



N O T E S & T R E N D S

CIVIL LITIGATION

JUDICIAL LAW

■ **LACK OF ATTORNEY SIGNATURE ON COMPLAINT NOT JURISDICTIONAL DEFECT.** Although corporate entities are required to appear in legal proceedings through counsel, if a corporate litigant has originally had a nonlawyer sign a pleading, it may amend that pleading and cure the defect even after the statute of limitations has run. Save Our Creeks (SOC), a Minnesota corporation, brought a declaratory judgment action against the city of Brooklyn Park to challenge the denial of its petition for an environmental impact statement. SOC's nonattorney corporate officer signed the complaint on the corporation's behalf. Shortly after the expiration of the statutory period for seeking review, the city moved to dismiss, arguing that SOC's complaint was null, and that the lack of an attorney's signature was an incurable jurisdictional defect. SOC then retained an attorney who promptly filed a notice of appearance and signed the complaint. The trial court permitted the amendment of the complaint and allowed the amendment to relate back to the original pleading. The Court of Appeals affirmed, noting that "the requirement that a corporation be represented by counsel in legal proceedings is not jurisdictional." Rather, the trial court acquires jurisdiction so long as the summons — in spite of the defect — fully informs the defendant of the nature of the plaintiff's claims. Because the requirement that a corporation be represented by counsel "does not serve an essential notice-pleading function," the omission of an attorney's signature "is not fatal when the complaint leaves no genuine doubt about the nature of the corporation's claims." For the same reasons, the Court of Appeals held that the amended complaint related back to the original complaint for statute of limitations purposes. The Court of Appeals did caution, however, that amendment might not be permitted under some circumstances, such as when the corporation knew its action was improper, when the nonlawyer's activity on the corporation's behalf was substantial, or when the corporation did not take prompt action to correct the defect. **Save Our Creeks v. City of Brooklyn Park**, A03-1794 (Minn. App. 07/06/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0407/opa031794-0706.htm>

■ **SERVICE BY MAIL; REMOVAL FROM CONCILIATION COURT TO DISTRICT COURT.** A litigant who is unhappy with a conciliation court ruling may continue the action in the district court without adhering to the requirements of Minn. R. Civ. P. 4.05. The Minnesota Supreme Court recently reviewed a case that began in conciliation court as a dispute between a lawyer and his former client. After the conciliation court refused to award damages to either party, the attorney filed a demand for removal to district court pursuant to Minn. Gen. R. Prac. 521(b). He mailed a copy of the demand to his opponent, as is permitted under the same rule. His opponent failed to appear at the trial, and the district court entered a default judgment against her. She later moved to vacate the default judgment, maintaining, among other things, that the service by mail of the demand for removal was ineffective because the plaintiff did not obtain an acknowledgment of service as required by Minn. R. Civ. P. 4.05. The district court rejected this argument but the Court of Appeals reversed, holding that, because of the plaintiff's failure to personally serve the defendant or obtain an acknowledgment of service, the district court did not have jurisdiction over the removed action. The Supreme Court reversed the Court of Appeals, finding that first-class mail was sufficient to confer jurisdiction. In doing so, Justice Meyer acknowledged the existence of a conflict between Minn. R. Civ. P. 4.05 (requiring an acknowledgment of service to make service by mail effective) and Minn. R. Gen. Prac. 521(b) (permitting litigants to accomplish removal either by personal service or by first-class mail). The Court resolved this conflict by applying the specific rule over the general one. Thus, the method of service for a demand for removal from conciliation court is governed exclusively by Minn. R. Gen. Prac. 521(b). Service by first-class mail is sufficient to remove the matter for a trial *de novo* in the district court. **Roehrdanz v. Brill**, CX-03-137 (Minn. 07/15/04). <http://www.lawlibrary.state.mn.us/archive/supct/0407/opc030137-0715.htm>

■ **RULE 68 OFFER OF JUDGMENT; SEPARATE RECOVERY OF PREJUDGMENT INTEREST NOT PRECLUDED BY ACCEPTANCE.** Lawyers should carefully draft offers of judgment to ensure they encompass all of their clients' potential liabilities. The Minnesota Supreme Court recently explored the scope of a Rule 68 offer in a contract case. The pleading in question offered "the amount of Eight Hundred Thousand Dollars (\$800,000) and that judgment may be entered in that amount, if timely accepted, within ten (10) days after service of the offer." Upon acceptance of the offer, questions arose whether amounts for attorneys' fees (recoverable pursuant to the contract) and prejudgment interest (recoverable pursuant to Minn. Stat. §549.09, subd. 1) were included in the offer, or whether the plaintiff could recover those amounts in addition to the \$800,000. As for the attorneys' fees, the Court held that the offer was intended to resolve all claims under the contract — including the attorneys' fees recoverable under it. Had there been a statutory basis for attorneys' fees, the Court would likely have ruled otherwise. Indeed, on the issue of prejudgment interest the Court noted that, because the remedy is required by statute, "[t]he failure of the Rule 68 offer to expressly include prejudgment interest in the lump sum offered means that prejudgment interest is separately recoverable against [the defendants] as a cost and disbursement in addition to the lump sum." Attorneys can avoid such situations and ensure predictability by clearly artic-

