*, 348 F.3d 685 (8th Cir. 2003).

• **OTHER NOTEWORTHY DECISIONS.** The 8th Circuit declined to grant leave for a Fed. R. Civ. P. 23(f) interlocutory appeal from an order conditionally certifying a nationwide class action. In doing so, it noted the standards governing Rule 23(f) appeals in numerous other Circuits, but declined the opportunity to establish a specific 8th Circuit standard. *Liles v. Del Campo*, 350 F.3d 742 (8th Cir. 2003).

Judge Tunheim granted defendants' motion to certify an ERISA appeal under 28 U.S.C. §1292(b), finding that the "relevant issues are in a state of flux and certification for interlocutory review is appropriate." *Smith v. United Healthcare Services, Inc.*, 2003 WL 22834865 (D. Minn. 11/26/03).

The 8th Circuit found that the district court did not abuse its discretion in approving a settlement in a PSLRA class action over the objections of some of the lead plaintiffs. *In Re BankAmerica*

*Corp. Sec. Lit.*, 350 F.3d 747 (8th Cir. 2003).

In the fourth published opinion by the 8th Circuit in a long-pending diversity class action, the 8th Circuit endorsed the defendant's "belated jurisdictional challenge," and finding that the individual class members' claims did not meet the amount in controversy requirement, remanded the case to the district court with instructions to remand it to the Arkansas courts. **Kessler v. National Enterprises, Inc.**, 347 F.3d 1076 (8th Cir. 2003).

The 8th Circuit reversed a dismissal for lack of general jurisdiction over the defendant, finding that the trial court had abused its discretion by failing to allow jurisdictional discovery. The decision is also noteworthy for its extended discussion of the impact of the Internet on concepts of general jurisdiction. **Lakin v. Prudential Securities, Inc.**, 348 F.3d 704 (8th Cir. 2003).

The 8th Circuit found no "clear abuse of discretion" in the trial court's exclusion of a witness who was not listed on a defendant's witness list. **Sellers v. Mineta**, 350 F.3d 706 (8th Cir. 2003).

Judge Tunheim denied the defendant's motion to dismiss premised on the plaintiff's alleged perjury. **Thoms v. McDonald's Corp.**, 2003 WL 22901686 (D. Minn. 11/26/03).

#### COURT DEVELOPMENTS

Major changes to Local Rule 7.1(b), which governs dispositive motion practice in the District of Minnesota, took effect January 1, 2004.

The District of Minnesota Clerk's Office has issued written guidelines governing taxation of costs in civil cases. While the guidelines are not intended to be "cited as legal authority," and are not intended to "create or add to any rights, claims or causes of action," the clerk's adherence to the guidelines is likely to carry substantial weight in the event of a review by the court under Fed. R. Civ. P. 54(d)(1). The guidelines may be viewed at [http://www.mnd.uscourts.gov/bill\\_of\\_costs\\_guidelines.htm](http://www.mnd.uscourts.gov/bill_of_costs_guidelines.htm).

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### INTELLECTUAL PROPERTY

#### JUDICIAL LAW

• **PATENTS; DICTIONARIES; CONSTRUING DISPUTED TERMS.** A local decision and two recent opinions from the Court of Appeals for the Federal Circuit shed light on the proper use of dictionaries when construing disputed terms in patent claims. In a patent infringement case, disputed claim terms must be construed by the court. The first step in claim construction is to determine the "ordinary and customary meaning" of the term as understood by one skilled in the technology of the patented invention at the time the applicant filed the patent application. Dictionaries and technical treatises have become the favored sources for determining the "ordinary and customary meaning" of claim terms. But dictionaries may lack context and other sources exist.

In **Dane Indus. v. Ameritek Indus.**, Civ. No. 03-3488, 2003 U.S. Dist. LEXIS 21549 (D. Minn. 11/24/03), Judge Magnuson determined the ordinary and customary meaning of the patent claim term "jaws." The patent claim-at-issue protected a shopping cart retrieval vehicle — like those used at grocery stores or retail malls — that required "jaws" that "engage" the shopping cart. Referring first to *Merriam-Webster's Collegiate Dictionary*, which has multiple definitions for the word "jaw," the court used the written description and drawings of the patent to modify a definition that fit best with the context of the patented invention: "something resembling the jaw of an animal for holding or engaging something else." The patent drawings showed J-shaped hooks. The drawings appear to have assisted the court in weeding out nonsensical definitions of "jaw" such as: "a friendly chat."

In **Ferguson Beauregard v. Mega Sys.**, 2003 U.S. App. LEXIS 24417 (Fed. Cir. 12/04/03), the Federal Circuit warned that dictionaries used alone may not always correctly determine the "ordinary and customary meaning" of a claim term because the context may be wrong. The court stated that: "Dictionary definitions, while reflective of the ordinary meanings of words, do not always associate those meanings with context or reflect the customary usage of words by those skilled in a particular art. The words used in the claims must be considered in context and are examined through the viewing glass of a person skilled in the art." A different judge wrote, in a concurring opinion, that Federal Circuit case law "requires primary reliance on the 'customary' meaning. ... The 'customary meaning' of a term in a patent claim links the inquiry to the understanding of one of ordinary skill in the art at the time of invention." In other words, the dictionary is a good start but the court should choose a definition that fits best with the context of the patented invention — as Judge Magnuson seemed to do in *Dane*. Sometimes that may mean rejecting the dictionary definition(s) for a definition used in another source.

In **Kumar v. Ovonic Battery Co, Inc.**, 2003 U.S. App. LEXIS 24900 (Fed. Cir. 12/11/03), the Federal Circuit used another patent as a source for determining the ordinary and customary meaning of a disputed claim term and rejected a dictionary definition. The disputed claim term or phrase was "amorphous rare earth-transition metal." Ovonic urged adoption of the dictionary definition of

“amorphous,” but Kumar relied on a prior-art patent that provided a definition that was different than the dictionary. The Federal Circuit held that the prior-art patent definition trumped the dictionary definition in this case because it revealed the customary usage of the term by others in the industry, *i.e.*, those skilled in the technology of the patented invention.

— TONY ZEULI  
— JEFF COOK  
Merchant & Gould

## JUVENILE LAW

### JUDICIAL LAW

• **APPEAL OF PRETRIAL ORDER; DELINQUENCY PETITION; LACK OF PROBABLE CAUSE; INDEPENDENT EVIDENCE OF CHARGED OFFENSE.** The Minnesota Court of Appeals issued a published decision in which the state appealed a pretrial order where a delinquency petition was dismissed by the trial court for lack of probable cause. The trial court determined that the delinquency petition lacked probable cause because the minor respondent’s confession to the charge of second-degree burglary was not sufficiently corroborated by independent evidence that the charged offense had been committed. Such probable cause is required by Minn. Stat. §634.03 (2002).