ulating which amounts are included in or excluded from their offers of judgment. *Schwickert v. Winnebago Seniors, Ltd.*, C8-02-1972, C4-02-2083 (Minn. 05/27/04). <http://www.lawlibrary.state.mn.us/archive/supct/0405/op021972-0527.htm>

— EMILY DUKE
— JAMES MAYER
Fredrikson & Byron

CRIMINAL LAW

JUDICIAL LAW

■ **EVIDENCE; CONFRONTATION CLAUSE; OUT-OF-COURT STATEMENTS; VICTIM; CHILD WITNESS; CRAWFORD.** In an assault trial against the defendant, the victim testified favorably for the appellant by recanting her former statement to police. Her tape-recorded statement was then played for the jury. The victim's six-year-old child was a witness to the assault, and her videotaped statement was shown to the jury. The statement was given to a child protection worker, and was monitored remotely by a police officer.

Held, the admission of the child's videotaped statement violated *Crawford v. Washington*, 124 S.Ct. 1354 (2004), which holds that testimonial statements may be admitted as evidence against a criminal defendant only if both the declarant is unavailable to testify and the defendant has had a prior opportunity to cross-examine the declarant. Neither of those two factors exists concerning the child's statement. The court notes that it is "testimonial" because it was given to a child protection worker, monitored by a police officer, and was made in preparation for the case against the appellant. The statement of the victim, however, does not violate *Crawford*, because the victim did testify. *State v. Antoine Edward Eugene Courtney*, A03-709, A03-791 (Minn. App. 07/06/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0407/opa030790-0706.htm>

■ **EVIDENCE; SPREIGL; DISSIMILAR CRIMES; BOTH ASSAULTS; CASE IN CHIEF NOT WEAK:** In a prosecution for assault upon a police officer, the defendant's pending charge for assault against his girlfriend was offered as *Spreigl* evidence. However, while both matters are assaults, the assault against the defendant's girlfriend is dissimilar to the assault against the police officer, and the potential for prejudice far outweighed any probative value. Moreover, the state's case against the defendant for the assault on the police officer was not weak. Hence, the only reason the prosecution could have been introducing the evidence was to show that he was a bad person. This wrongful admission of the *Spreigl* evidence entitles the appellant to a new trial. *State v. Courtney*, *supra*.

■ **EVIDENCE; OUT OF COURT STATEMENT; CONFRONTATION CLAUSE; DECLARANT TESTIFIES.** In a prosecution for attempted murder, assault, etc., the victim testified substantially differently from the statements he had made at the hospital and in an interview with police. Over the defendant's objection, the declarant's out-of-court statements to the police and to hospital personnel were admitted by the court under Rule 803 (24), using the four-step test under *Ortlepp*, 363 N.W.2d 39 (Minn. 1985). The court ultimately determined that these out-of-court statements were also admissible as substantive evidence. The court finds no confrontation clause violation because the victim testified. The court notes that the United States Supreme Court states in a footnote that "... when the declarant appears for cross-examination at trial, the confrontation clause places no constraints at all on the use of prior testimonial statements." *State v. Kevin Patrick Plantin*, A03-258 (Minn. App. 07/13/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0407/opa030258-0713.htm>

■ **EVIDENCE; FALSE STATEMENT; POLICE INTERROGATION; PREJUDICE.** At trial, the state played an audiotape of an interview between a BCA agent and the appellant. The false portion stated that both codefendants said that the appellant wanted a murder committed. During the whole time of the murder, the appellant was in custody. The entire trial was a circumstantial case, premised on the allegation that the appellant ordered "the hit" from jail. Trial counsel did not object to the false statement, either based on its falsity, prejudicial value, or hearsay nature. The Supreme Court finds that the alleged accusations of two accomplices were, taken together, compelling evidence. Given its false nature, the court finds that the admission was plain error. Combined with the insufficiency of the evidence, the murder conviction is reversed. *Salem Matthew Bernhardt v. State of Minnesota*, C8-02-748, A03-1458 (Minn. 08/05/04). <http://www.courts.state.mn.us/opinions/sc/current/opc020742-0805.htm>