The Court of Appeals first addressed the issue of whether such a pretrial order is an appealable order. The appellate court concluded that the state may appeal a pretrial order dismissing a delinquency petition for lack of probable cause if review presents a legal question based solely on the legal interpretation of a statute. Because the trial court’s dismissal of the petition was premised on its determination that the minor’s confession could not be considered under Minn. Stat. §634.03, the appellate court reasoned that this involved a legal question based upon the legal interpretation of that statute, and hence the order for dismissal was appealable.

When reaching the merits of the case, the Court of Appeals held that Minn. Stat. §634.03, which states that a confession “shall not be sufficient to warrant conviction without evidence that the offense charged has been committed,” does not apply to a probable cause determination where the record includes not only the confession, but also other evidence that establishes the commission of the crime. Because the trial court was found to have erred in its application of Minn. Stat. §634.03 and in dismissing the petition for lack of probable cause, the trial court was reversed and the matter was remanded with instructions to reinstate the petition against the minor respondent. *In the Matter of the Welfare of C.M.A.*, A03-773 (Minn. App. 11/18/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0311/opa0307731118.htm>

• **EVIDENCE; CRIMINAL SEXUAL CONDUCT; VOLUNTARY STATEMENT; RESTITUTION OF FOSTER CARE COSTS.** In a published decision, the Minnesota Court of Appeals considered an appellant’s challenge to his conviction of criminal sexual conduct in the fourth degree (engaging in sexual contact with his minor daughter). The appellant argued that the trial court erred by failing to suppress statements he made in a noncustodial interrogation and evidence obtained pursuant to a search warrant that was based on those statements. Appellant also argued that the trial court erred in awarding restitution to the county for the cost of his daughter’s foster care.

The Court of Appeals affirmed the trial court’s refusal to suppress the confession and the evidence obtained pursuant to a search warrant based upon the confession. The trial court found that the appellant was alert, responsive, did not object to the questioning, nor did he decline to answer any question or ask to suspend the interview at any time. He was also not deprived of any physical needs or forced to endure a lengthy or threatening interview. The appellant also read and signed the Tennessee Warning that was labeled as such and which informed him that he did not need to answer the questions, that information he provided was not confidential; incorporated in the warning was a list of local and state law enforcement agencies who could receive the information. Based on these findings, the trial court did not err in concluding that appellant’s statements and confession were voluntary.

With regard to the restitution issue, the Court of Appeals found that there was clearly statutory authority allowing the county restitution in the form of costs of the appellant’s daughter’s foster care. However, on that issue, because the statute allowing such restitution required the court to use an established fee schedule, the Court of Appeals concluded that when the trial court orders a parent to pay restitution for foster care, it needs to apply the provisions of Minn. Stat. §260C.331, subd. 1(1)(c) (2002) to determine the amount. The matter was remanded to the trial court for a recalculation of appellant’s restitution obligation to the county. The trial court was reversed, however, on the part of its order requiring the appellant to pay \$633 to his daughter for the destruction of her personal property. The Court of Appeals found that there was no evidence presented that any personal property was destroyed as a result of the appellant’s crime, and the trial court abused its discretion by so awarding for undocumented damages unrelated to the appellant’s crime. *State v. Wilkens*, CX-02-2136 (Minn. App. 12/02/03).

• **TERMINATION OF PARENTAL RIGHTS; SUFFICIENCY OF FINDINGS; BEST INTERESTS OF CHILD.** The

Court of Appeals reviewed a termination of parental rights proceeding initiated by a county under Minn. Stat. §260C.301 (2003). The proceeding involved a biological mother's alleged failure to correct conditions that resulted in the placement of her three children outside of her home. The Court of Appeals observed that parental rights may be terminated for any one of the nine statutory bases found in Minn. Stat. §260C.301, subd. 1 (b) and cited the critical provision that if a statutory condition has been met, "the paramount consideration in determining whether parental rights will be terminated is the best interests of the child." Minn. Stat. §260C.301, subd. 7 (2002). The order terminating parental rights is required to explain the trial court's rationale for concluding that termination is in the best interests of the child.

While the Court of Appeals acknowledged that the statutory conditions had been met and were supported by the evidence, neither the original nor the amended trial court order contained any findings or conclusions on the children's best interests. The Court of Appeals noted that there is case law that suggests that in some circumstances reviewing courts, while recognizing that findings are legally insufficient, will nonetheless undertake an examination of the record to determine whether a decision is objectively justified. However, even in those circumstances, an appellate court will remand if it cannot ascertain whether the trial court actually considered the issue.

Determination of a child's "best interests" is not generally susceptible to an appellate court's global review of the record, and the Court of Appeals noted prior Supreme Court decisions stating that an appellate court's combing through the record to determine best interests is inappropriate because it involves credibility determinations. Considering that a child's best interests is particularly important in a termination of parental rights proceeding because a child's best interests may preclude terminating parental rights even when a statutory basis for termination exists, the Court of Appeals felt that the law was clear that the trial court must consider a child's best interests and explain its rationale in its findings and conclusions. Because the trial court did not do that in this case, the Court of Appeals remanded the matter for further proceedings. ***In the Matter of the Termination of Parental Rights of: Amy Tanghe***, A03-760 (Minn. App. 12/30/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0312/opa030760-1230.htm>

- **JAIL CREDIT FOR TIME SERVED IN JUVENILE FACILITY; EQUAL PROTECTION.** Where an appellant challenged a trial court's denial of jail credit for time spent in a juvenile correctional facility prior to the execution of his adult sentence of imprisonment, the Court of Appeals affirmed the trial court's decision holding that upon execution of an adult sentence, Minn. Stat. §260B.130, subd. 5 (2000) prohibits jail credit for time served by extended jurisdiction juvenile offenders in a juvenile facility under the juvenile disposition. The court further found that this application of the jail credit restriction to this appellant, whose adult sentence was stayed prior to the effective date of an amendment to Minn. Stat. §260B.130, subd. 5 (2000) and executed pursuant to a probation violation committed after the effective date of the statutory amendment, did not violate the *ex post facto* clause because the jail credit restriction applied to acts committed after the effective date of the amendment. The court further found that application of this statute in this particular case did not violate the equal protection guarantees of the United States and Minnesota constitutions. ***State v. Serena***, A03-362 (Minn. App. 12/30/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0312/opa030362-1230.htm>

- **OKLAHOMA DECISION; FOSTER CARE RATES VS. ADOPTION ASSISTANCE RATES; ADOPTION AND CHILD WELFARE ACT.** In a case with potential for landmark significance throughout the nation, the Court of Civil Appeals in the state of Oklahoma issued a decision in November finding that the state's imposition of a lower Title IV-E subsidy cap for adoptive families of children with special needs than for foster families was unlawful. The Oklahoma court held that adoptive parents are entitled under the Adoption and Child Welfare Act to negotiate for an amount of assistance up to, but not in excess of that amount of assistance available to foster parents. The Oklahoma Court of Civil Appeals reasoned that the state's system of having higher rates for foster care payments than adoption subsidy payments was contrary to the objective of adoptive assistance. This differential between foster care rates and adoption assistance rates also exists in the state of Minnesota, and presumably in many, if not most, jurisdictions across the country. It will be interesting to observe whether the reasoning adopted by Oklahoma's Court of Civil Appeals is applied in other jurisdictions across the country. ***Laws v. State, ex rel. Oklahoma Department of Human Services***, Case No. 96740, 203 OK Civ. App. 97 (Division IV) (11/20/03).

- **WASHINGTON STATE; SUBSTANTIVE DUE PROCESS RIGHTS OF FOSTER CHILDREN.** The Washington Supreme Court filed an opinion on December 18, 2003, dealing with the issues of the rights of foster children under both state and federal law. The case held that foster children possess a constitutional substantive due process right that the state, in its exercise of executive authority, must respect. Foster children were found to have a substantive due process right to be free from unreasonable risks of harm and a right to reasonable safety. To be reasonably safe, the state is required to provide conditions free of unreasonable risk of danger, harm, or pain and must include adequate services to meet the basic needs of the child as the legal custodian and caretaker of a foster child. The stan-

ard to be applied is whether the state's conduct falls substantially short of the exercise of professional judgment, standards, or practices. The Court specifically held that "deliberate indifference" is not the correct standard. *Braam v. Department of Social and Health Services*, No. 72598-5 (Wash. Sup. Ct. 12/18/03).

#### ADMINISTRATIVE DEVELOPMENTS

- **Citizenship Certificates; Internationally Adopted Children.** The U.S. Citizenship and Immigration Services announced recently a Child Citizenship Act (CCA) program to streamline the acquisition of certificates of citizenship for internationally adopted children. The CCA program will both end the existing backlog of applications for certificates and begin automatically providing (without application fee) these certificates to children whose adoptions were finalized overseas (i.e., IR-3 Visa Category) within 45 days of entering the United States. Children with IR-3 visas comprise about 70 percent of all internationally adopted children. The CCA of 2000 granted automatic citizenship for children adopted from other countries.

#### LEGISLATION

Senator Nickles (R-OK) introduced the Inter-Country Adoption Reform Act ("ICAR") (S 1934) on November 23, 2003, to create an Office of Inter-Country Adoptions (OIA) in the State Department. The OIA would be charged with performing six functions, including approving families to adopt internationally, determining that children are legally free for adoption, and assuming immigration functions from the Department of Homeland Security. ICAR would confer United States citizenship on children upon entry of the final adoption decree, not upon entry into the United States.

Senator Bunning (R-KY) introduced legislation (S-1931) in November to make the adoption tax credit permanent. Currently, the credit is set to expire December 31, 2010, reducing the maximum credit from \$10,000 to \$5,000 and making the adoptive parents of children with special needs eligible for only \$6,000 in qualified expenses, not a flat \$10,000 credit.

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#### REAL PROPERTY

##### JUDICIAL LAW

- **POSTHUMOUS CONVEYANCE.** In 1997, Savich conveyed to her children, nephew and minor grandchildren parcels of land in various sizes that together constitute the family farm. Savich reserved a life estate interest in each parcel. In July 2001, upon Savich's request to keep the farm intact, the children and nephew conveyed their respective parcels back to Savich. Savich intended that the farm would be owned by a limited liability company formed by Savich on July 11, 2001. The quit claim deeds executed by the children and nephew were recorded on July 12, 2001. Savich died on July 24, 2001. In her will, Savich left the limited liability company to her children and nephew. Shortly thereafter, Savich's grandchildren executed deeds conveying their parcels to Savich. The grandchildren and their mother objected to the final accounting of Savich's estate and brought this action to nullify the quit claim deeds. Agreeing with the district court, the Court of Appeals concluded that the deeds were void and unenforceable. In order to transfer title to real estate a deed must be delivered. A deed cannot be delivered to a deceased person. While the court would not reform the deeds from the grandchildren to show the grantee as Savich's estate or the limited liability company, because there was no evidence of a mistake in deeding the property, the court imposed a constructive trust. The court found that the grandchildren would be unjustly enriched if they were permitted to own the lands. *In the Estate of Bette Janiece Savich, Decedent*, A03-414 (Minn. App. 11/25/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0311/opa030414-1125.htm>

- **MECHANICS' LIEN.** Homeowners failed to pay the full contract price to Contractor for building and installing custom-made cabinets in Homeowners' house. Contractor completed its work on January 25, 2002. The Dakota County Recorder recorded the mechanic's lien statement on May 28, 2002. Homeowners received the mechanic's lien statement, sent by certified mail, on May 30, 2002. Minn. Stat. §514.08, subd. 1 expressly provides that a person must record a mechanic's lien statement and serve the owner with notice within 120 days after the work is completed or the last piece of material or equipment is furnished, otherwise the lien terminates. Service may be done personally or sent by certified mail. Regardless of the method of service, service is effective upon delivery or refusal to accept delivery, not when deposited into the mail box. The Court of Appeals upheld the district court decision that Contractor failed to serve Homeowners within the statutory 120-day period; thus the mechanic's lien expired. *Eischen Cabinet Company v. Hildebrandt, et al.* A03-358 (Minn. App. 11/25/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0311/opa030358-1125.htm>

- **LANDLORD/TENANT.** Tenant leased 640 acres of farmland from Landlord. The lease executed by

both parties in 1999 provided Tenant with a right of first refusal to purchase the land by meeting any bona fide offer. The lease did not specify the method for giving notice of such an offer or set a time limit for exercising the right of first refusal. Buyer made Landlord an offer to buy the land. The purchase agreement listed the purchase price as \$265,000 and set the closing date for February 5, 2002. Landlord sent Tenant first an illegible but signed copy of the purchase agreement and later a legible but unsigned agreement. Tenant did not exercise the option to buy the land; instead, Tenant initiated this lawsuit and recorded a notice of *lis pendens* against the land. Even though Tenant argued that the information he received about the offer was inconsistent and incomplete, the Court of Appeals found that because the lease is silent as to notice the two copies of the purchase agreement provided Tenant with sufficient notice of the proposed sale. In addition, the purchase agreement reasonably disclosed all necessary terms of the sale to trigger the right of first refusal. Moreover, Tenant had a duty to seek clarification of any unclear terms and obtain additional information in order to make an informed decision to buy the land. Lastly, the court upheld the district court ruling that Tenant tortiously interfered with Landlord's contractual relationship with Buyer by filing the notice of *lis pendens* without justification and awarded Landlord bad-faith attorneys fees under Minn. Stat. §549.211. **Dyrdal v. Golden Nuggets, Inc. et al.**, A03-214 and A03-215 (Minn. App. 12/16/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0312/opa030214-1216.htm>