■ **EVIDENCE; SPREIGL; JIG MODIFICATION; REQUEST BY DEFENSE; NOT HARMLESS ERROR.** In a prosecution for attempted second-degree murder and assault of police officers, the defendant filed notice of self defense, mistake of fact, defense of others, and defense of property. In response, the state filed a *Spreigl* notice, stating that it intended to introduce evidence of the appellant's prior conviction of obstruction of legal process. The district court ruled that the obstruction evidence was admissible to show modus operandi and absence of mistake. Defense counsel objected to CRIMJIG 2.01, asking a modification to state the specific purposes for which the evidence was admitted under 404(b). This was made orally, on the record, but not in writing. In the future, the proper procedure is for defense counsel to submit a proposed written instruction. It was not harmless error to deny the request to modify CRIMJIGS 2.01 and 3.16. The evidence was weak, and the prosecutor mentioned the *Spreigl* evidence in closing argument. Citing, *State v. DeYoung*, 672 N.W.2d 202 (Minn. App. 2003). *State v. Dennis Louis Babcock*, C9-03-131 (Minn. App. 08/03/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0408/op030131-0803.htm>

■ **SENTENCE; OUT-OF-STATE CONVICTIONS; SUSPENDED IMPOSITION OF SENTENCE; FELONY POINT UNDER GUIDELINES.** The appellant had three prior convictions from Missouri, each of which was a "suspended imposition of sentence," which Missouri law does not treat as a conviction. However, following *State v. Strom*, 430 N.W.2d 860 (Minn. App. 1988), the fact that the out-of-state system does not consider a deferred sentence to be a conviction does not disqualify the conviction from being used as a felony point in Minnesota. Guideline II.B.101 states that an offender is assigned a particular weight for every felony conviction for which a felony sentence was "stayed or

opposed” before the current sentencing. The Minnesota district court recently concluded that a Missouri suspended imposition of sentence was the equivalent of the Minnesota stay of imposition. *State v. Courtney*, *supra*.

■ **SENTENCE; JAIL CREDIT; EJJ; RED WING; EQUAL PROTECTION.** Minn. Stat. §260B.130, subd. 5 (2002) violates equal protection under the Minnesota Constitution by denying jail credit to extended jurisdiction juveniles (EJJ) for time served in juvenile facility custody. This case reverses the Court of Appeals and holds that the statute fails to satisfy the Minnesota, as opposed to federal, rational basis test because there is no reasonable connection between the actual, and not just theoretical, effect of the challenged classification and statutory goals. The classification is between EJJ juveniles versus juveniles certified as adults, who, by the adult rules of criminal procedure, are granted such credit. *State v. Francisco Garcia*, A03-483 (Minn. 07/15/04). <http://www.lawlibrary.state.mn.us/archive/supct/0407/opa030483-0715.htm>

■ **SENTENCE; BLAKELEY; ENHANCED SENTENCE; SEX OFFENDER.** Under Minn. Stat. §609.108, subd. 1 (2002), the court “shall” impose at least a double sentence if the court is imposing an executed sentence for a sex offense, the offender is a danger to public safety, and the offender needs long-term treatment beyond the presumptive term of imprisonment. Such a sentence is a “departure” from the sentencing guidelines under Minn. Stat. §609.108, subd. 5 (2002).

Although the appellant waived his right to a jury trial in the criminal charge, he did not make an explicit and knowing waiver of the right to have a jury consider the issue of sentencing enhancement, nor was he informed that the fact finder had to make such a finding. Therefore, the waiver was not knowing, intelligent, and voluntary given the U.S. Supreme Court’s recent pronouncement of *Blakeley*. Hence, the case is remanded for resentencing. *State v. Dennis L. Whitley*, A03-725 (Minn. App. 07/20/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0407/opa030725-0720.htm>

■ **SENTENCE; FELONY MURDER; CONCEALMENT OF BODY NOT AGGRAVATING FACTOR.** The appellant was charged and convicted of second-degree felony murder, accomplice after the fact, and second-degree assault. The appellant’s essential role was, at the direction of the murderer, to dispose of the victim’s body parts, following his dismemberment by the codefendants. There was no evidence that the appellant participated in the actual murder by meting out particular cruelty, or that she felt any ill will toward the victim. The Supreme Court finds that the trial court’s upward durational departure, from the presumptive sentence of 150 months to 210 months, was an abuse of discretion. Substantial and compelling circumstances did not exist to justify considering whether the appellant’s concealment of the victim’s body was an aggravating factor sufficient to support the upward departure. Unlike defendants in other cases, appellant made no effort to bargain her knowledge of the location of the body, and the appellant was not the same person who committed the underlying murder. Based on those facts, the Supreme Court cannot conclude that the appellant’s conduct constituted anything more than the typical offense of second-degree felony murder. *State v. Tina DeAnn Leja*, C9-02-863 (Minn. 07/29/04). <http://www.lawlibrary.state.mn.us/archive/supct/0407/op020863-0729.htm>

■ **JURY INSTRUCTIONS; UNANIMITY, FAILURE TO GIVE INSTRUCTION; POLLING THE JURY.** While it is clearly the better protection for a trial court to give the jury a clear instruction on the unanimous verdict requirement (CRIMJIG 3.04), the Minnesota Court of Appeals adopts the reasoning of a majority of other state jurisdictions and concludes that the unanimity requirement is satisfied if the district court polls the jury after the verdict has been reached. The court notes that a defendant’s constitutional right is to a unanimous verdict, not to the unanimity instruction. *State v. Kevin Patrick Plantin*, *supra*.

■ **JURY INSTRUCTIONS; ACCOMPLICE TESTIMONY; ERROR TO OMIT INSTRUCTION.** The state’s testifying witness had delivered stolen goods to the appellant, who was convicted of receiving stolen property, among other things. The court did not give the accomplice instruction, such as the one available in CRIMJIG 3.18. Minn. Stat. §634.04 (2002) provides that a conviction cannot be had upon the testimony of an accomplice unless it is corroborated. Here, both the appellant and the person delivering the stolen goods could have been charged with the same crime; therefore, the witness was an accomplice. It was error for the court not to give an accomplice instruction, which duty to instruct remains with the trial court regardless of whether counsel for the defendant requested the instruction. However, the error was harmless in view of the weight of the evidence. *State v. Houa V. Lee*, C8-02-2278 (Minn. 07/22/04). <http://www.lawlibrary.state.mn.us/archive/supct/0407/opc022278-0722.htm>

■ **PLEA WITHDRAWAL; IMMIGRATION CONSEQUENCES; VIENNA CONVENTION.** The respondent was a permanent resident alien and had been granted that status in October of 1992. In August of 1999, he pled guilty to one count of third-degree controlled substance crime, a felony, for marijuana possession. Respondent signed a four-page petition to enter a plea of guilty, which contained the standard language concerning immigration consequences. In December 2000, the felony conviction was reduced to a misdemeanor, pursuant to a stay of imposition. In March 2003, the respondent was arrested when he sought reentry to the United States. Immigration denied his readmission, stating that respondent had been convicted of an “aggravated felony.” The court notes that the law is unsettled with respect to the reclassification of the felony as a misdemeanor pursuant to a stay of imposition. However, the court reverses the trial court and finds that it was an abuse of discretion for the court to allow withdrawal of the guilty plea. The court reiterates that immigration is not a direct consequence of a guilty plea, and due process does not require the respondent to be informed of such consequences. The court notes that the plea petition did contain a warning of the danger of deportation. Finally, in order to raise a Vienna Convention defense, a defendant must show that the violation resulted in an actual prejudice. *State v. Miranda*, 622 N.W.2d 353 (Minn. App. 2001). The respondent made no such showing. *State v. James Byron*, A03-1166 (Minn. App. 07/13/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0407/opa031166-0713.htm>

■ **SEARCH AND SEIZURE; DOG SNIFF; WIEGAND LIMITED; STORAGE FACILITY.** Police conducted a dog sniff around the outside area of the appellant’s storage unit, the results of which were used to partially support an affidavit for a search warrant. The Court of

Appeals finds no expectation of privacy in the outside area of a storage facility where the sniff occurred. Further, the court notes that *State v. Wiegand*, 645 N.W.2d 125 (Minn. 2002) is “confined to a case where law enforcement attempts to expand the scope or duration of an investigative stop beyond the investigation of an equipment violation that was the cause for the stop. The facts before us in the instant case do not present an investigative stop, and we do not find in *Wiegand* a universal requirement that dog sniffs be limited to cases where a reasonable, articulable suspicion of criminal activity is shown.” ***State v. Andre Lishon Carter***, A03-1215 (Minn. App. 07/13/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0407/opa031215-0713.htm>

■ **SEARCH AND SEIZURE; FIREFIGHTER; INVESTIGATIVE SEARCH; HOT SPOTS; FREEZER.** A deputy sheriff was the first to arrive at the appellant’s burning home. Appellant assisted firefighters by describing the floor plan before they entered. Once the fire was extinguished, several teams of firefighters searched throughout the house for hot spots and smoldering material. One firefighter saw, in plain view, several marijuana plants growing in an upstairs bedroom closet. Another firefighter went into the basement, where he believes smoldering embers could have fallen, and opened an unplugged freezer “out of curiosity,” and found additional marijuana.