• **ZONING.** The Foundation purchased an abandoned nursing home in 2001 with the intention of operating a supportive housing facility for homeless persons suffering from mental illness, chemical dependency, or HIV/AIDS. Because the building is situated within a zoning district that did not permit such a use, the Foundation applied for a conditional use permit. The Foundation's application also requested a variance to the occupancy ordinance and waiver of certain spacing requirements. The city planning commission granted the CUP, the variance, and the waiver concluding that such actions are a reasonable and necessary accommodation for disabled persons under the federal Fair Housing Amendment Act ("FHAA"). Citizens appealed this decision. The Minneapolis City Council denied the appeal. Citizens then appealed to the Hennepin County District Court and the district court granted the Foundation's summary judgment motion. The Court of Appeals affirmed the district court decision and concluded that the FHAA requires a municipality to grant a waiver of a zoning ordinance if the waiver is capable of enhancing the life of disabled persons by providing them the same opportunity to live in a particular neighborhood as people without a disability without imposing an undue financial or administrative burden on the municipality. Therefore, the court determined that the city's actions were reasonable because the city's decision to grant the waiver based on the requirements of the FHAA is legally sufficient and has factual basis to conclude the waiver is a reasonable accommodation. Finally, the court agreed that the city's decision to grant the CUP and variance was reasonable. **Citizens for a Balanced City, et al. v. Plymouth Church Neighborhood Foundation**, A03-190 (Minn. App. 12/2/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0312/opa030190-1202.htm>

— MELISSA BAER  
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## TAX

### JUDICIAL LAW

• **CORPORATE INCOME TAX; DIVIDEND-RECEIVED DEDUCTION; MOTION FOR RECONSIDERATION DENIED.** The Minnesota Tax Court denied the taxpayer's motion to reconsider the court's denial of a Minnesota corporate franchise tax-dividend-received deduction for dividends received from the taxpayer's wholly-owned subsidiary, which qualified as a foreign sales corporation. The taxpayer argued that it was entitled to a trial on the merits for its Equal Protection claim or if not, to further discovery on its claim. While the taxpayer claimed that the commissioner's denial of the dividend-received deduction violated the taxpayer's Equal Protection rights, the taxpayer did nothing to pursue its claim or to present it to the court. Waiting to argue that it had an inadequate opportunity to respond the commissioner's raising of the Equal Protection claim until after the court had issued its decision was neither timely nor within the intended scope of a motion for reconsideration.

**Hutchinson Technology Inc. v. Commissioner of Revenue**, Nos. 7398-R and 7504-R, 2003 WL 223405 (Minn. Tax Ct. 11/06/03).

• **REAL ESTATE VALUATION.** The Minnesota Tax Court held that a nonbuildable triangular parking lot was not income-producing property, and the assessors' estimated market value of the property should be reduced and real estate taxes recomputed. The county presented an appraisal as evidence of the property's market value and the tax court placed some weight on the appraisal, but found that all four comparables in the appraisal were properties superior to the subject property. Therefore, a downward adjustment was made in the market value of the property to \$5,000. **David P. Gregorich v. County of Anoka**, C6-02-4557, 2003 WL 22476263 (Minn. T. Ct. 10/08/03).

• **PROPERTY TAX; VALUATION.** The Minnesota Tax Court found the fair market value of the residential property to be \$500,000 rather than the assessed value of \$470,000 on January 2, 2002, but found that the homestead property was unequally assessed and therefore the 2002 assessment was

reduced by 10 percent or \$450,000. **Jeffrey J. Dypwick v. County of Carver**, CV-03-186, 2003 WL 23094683 (Minn. T. Ct. 12/01/03).

- **PROPERTY TAX; VALUATION.** The Minnesota Tax Court ruled that an island campgrounds' highest and best use was as a seasonal/recreational camping grounds. In addition, the court found the fair market value of the campgrounds was \$694,000 rather than the \$865,800 assessed value as of January 2, 2002 or the county's fair market value of \$1.3 million submitted at trial. **Jean & H. R. Swaggert v. County of Hubbard**, C8-02-619, 2003 WL 23094712 (Minn. T. Ct. 12/16/03).

- **PROCEDURE: COSTS AND DISBURSEMENTS IN PROPERTY TAX CLAIM.** The Minnesota Tax Court dismissed the taxpayer's motion for costs and disbursements because it was not filed within the 90-day filing requirement found in Minn. R. Civ. P. 68 and Minn. Stat. §278.05(5). Moreover, the taxpayer declined an offer of settlement and, therefore, even if the motion had been timely made, would have been ineligible for costs and disbursements since the court's final judgment was not more favorable than the offer of settlement. **Kenneth N. Raisanen v. County of Hennepin**, No. 29104, 2003 WL 22461811 (Minn. T. Ct. 10/09/03).

- **REAL PROPERTY TAXES: DISCOVERY MOTIONS ON COMPELLING AND DISQUALIFICATION OF COUNSEL.** In a series of order opinions, the Minnesota Tax Court ruled on various discovery motions made on the compelling of nonpublic or private information and whether a conflict of interest disqualified counsel for the taxpayer from the case. Counsel for the taxpayer requested third party lease, income, or rent information on 21 third party property owners in the area where taxpayer's building was located. As part of the request, counsel for the taxpayer had represented one of the third party owners in their tax dispute with the county and a protective order was issued in that case. That third party owner made a motion by independent counsel to disqualify the taxpayer's attorney on the grounds of a conflict of interest in that he was representing two clients in violation of Minnesota Rules of Professional Conduct Rule 1.7 "Conflict of Interest." The first order of the Tax Court found that the tax counsel for the taxpayer was disqualified since he had violated Rule 1.7 and had not sought the third party's consent to seek the nonpublic and private data from the county. The fact that counsel for the taxpayer was terminated by the third party owner prior to the hearing of the motion was irrelevant as an actual conflict existed. The Tax Court then granted the county's motion to compel discovery from the taxpayer including the right to either have the taxpayer's records located in Chicago copied or that the county travel to Chicago to review the documents, whichever was less expensive to the county. Lastly, the court denied the taxpayer's request for the lease, income and rent information for the 21 third party owners since such material was private and nonpublic data under Minn. Stat. §13.51. The balancing test found in Minn. Stat. §13.03(6) disclosed that any benefit to the taxpayer seeking the private data was outweighed by the harm to the confidentiality interests of the county in maintaining the data and the third parties themselves, who had provided the financial information to the county in the first place. **EOP-Nicollet Mall, LLC v. County of Hennepin**, File Nos. 29743, 28783, 28457, 2003 WL 22717507, 22717593, 22717610, 22827677, 22827979, and 228281152 (Minn. T. Ct. 11/13/03).

- **PROPERTY TAX; CLASSIFICATION.** The Minnesota Tax Court held that the taxpayer was not entitled to a residential homestead classification because the taxpayer was not a Minnesota resident for the purposes of Minn. Stat. §273.124 (2002). Therefore, the assessor's classification of the subject property as seasonal recreational as of January 2, 2001, was affirmed. In weighing the evidence, the court found that a close examination of the factors involved indicated a strong connection between the taxpayer and the state of Louisiana rather than the state of Minnesota. Therefore, taxpayer was not domiciled under Minn. R. 8001.0300, Subp. 3 and the property was not qualified for the homestead classification. **Dale Rowe, Jr., v. County of Lake of the Woods**, C1-02-171, 2003 Minn. Tax LEXIS 40 (Minn. T. Ct. 10/23/03).

- **CIGARETTE TAX; ENFORCEMENT.** The Ramsey County District Court upheld Minn. Stat. §297E.24 against plaintiff's challenges. Minn. Stat. §297E.24 imposes a 35¢ per pack fee on "non-settlement cigarettes." A "non-settlement cigarette" means a cigarette manufactured by a person other than a manufacturer [1] that ... is making annual payments to the State of Minnesota under a settlement of the lawsuit styled as *State v. Philip Morris, Inc.* or [2] that has entered into a similar agreement also requiring annual payments. The court rejected the plaintiff's arguments that the challenged enforcement of the statute infringed free speech, violated Equal Protection and Due Process guarantees, or was a bill of attainder. **Council of Independent Tobacco Manufacturers of America et al. v. State**, C1-03-7120, Ramsey Cty. D. Ct. (11/19/03).

- **MEDICAL ASSISTANCE FOR NEEDY PERSONS; RESIDENT.** The Minnesota Court of Appeals held that the requirement that a medical assistance recipient's child or grandchild "resided" in the recipient's home "continuously since the date of [recipient's] institutionalization" means that the child or grandchild must have physically lived in the recipient's home as a primary residence continuously since the date of the recipient's institutionalization. Physically residing elsewhere with an intent to return to the recipient's home sometime in the future did not satisfy the requirement of the statute as set forth in Minn. Stat. §256B.15(4) (2000). **Re Viva Bertha Handy v. Murray County**, A03-95,

2003 WL 22889712 (Minn. App. 12/09/03),

- **U.S. SUPREME COURT; ARIZONA TAX CREDIT CHALLENGE.** The U.S. Supreme Court has agreed to review a judgment holding that taxpayers were not barred from pursuing a federal court action challenging an Arizona personal income tax credit. The taxpayers contend that the credit for contributions that benefit private schools violates the Establishment Clause of the U.S. Constitution. The U.S. Court of Appeals for the 9th Circuit held that, because the taxpayers sought to enjoin the granting of a tax credit rather than the collection of state revenue, the federal Tax Injunction Act and principles of comity did not preclude the suit. *Hibbs v. Winn*, Dkt. 02-1809, U.S. Supreme Court, cert. granted 09/30/03).

- **FEDERAL CLAIMS COURT LACKS JURISDICTION OVER TAXPAYER'S CONSTITUTIONAL CLAIMS.** The Court of Federal Claims held it lacks requisite power and authority to adjudicate plaintiffs' claims of alleged constitutional Due Process and Equal Protection violations, as well as various civil rights claims. *Stephenson v. United States*, No. 03-616 T, 58 Fed. Cl. 186 (Fed. Cl. 10/15/03).

- **UNCOLLECTIBLE RECEIVABLES COMPUTATION BY IRS.** The 6th Circuit held that the temporary amended regulation relating to treatment of bad accounts, under which a taxpayer's uncollectible receivables are estimated by multiplying the year-end receivables for the current year by a ratio of average bad debts written off during the current year and the previous five years, divided by its average total sales for the same period, is a reasonable interpretation of IRC Section 448(d)(5). *Hospital Corporation of America v. Commissioner*, No. 01-1810, 92 AFTR 2d 2003-6705 (6th Cir. 10/30/03).

- **INTEREST PAID ON INCOME TAX DEFICIENCY RULED NONDEDUCTIBLE PERSONAL INTEREST.** The U.S. Tax Court held that accrued statutory interest paid by taxpayers on income tax deficiency for a prior year is personal in nature and thus not deductible under IRC Section 163(h), even though the income that was the subject of the deficiency was produced by taxpayer's principal trade or business. *Alfaro v. Commissioner*, No. 03-60261, 2003-2 U.S.T.C. 50, 715 (5th Cir. 11/08/03).

- **SUMMARY JUDGMENT FOR NONPROFIT HOSPITAL IN PARTNERSHIP WITH COLUMBIA/HCA VACATED.** The 5th Circuit held that factual issues relating to whether a nonprofit hospital ceded control to a for-profit hospital corporation when it entered into a partnership with the latter precluded grant of summary judgment recognizing the nonprofit hospital's continued qualification as a tax-exempt charitable entity. *St. David's Health Care System Inc. v. United States*, No. 02-50959, 92 AFTR 2d 2003-6865 (5th Cir. 11/07/03).

- **TAX UNDERPAYMENTS EQUITABLE RECOUPED FOLLOWING REVERSAL OF IRS ADJUSTMENTS.** The 8th Circuit held that IRS is entitled to equitably recoup, from overpayments of taxes for 1989 and 1990, underpayments of taxes for 1991 and 1992 resulting from reinclusion of dividend income in 1991 and 1992 following appellate court's reversal of IRS adjustments involving taxpayer's American Depository Receipts transaction. *IES Industries Inc. v. United States*, No 02-3106, 92 AFTR 2d 2003-7038 (8th Cir. 11/14/03).

- **SEVERANCE PAID UNDER CONTINUATION PLANS NOT DEFERRED COMPENSATION.** The Court of Federal Claims held that payments made by companies pursuant to continuation plans to covered employees, who were terminated because of corporate restructuring or failure to perform at minimum acceptable standards, were not paid compensation from nonqualified deferred compensation plans, and thus, were not eligible for special timing rules for purposes of determining FICA tax liability. *Kraft Foods North America Inc. v. United States*, No. 02-342T, 92 AFTR 2d 2003-7068 (Fed. Cl. 11/14/03).

- **U.S. SUIT TO RECOVER ERRONEOUS PAYMENT OF INTEREST ON CASH BOND RULED TIMELY.** The 2nd Circuit held that the two-year statute of limitations in IRC Section 6532 with respect to IRS suits seeking recovery of erroneous tax refunds does not apply to an IRS suit seeking recovery of an erroneous payment of interest on a taxpayer remittance in the nature of a cash bond. *United States v. Domino Sugar Corp.*, No. 02-6287, 92 AFTR 2d 2003-6936 (2nd Cir. 11/10/03).