Held, the marijuana from the freezer is suppressed. Firefighters’ search of a residence for hot spots is subject to constitutional limitation: if the search is for fire investigation purposes, it is presumptively reasonable. However, the state offered no justification for the intrusion into the freezer, other than to satisfy the firefighter’s curiosity. Hence, the state failed to meet its burden to justify the warrantless search, and the marijuana is suppressed. ***State v. David Voss***, A03-1241 (Minn. App. 07/20/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0407/opa031241-0720.htm>

■ **SEARCH AND SEIZURE; AUTOMOBILE STOP; “LANE AWAY” FROM EMERGENCY VEHICLE; OFFICER MISTAKE OF LAW.** The Supreme Court reverses the Court of Appeals. A police officer, stopped on the side of the road, noted that a passing motorist did not give a buffer zone by placing a lane between his squad car and the motorist. Minn. Stat. §169.18 subd. 11 requires that motorists move “a lane away” from a stopped emergency vehicle. The Court of Appeals held that a police officer’s mistaken belief that an ambiguous, but as yet unconstrued statute applies may still be the basis for an automobile stop.

Held, Minn. Stat. §169.18 subd. 11 is not ambiguous. The phrase “a lane away” means “in the lane next to” the stopped emergency vehicle. The Supreme Court reverses the Court of Appeals and finds that decisions of the Minnesota Supreme Court and the United States Supreme Court focus not on the subjective belief of the officer, but rather on the objective basis for the belief that the defendant was engaged in illegal activity. Here, because there was no violation of the law, there was no “objective basis” for the stop, the reasonableness and good faith of the police officer’s belief notwithstanding. ***State v. Matthew Philip Anderson***, A03-290 (Minn. 07/29/04). <http://www.lawlibrary.state.mn.us/archive/supct/0407/opa030290-0729.htm>

■ **SEARCH AND SEIZURE; AUTOMOBILE STOP; PASSING ON SHOULDER; ARTICULABLE SUSPICION.** The appellant passed another vehicle, taking a left-hand turn, by driving onto the shoulder, which was paved, but which contained a break in the fog line at the intersection. The appellant had been in a right-turn lane, but did not turn right; instead, he passed the vehicle taking a left-hand turn, drove through the intersection, and crossed to the right of the fog line after he cleared the intersection.

Held, driving on the shoulder to pass a vehicle on the right violates Minn. Stat. §168.18 subd. 4 (4), even if the shoulder is paved. “Roadway” means the portion of a highway, exclusive of the sidewalk or shoulder, which is ordinarily used for vehicular traffic. “Shoulder” means that part of a highway which is contiguous to the regularly traveled portion of the highway, and may be paved. Minn. Stat. §169.01 subd. 73 (2002). Therefore, the police had a particularized and objective basis for suspecting the appellant of criminal activity. ***Ryan Lee Duncan v. Commissioner of Public Safety***, A03-1414 (Minn. App. 07/27/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0407/opa031414-0727.htm>

■ **SEARCH AND SEIZURE; MOTORCYCLE; SIGNAL MALFUNCTION; AFFIRMATIVE DEFENSE.** The appellant, driving a motorcycle, took a right turn at an intersection marked “no right turn on red.” The appellant had waited approximately ten seconds before doing so. Upon being stopped, the appellant exhibited signs of intoxication and was subsequently arrested and charged for DWI. The appellant moved at his *Rasmussen* hearing to suppress all evidence because Minn. Stat. §169.06 subd. 9 provides motorcyclists with an affirmative defense to failing to obey the instructions of a traffic-controlled device under certain circumstances, including apparent malfunction. The Court of Appeals holds, however, that this subdivision applies only to those charged with the signal violation; here, the appellant was charged with DWI. Therefore, the district court erred by concluding that the arresting officer lacked a reason to stop the appellant. Finally, the Court of Appeals holds that the burden of proof regarding this motorcyclist’s affirmative defense does not shift to the state, and may remain with the defendant because the defense does not negate an element of the offense. ***State v. Randy Ruth Strandness***, A03-1863 (Minn. App. 08/03/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0408/opa031863-0803.htm>

— FREDERIC BRUNO
Frederic Bruno & Associates

EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **EMPLOYMENT DISCRIMINATION.** The 8th Circuit Court of Appeals recently rejected a number of employment discrimination cases under Title VII of the Federal Civil Rights Act.

In ***Woods v. Perry***, 375 F.3d 671 (8th Cir. 2004), the court affirmed a dismissal of a reverse discrimination case by a man who claimed that he was passed over for a promotion in favor of a female coworker. The court rejected the claim that the employer was the “unusual” one who discriminates against the majority. The male claimant did not show that the employer’s reason for pro-

moting the female over a male, consisting of her superior leadership skills and ability, was a pretext for reverse sex discrimination.

In *Tolen v. Ashcroft*, 2004 WL 1673528 (8th Cir. 2004), the court held that an assistant U.S. attorney who was discharged for misconduct did not make a *prima facie* case of race discrimination because he failed to show that similar-situated employees who were Caucasians were treated differently for disciplinary purposes.