- **TAXPAYERS BOUND BY ARBITRATION AGREEMENT ON TIME TO SUBMIT INFORMATION TO ARBITRATOR.** The U.S. Tax Court held that the taxpayers are bound by the schedule set out in an arbitration agreement for the submission of information to the arbitrator. Therefore motion to delay entering the arbitrator's findings in the record because of arbitrator's failure to consider information that was not submitted on time was denied. *Duncan v. Commissioner*, 121 T.C. No. 17 (U.S.T.C. 11/24/03).

- **SOME DAMAGES FOR RODMAN'S KICKING INCIDENT EXCLUDABLE.** The U.S. Tax Court held that \$120,000 of the \$200,000 that NBA player Dennis Rodman paid taxpayer for kicking him during a 1/15/97 Chicago Bulls basketball game was excludable from taxpayer's income under IRC Section 104(a)(2) as payment for "his claimed physical injuries relating to the incident." However, the remaining \$80,000, which was attributed to taxpayer's agreement, in part, not to defame Mr. Rodman or assist in the criminal prosecution of Mr. Rodman (collectively, the *nonphysical injury provisions*), was includable in taxpayer's income. *Eugene Amos*, TC Memo 2003-329 (12/01/03).

- **OFFSET OF OVERPAYMENT WAS "COLLECTION ACTIVITY"; INNOCENT SPOUSE RELIEF UNTIMELY.** The U.S. Tax Court decided that the overpayment, applied by the IRS as a credit to other tax due, was

a collection action for purposes of innocent spouse relief. The court concluded that the taxpayer's innocent spouse relief request was untimely. Under IRC Section 6015(b), (c), or (f), a request for relief from joint and several liability must be made within two years of the IRS's first collection activity. The taxpayer's election was filed on July 23, 2001, more than two years after the May 13, 1999 collection activity. *Campbell v. Commissioners*, 121 T.C. 16 (2003).

- **WRONGFULLY DISCHARGED EMPLOYEE'S ATTORNEY FEES NOT EXCLUDIBLE UNDER ACCOUNTABLE PLAN RULES.** The 9th Circuit held that attorneys' fees incurred by a former employee in a wrongful termination action against his former employer did not qualify as having been paid under an employee reimbursement or other expense allowance arrangement and therefore are not eligible for "above-the-line" deduction. *Biehl v. Commissioner*, No. 02-72723, 92 AFTR 2d 2003-7280 (9th Cir. 12/12/03).

- **SELF-EMPLOYMENT TAX ASSESSMENT ON PAYMENTS FROM COOPERATIVE UPHELD.** The Tax Court's decision upholding IRS's assessment of self-employment tax on value-added payment individuals received from a corn growers cooperative association was affirmed by the 8th Circuit. Like the Tax Court, the 8th Circuit held that the unique nature of the relationship between a cooperative and its members plays a significant role in deciding the case. *Bot v. Commissioner*, No. 02-2956, 92 AFTR 2d 2003-7385 (8th Cir. 12/22/03).

- **NEW JERSEY TAX COURT REQUIRES PHYSICAL PRESENCE FOR STATE TO IMPOSE CORPORATE INCOME TAX.** The New Jersey Tax Court Oct. 23 held that the state's corporate income tax cannot apply to an out-of-state corporation with no physical presence in the state and with New Jersey-source income from a licensing agreement with a New Jersey retail business. Several factors supported the physical presence test. The difference between use tax liabilities and income tax liabilities are not significant enough to justify a different rule for physical presence. Secondly, Supreme Court decisions before *Quill* strongly suggested that physical presence was a necessary element of nexus for taxing income, the court said. Finally, only one state supreme court since *Quill* held that physical presence is not needed for nexus, and that case, *Geoffrey Inc. v. South Carolina Tax Commission*, 437 S.E.2d 13 (S.C. 1993), involved facts similar to the *Lanco* case at issue. Other state court decisions decided since *Quill* have not followed *Geoffrey*. *Lanco Inc. v. Director of the New Jersey Division of Taxation*, No. 005329-97 (N.J.T.C. 10/23/03).

#### ADMINISTRATIVE MATTERS

- **MINNESOTA SALES TAX — NONPROFIT.** In Minnesota Department of Revenue Notice 03-14 (10/20/03), the commissioner updated and replaced Revenue Notice 00-1 (01/10/00) by explaining the 2003 amendments to Minn. Stat. §§297A.70 (10) and (14), and set forth the requirements that must be met by a nonprofit organization to qualify for the admission ticket and fund-raising exemptions and for facilities to follow when handling ticket sales for events sponsored by nonprofit organizations.

- **MINNESOTA SALES TAX; SALES INCENTIVE PROGRAMS.** In Minnesota Department of Revenue Notice 03-15 (10/27/03) the commissioner issued a release discussing the taxation of sales incentive programs that encourage customers to purchase merchandise or services by giving the customer script, such as points, trading stamps, box tops or other types of proof-of-purchase, when they purchase merchandise or services. The customer can then redeem the script for an incentive or promotional item. The sales price, when script is exchanged for an incentive item, is determined as follows: (1) if the retailer has provided a fixed value for the script (for example \$5 per point), then that is the money value of the script, and the consideration is that fixed value plus any additional cash required for the redemption of the incentive item; (2) if there is no fixed value per unit of script but a dollar amount is given by which the customer may purchase the item without any script, then the sales price is the dollar amount given; or (3) if neither (1) or (2) apply, but information is given as to the value in money for the item, then the sales price is the money value given.

- **MINNESOTA REAL PROPERTY; RULES.** In S.R. 28 S.R. 750 (12/08/03), the commissioner requested comments or questions on the amendment of the rules governing the application of valuation and assessment of the property of utility companies found in Chapter 8100.

- **IRS LISTED TRANSACTIONS: ROTH IRA.** In Notice 2004-8, 2004-4 IRB, arrangements involving Roth IRA disguised-value contributions were labeled tax avoidance and listed transactions by IRS. For example, an individual's business may sell its receivables for less than fair market value to a shell corporation owned by the individual's Roth IRA, and thereby attempt to artificially shift taxable income away from his business into the shelter of the Roth IRA.

- **IRS ISSUES NEW GUIDELINES FOR TAXPAYER SUBMISSIONS BY FAX.** In IR 2003-119, the IRS announced the release of expanded guidelines for the use of faxes by taxpayers and tax practitioners submitting information to IRS. The expanded guidelines, which are effective October 1, 2003, cover operations related to income tax, employment tax, excise tax, estate and generation-skipping transfer taxes and tax-exempt and employee plan determinations.