Sporadic racial remarks adverse to Asians did not constitute grounds for a racial discrimination claim in *Bainbridge v. Loffredo Gardens, Inc.*, 2004 WL 1737340 (8th Cir. 2004). The deprecatory comments, which were made by various members of management as well as coworkers, did not make the workplace “objectably hostile” because they were sporadic, “no more than one per month,” and were not about the claimant, his wife or their marriage or about customers, or other employees.

However, the court remanded for a determination of whether the claimant was retaliated against because he had presented sufficient “circumstantial” evidence to support a reprisal claim and he was fired six days after making a complaint of discrimination. The claimant’s “consistently” good job performance allowed him to have the “benefit of the inference” of possible retaliation, which warrants a trial. A dissenting judge would have reversed on the discrimination claim, holding that the “repeated, seemingly habitual” use of anti-Asian and other slurs in the presence of the employee created a hostile work environment.

The Minnesota Supreme Court ruled that front pay may be trebled under the Minnesota Human Rights Act. In *Ray v. Miller Meester Advertising, Inc.*, 2004 WL 1688200 (Minn. 2004), the Court held that under Minn. Stat. §363.071, Subd. 2, front pay constitutes a component of “actual damages,” which are subject to trebling under the statute.

■ **WORKERS COMPENSATION.** An employee, who sued an employer in tort after coemployees administered a prank “birthday” spanking to him, may be entitled to pursue the claim, despite the exclusivity of the workers compensation statute. In *Meintsma v. Loram Maintenance of Way, Inc.*, 2004 WL 1688183 (Minn. 2004), the Minnesota Supreme Court held that neither the assault nor intentional tort exceptions to the exclusivity provision permit the tort claim against the employer. However, there are fact disputes regarding the coemployee exception, which requires remand to determine the intent underlying the prankish episode.

■ **MANAGEMENT-LABOR ISSUES.** The Minnesota Court of Appeals affirmed a verdict for wrongful termination against an employer in *Johnson v. McQuay International*, 2004 WL 1774699 (Minn. App. 2004). The employee’s union declined to take his grievance to arbitration, which precipitated his wrongful termination claim against the employer, which claimed that the union breached its duty of fair representation. The trial court ruled that the employee had been wrongfully terminated and the union fulfilled its initial duty to grieve, but failed to pursue a “new” grievance based upon the employee’s expectation that he could be reinstated only if he returned to work on short notice. The appellate court affirmed the lower court’s determination of lost wages and benefits, rejecting the employee’s claim that the employee failed to show that the union acted arbitrarily or in bad faith in not filing a grievance on the employee’s behalf.

The National Labor Relations Board, overruling a prior determination, recently held, by a 3-2 vote, that employees, who work in a nonunionized setting do not have a right to have a coworker present and investigators for an interview that may lead to disciplinary action. In *IBM Corp.*, 341 NLRB No. 148 (2004), the Board refused to extend the rights accorded union employees in *Weingarten*, 2002 NLRB 446 (1917) to employees who are not members of labor unions.

■ **UNEMPLOYMENT COMPENSATION.** An employee who had a substantial history of disciplinary actions for poor attendance was entitled to unemployment compensation benefits in *Moren v. Northland Process Piping, Inc.*, 2004 WL 1661858 (Minn. App. 2004) (unpublished). The two absences that predicated the employees’ discharge did not constitute disqualifying “misconduct” because one was for a properly noticed illness and another was for a previously approved absence to attend a court hearing.

An employee who continued, despite repeated warnings, to socialize with a front desk receptionist, was disqualified from receiving unemployment compensation benefits in *Bucci v. Tyco Plastics, LP*, 2004 WL 1557928 (Minn. App. 2004) (unpublished). The appellate court rejected the employee’s claim that her job required her to talk to the receptionist and that she was discharged because she was disliked by her supervisor, who treated her unfairly.

An employee who quit in anticipation of possible disciplinary action did not have “good” reason to resign and, therefore, was disqualified from receiving unemployment compensation benefits in *Wolfe v. Healtheast St. John’s Hospital*, 2004 WL 1557911 (Minn. App. 2004) (unpublished). The appellate court affirmed the determination by the Department of Employment and Economic Development that quitting in anticipation of disciplinary action did not constitute sufficient grounds to warrant receipt of unemployment benefits.

LEGISLATION

Employees who win court awards or settlements in discrimination cases may be entitled to favorable treatment for income tax purposes, according to a bill pending in Congress. The measure, S. 1637, known formally as the “JOBS” Act (“Jump-Start Our Business Strength”) was approved in May by the Senate, but has not been acted upon by the House of Representatives.

Federal appellate courts have issued conflicting opinions on how to interpret the taxability of settlements or court awards for discrimination. Some have ruled that the total amount of the award or settlement, including attorney’s fees, are taxable, even though the attorney’s fees go to the lawyer, rather than the claimants.

The U.S. Supreme Court will review two of those rulings this term in *Banaitis v. Commissioner*, 340 F.3d 1074 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 1713 (2004), and *Banks v. Commissioner*, 345 F.3d 373 (6th Cir. 2003) *cert. granted*, 124 S.Ct. 1712 (2004).

The proposed legislation would create a deduction for legal fees and court costs for verdicts and settlements in certain discrimination cases.

— MARSHALL H. TANICK
Mansfield, Tanick & Cohen, PA

ENVIRONMENTAL LAW

JUDICIAL LAW

■ **COMMON LAW; RYLANDS CAUSE OF ACTION FOR CONTAMINATION UNAVAILABLE TO SUBSEQUENT LANDOWNER.** The 8th Circuit Court of Appeals determined, among other things, that Minnesota common law does not support of claim of strict liability by a subsequent landowner for environmental contamination caused by a previous owner at a site. Westinghouse Electric Corporation (“Westinghouse”), a predecessor in interest to defendant-appellant Viacom, Inc. (“Viacom”), owned property at 2303 Kennedy Street in Minneapolis from the 1920s until 1980. Among other things, Westinghouse used the facilities on the property to repair transformers whose insulation contained polychlorinated biphenyls (“PCBs”). Westinghouse also used chlorobenzenes as a solvent to thin the PCBs during the repair process. Although Westinghouse had reason to believe that considerable PCB contamination existed on its property, it sold the site to a development company in 1980 without conducting any investigation or cleanup of the site and without disclosing the nature of its work there. A partner in plaintiff-appellee Kennedy Building Associates (“Kennedy”) purchased the site in 1982 without knowledge of the environmental contamination at the site and transferred it to Kennedy. Kennedy attempted to sell the property back to the original developer in 1997. The latter’s environmental consultant discovered the PCB contamination, at which point the developer withdrew its offer. Kennedy entered the site in the MPCA’s Voluntary Investigation and Cleanup (“VIC”) Program. The MPCA eventually placed the site on its permanent list of priorities in September 2000.

Kennedy filed suit in state court in 1999 seeking relief under the Minnesota Environmental Response and Liability Act (“MERLA”) and the Minnesota Environmental Rights Act (“MERA”) and alleging common law claims of nuisance, negligence and strict liability. Viacom removed the case to federal court. Kennedy responded by amending its complaint to add claims for federal Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) relief and punitive damages. Viacom counterclaimed that Kennedy was liable under CERCLA and MERLA and sought injunctive relief against Kennedy under MERA.

The jury found in favor of Viacom on the common law negligence and nuisance claims but awarded Kennedy \$225,000 in actual damages and \$5 million in punitive damages on the strict liability claim. The district court decided the equitable CERCLA, MERLA and MERA claims. It found that Kennedy proved its CERCLA and MERLA claims against Viacom but that Viacom did not do the same with regard to its CERCLA and MERLA claims against Kennedy. The district court awarded Kennedy response costs of \$106,393.23 for costs already incurred and declared Viacom liable for future response costs. It also found in Kennedy’s favor on its MERA claim and enjoined Viacom to remediate the site’s soil, ground water and building interior so that the deed restriction the MPCA required Kennedy to place on the property’s title could be removed. The district court also adopted a magistrate judge’s recommendation that Kennedy’s post-trial motions regarding prejudgment interest and the award of attorneys’ fees, expert witness fees, and costs be granted. The district court awarded Kennedy \$41,677.89 in prejudgment interest on the CERCLA response costs and the actual damages award and an award of \$1,113,915 in attorneys’ fees, expert witnesses’ fees, and costs. Viacom appealed everything except the CERCLA and MERLA relief.

The 8th Circuit first considered whether Minnesota common law would hold a landowner strictly liable to its successor in interest for environmental contamination of land, an issue not previously addressed by the Minnesota Supreme Court. Minnesota long ago adopted the principle first espoused in *Rylands v. Fletcher*, LR 3 H.L. 330 (1868), which holds a landowner strictly liable for damage caused when something on his or her property not naturally there escapes to neighboring property. The 8th Circuit held that while Minnesota courts had found *Rylands* liability in other cases involving pollution and ground water contamination, such liability did not apply in this case. The reason was that Kennedy, the injured party, was not a neighboring property owner but rather a subsequent owner of the contaminated property itself. The Court of Appeals reversed the district court’s entry of judgment for Kennedy on the jury’s verdict of strict liability and accompanying punitive damages.