- **SINGLE MEMBER LLC LIABLE FOR EMPLOYMENT AND PAYROLL TAXES.** In CCA 200338012, the

Chief Counsel's Office explained that because the disregarded LLC was not separate from its owner for federal tax purposes, the single member owner was the taxpayer with respect to tax and payroll liabilities arising from LLC's business. These liabilities could be collected by assessing the single member owner and pursuing an administrative collection action. The IRS could file a notice of federal tax lien and levy on the single member owner's property and rights to property.

- **IRS TO STRENGTHEN CONTROLS ON INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS.** In IR 2003-140, the IRS announced that it will make several changes to the procedure for issuing individual taxpayer identification numbers to ensure that ITINs are issued primarily for tax purposes rather than for identification. ITINs are issued to resident and nonresident aliens who do not qualify for Social Security numbers, but may be required to file tax returns, including alien spouses and dependents of taxpayers with Social Security numbers, as well as resident alien students, professors, or researchers.
- **IRS FINAL RULES ISSUED ON QUALIFIED OFFERS ENTITLING TAXPAYERS TO FEE AWARDS.** In T.D. 9106, the IRS addressed the requirements for qualified offers that entitle taxpayers to an award of administrative and litigation costs. The qualified offer rules reflect 1998 changes to IRC Section 7430 on the award of costs to the "prevailing party" in a court case determining taxes, interest or penalties. The final regulations replace temporary and proposed regulations issued almost three years ago. The final rules generally adopt the proposed regulations and provide 15 examples to illustrate the operation of the qualified offer rules.
- **BROKERS REQUIRED TO FILE RETURNS REPORTING PAYMENTS IN LIEU OF DIVIDENDS.** In T.D. 9103, the IRS issued rules requiring brokers to tell it, as well as their customers, when they make substitute payments in lieu of dividends. The rules apply to brokers who transfer a customer's securities for use in a short sale or similar transaction and make payments to individuals in lieu of a dividend, tax-exempt interest or other items under IRC Section 6045. The rules reflect changes made under the Jobs and Growth Tax Relief Reconciliation Act of 2003.

#### LEGISLATION

- **Federal Law: Military Tax Relief Act.** The Military Family Tax Relief Act of 2003 ("MFTRA") was signed in late November 2003 and became law. The MFTRA gives tax relief to active duty and National Guard/Reserve personnel. It also benefits survivors of servicemen and women killed in the line of duty. Major provisions are:
  - Exclusion of military death gratuity payments;
  - Exclusion of amounts received under military housing assistance program;
  - Expansion of combat zone filing rules to include contingency operations;
  - Clarification of treatment of child care subsidies;
  - Treatment of service academy appointments as scholarships for purposes of Code Sec. 529 and Code Sec. 530 education programs; and
  - Above-the-line deduction for overnight travel expenses of National Guard and Reserve members.
- **FEDERAL LEGISLATION PROVIDING FEDERAL AND STATE TAX RELIEF FOR SERVICEMEMBERS PASSED BY CONGRESS.** The President signed in November 2003 the Servicemembers Civil Relief Act (H.R. 100), which amends the Soldier's and Sailor's Civil Relief Act of 1940, renaming it as the Servicemembers Civil Relief Act. In addition to providing nontax civil relief for servicemembers, the act provides various forms of federal and state tax relief and contains other provisions affecting federal and state taxes.
- **FEDERAL LEGISLATION: MEDICARE PRESCRIPTION DRUG IMPROVEMENT AND MODERNIZATION ACT.** The Medicare Prescription Drug Improvement and Modernization Act became law in late November 2003. The new law created Health Savings Accounts ("HSAs"), among other items. HSAs are tax-advantaged savings accounts that can be used to pay for medical expenses incurred by individuals, their spouses, or their dependents. However, the participant must also be enrolled in a high-deductible health insurance plan. Then the tax-deductible savings account (HSA) may be opened. Here are more details regarding HSAs:
  - These accounts are available to those who have health insurance with annual deductibles of at least \$1,000 for single coverage or \$2,000 for family coverage.
  - Participants can make tax-deductible deposits to the accounts. Up to 100 percent of the health plan deductible may be saved annually (limit: \$2,250 for self-only coverage; \$4,500 for family coverage). Individuals age 55-65 can make additional tax-free catch-up contributions of up to \$500 in 2004, gradually increasing to \$1,000 by 2009. Note that the deduction for contributions by individuals is an "above-the-line" deduction, meaning the contributions are deductible whether or not the taxpayer itemizes other deductions.
  - Employers can deduct contributions to HSAs (within the limits explained above) for employees who are eligible. HSAs can be offered under an employer's cafeteria plan. An employee who is an eligible individual will be able to exclude amounts contributed by his employer to his HSA, and these amounts won't be subject to FICA, FUTA, or income tax withholding.

- Distributions used to pay unreimbursed medical expenses are completely tax free. Distributions can be used to pay for retiree health insurance, Medicare expenses, long-term care services, and insurance. Prescription drugs, surgery and other medical treatments and amounts not used to pay qualified medical expenses can be carried over from year-to-year, even if the HSA is provided under a cafeteria plan.
- Money can be withdrawn from an HSA for purposes other than medical expenses after payment of income tax plus a 10 percent penalty. The penalty will not apply in the case of distributions made after retirement age or for distributions made due to death or disability.
- HSAs are portable when an employee changes employers. Contributions are earnings belong to the account holder, not an employer.
- There are no income-related eligibility requirements.
- Assets can be passed on to the surviving spouse. Otherwise, the assets will be included in the deceased beneficiary's estate.
- Employers are required to report amounts contributed to an HSA on the employee's Form W-2.
- Nondiscrimination rules apply to employer contributions to HSAs. Employers who make contributions to an HSA for an employee during a year generally are required to make available comparable contributions to the HSAs of all comparable participating employees during the same year.
- The tax benefits are scheduled to start January 2004.

For more information and basic guidance, the IRS issued Notice 2004-2 and Treasury issued a news release and fact sheet.

#### LOOKING AHEAD

• **CONGRESS RAISES CONCERNS ABOUT DEDUCTIBILITY OF GOVERNMENT SETTLEMENT PAYMENTS AND REQUESTS GAO TO INVESTIGATE.** Concerned that various settlements reached by federal regulatory and oversight agencies may allow the payment of penalties to be tax-deductible, thereby lowering their effective costs, the Senate Finance Committee requested the Government Accounting Organizations ("GAO") to review the largest settlements and determine how they were reported for federal tax purposes. The GAO will be authorized to look at all relevant IRS files, records and returns for purposes of this review.

• **FEDERAL INTERNET BAN NOW FOCUSED ON 2004 CONGRESS.** Efforts to revive an expired Internet tax ban in 2003 were futile and will not resume until lawmakers return in January 2004. There may be support for tying the moratorium legislation to a measure that would give states the authority to require remote sellers to collect sales tax on out-of-state transactions if they simplify their tax systems under the Streamlined Sales and Use Tax Act.

• **FEDERAL TAX PROPOSALS IN 2004 CONGRESS.** Congress adjourned in 2003 without enactment of its full legislative program. Likely enactments in 2004 will focus on:

- Energy tax incentives
- Extenders
- Tax shelter penalties
- Pension reform
- Foreign sales corporation repeal
- Treasury/IRS appropriations
- State/federal tax issues

• **PUSH FOR BILL TO CREATE TAXPAYERS' BILL OF RIGHTS IN MINNESOTA.** Legislation has been proposed that would establish a "Taxpayers' Bill of Rights" for Minnesota (S.F. 1073). The legislation would limit state and local government spending to the rate of inflation plus the percentage increase in population and would be in the form of a constitutional amendment. As such, the vote of a simple majority in both houses of the Legislature would place it on the November 2004 election ballot. The goal of the bill is to limit the growth of state and local government spending. To that end, it would limit state spending growth to the rate of inflation plus the rate of population growth. Spending growth for cities and counties would be tied to the rate of inflation plus local property value growth. For school districts, spending growth would be tied to the rate of inflation plus student enrollment growth. Any spending increases beyond the limits established by the constitutional amendment would have to be approved by voters.

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## TORTS & INSURANCE

### JUDICIAL LAW

• **PERSONAL JURISDICTION; NONRESIDENT DEFENDANTS; STREAM OF COMMERCE.** Plaintiff was injured while repairing a scissor-lift table manufactured in Japan by the defendant and incorporated

into a sheet-metal-cutting system by another Japanese manufacturer. The system was then sold through an Illinois distributor to plaintiff's employer in Minnesota. After manufacturing the table, defendant had no further involvement in marketing or distributing the finished product in the United States.

The defendant manufacturer moved to dismiss for lack of personal jurisdiction on the ground that it lacked sufficient contacts with the state of Minnesota. Plaintiff argued that defendant was subject to jurisdiction in Minnesota because defendant delivered the table into the "stream of commerce" with the expectation that the table would be purchased by Minnesota consumers. Plaintiff relied heavily on evidence that defendant maintained an English-language website describing its products. The district court granted the motion to dismiss.

The Court of Appeals affirmed, concluding that plaintiff had not shown that defendant expected that the table would be purchased by Minnesota consumers. In reaching this decision, the court noted that the website provided only general information about defendant, did not provide a means for customers to communicate with defendant, and did not target Minnesota residents. **Juelich v. Yamazaki Mazak Optonics Corp.**, A03-174 and A03-228, (Minn. App. 10/14/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/opa030174-1014.htm>

• **PRODUCTS LIABILITY; CHOICE OF LAW; FORUM NON CONVENIENS.** Plaintiff was injured in Arizona after falling from a ladder purchased in Texas. Plaintiff lives in Minnesota six months of the year, and sued the seller of the ladder in Minnesota. The district court dismissed the claim because either Texas or Arizona law would bar the suit based on their respective two-year statutes of limitations. The court also held Minnesota was not the proper forum for the suit due to perceived hardship on the defendant in having the case heard in Minnesota.

The Court of Appeals reversed and remanded. A choice of law determination regarding the statute of limitations is either substantive or procedural. The court found Minnesota law applied and plaintiff had six years to bring his claim. The court held that the better approach is that statute of limitations determinations are substantive.

The Court of Appeals held that Minnesota is a proper forum for the claim. It concluded there were no hardships for defendant's case which require a different forum. Plaintiff lives here.

Witnesses are located here, experts are located in a neutral state, and the defendant has locations nationwide. **Danielson v. National Supply Co.**, A03-325 (Minn. App. 10/14/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/opa030325-1014.htm>

• **CONSUMER FRAUD; CONTRACTS; JUSTIFIABLE RELIANCE.** In a class action, the named plaintiff sued a group of automotive dealerships claiming consumer fraud. The plaintiff signed a contract to purchase a car and later claimed that three oral misrepresentations were made to him by the dealership: (1) that he was required to purchase a \$1,500 service contract in order to obtain financing; (2) that he had to purchase a \$340 credit insurance policy in order to obtain financing; and (3) that after he made 12 monthly payments to the bank, he could refinance at a lower interest rate. The alleged oral promises are each contradicted by language in the contract signed by the plaintiff. The dealership denied that such oral representations were ever made.

The trial court dismissed the case and the Court of Appeals affirmed, stating that since the alleged oral promises were each contradicted by "direct, clear, and unambiguous contractual language," the plaintiff could not establish the justifiable reliance element of a consumer fraud claim. A dissenting opinion argued that common law reliance requirements should not apply to a statutory consumer fraud act claim. **Wiegand v. Walser Automotive Groups, Inc.**, A03-250 (Minn. App. 10/28/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0310/opa030250-1028.htm>

• **LEGAL MALPRACTICE; STATUTE OF LIMITATIONS.** After his assault conviction was overturned, and 11 years after his conviction, a former client sued his attorney for malpractice alleging that the attorney failed to pursue an alleged self-defense theory.

The district court held that the client's claim was barred by the six-year statute of limitations. The appeals court reversed and was affirmed by the Supreme Court, which held that the statute of limitations for a legal malpractice action based on ineffective assistance of counsel resulting in a criminal conviction begins to run only when post-conviction relief is granted. The Court recognized that as long as the criminal conviction stood, the legal malpractice cause of action for ineffective assistance of counsel could not withstand a Rule 12 motion to dismiss. Finally, the Court held that the former attorney is not collaterally estopped from litigating any of the elements of the legal malpractice claim. **Noske v. Friedberg**, C7-02-1073 (Minn. 11/06/03). <http://www.lawlibrary.state.mn.us/archive/supct/0311/op021073-1106.htm>

• **WORKERS' COMPENSATION; ATTORNEY'S FEES.** Employee sustained an injury while working for one employer; four years later he sustained another injury while working for a different employer. Both employers and their insurers became parties to employee's claim for workers' compensation benefits following the second injury. Employers later stipulated that employee was entitled to bene-

fits, and the compensation judge allocated liability among employers.

The judge also ordered the employers to pay (1) \$21,073 in attorney's fees, under a statute authorizing a fee award if the liability dispute is primarily between employers or insurers, and (2) an additional fee award under a different statute allowing such an award if the employer or insurer unsuccessfully disputes a claim. The Workers' Compensation Court of Appeals reversed the second fee award on the grounds that the fees were awarded solely under the statute regarding disputes primarily between employers and that there was therefore no basis for an award under the statute regarding unsuccessful employer disputes.

Upon further review, the Supreme Court reversed and reinstated the compensation judge's award, holding that the statute authorizing an additional fee award where the employer unsuccessfully disputes a claim applies to all cases under the workers' compensation statute, including cases where the dispute is primarily between employers or insurers. *Banken v. Lac Qui Parle Coop Oil*, A03-1119 (Minn. 12/04/03).

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