The Court of Appeals next rejected Viacom’s argument that the district court could not grant Kennedy injunctive relief under MERA. Viacom argued that such relief was precluded under Minn. Stat. §116B.03, subd. 1, because Viacom had entered into a consent decree with the MPCA prior to the time of trial under which Viacom pledged to investigate the site and submit to the MPCA a remediation plan. The Court of Appeals found no conflict between the consent decree and the ordered relief, however, as the former only committed Viacom to general action into the future. Any consideration of conflicts between the two would be mere speculation in which the court refused to engage. The court also noted that relief to Kennedy separate from the consent decree was appropriate, as Kennedy would have no ability to enforce the terms of the consent decree if Viacom reneged on its commitments under the decree.

Nevertheless, the Court of Appeals remanded the injunction to the district court for a more precise definition of the specific acts required of Viacom. It noted that injunctive relief under MERA was limited merely to requiring remediation of past pollution to the extent past deposits pose a threat of continuing contamination of natural resources, including soil and water. The district court ordered remediation to the point that the deed restriction could be removed from the property. The Court of Appeals believed such relief went beyond remediation designed merely to prevent ongoing releases of PCBs and chlorobenzenes into soil and ground water, and, as such, ordered the district court to redraw the injunction to fit the relief available under MERA.

Viacom next challenged the district court’s award of attorneys’ fees, expert witness fees and costs under MERLA to Kennedy on the grounds that part of that award included noncompensable costs associated with claims other than the MERLA and CERCLA claims. The 8th Circuit agreed that Kennedy’s MERA claim sought only injunctive relief; therefore, any time spent on that claim was not compensable. It remanded the fee award to the district court for further reduction, to the extent possible, for the amount of fees attributable to the MERA claim.

Finally, the Court of Appeals rejected Viacom's argument that its pretrial settlement proposal halted the accrual of prejudgment interest under Minn. Stat. §549.09, subd. 1(b). It agreed with the magistrate judge's conclusion that Viacom's "settlement offer" lacked the necessary precision to warrant statutory protection and affirmed the award of interest on the CERCLA and MERLA claims. **Kennedy Building Associates v. Viacom, Inc.**, 375 F.3d 731 (8th Cir. 2004), 34 Env'tl. L. Rep. 20,050.

■ **CLEAN WATER ACT; DISMISSAL OF CITIZEN SUIT.** The United States District Court for the District of Minnesota dismissed a citizen suit brought under the Clean Water Act ("CWA"), 33 U.S.C. §1365(a) against the city of South St. Paul. The plaintiff, River Ravine Rescue, Inc., claimed the city of South St. Paul violated the CWA when it failed to obtain a National Pollutant Discharge Elimination System ("NPDES") permit before it discharged storm water and pollutants to surface waters. Specifically, River Ravine Rescue charged that the city failed to obtain a NPDES permit to control storm water discharges from two separate development projects that were part of a "common plan" and that together would disturb over five acres. The city obtained a permit from the MPCA to cover both projects after River Ravine Rescue commenced its lawsuit. The parties subsequently filed cross-motions for summary judgment.

The court first found that River Ravine Rescue's declaratory and injunctive relief and civil penalty claims were moot. The city had obtained the necessary permit and, by doing so, had met its burden of proving that the alleged violation (discharging storm water and pollutants without a permit) was not reasonably expected to recur. The court refused to entertain River Ravine Rescue's argument that the city's permit, which was issued after certain discharges were alleged to have occurred, was invalid. The court held that challenges to permits issued by a state agency must be brought in state court. Finally, the court rejected River Ravine Rescue's request that it be awarded its attorneys fees and costs. River Ravine Rescue argued that its lawsuit compelled the city to end its alleged violation of the CWA. The court found that this fact, even if true, was insufficient to deem River Ravine Rescue a "prevailing party" under the CWA's citizen suit provision, 33 U.S.C. §1365(d). The court granted the city's summary judgment motion, denied River Ravine Rescue's summary judgment motion, and dismissed the latter's complaint. **River Ravine Rescue, Inc., v. City of South St. Paul, Minnesota**, 2004 WL 1559448 (D. Minn. 07/09/04).

— BILL HEFNER
Greene Espel

FEDERAL PRACTICE

JUDICIAL LAW

■ **EVIDENCE SPOILIATION; OPPORTUNITY TO REBUT INFERENCE; BAD FAITH REQUIREMENT.** In March, 2004, this column discussed the 8th Circuit's decision in *Stevenson v. Union Pacific Railroad Co.*, 354 F.3d 739 (8th Cir. 2004), which certainly clarified (and arguably altered) the standards governing the imposition of adverse inferences as a sanction for the spoliation of evidence. A second case involving Union Pacific has presented the 8th Circuit with an opportunity to expand on its ruling in *Stevenson*.

In the second case, the plaintiff was seriously injured when a train he was working next to moved forward without warning. Union Pacific was aware of the incident at the time it occurred, but allowed the relevant tape recordings of communications between the train crew and dispatchers to be recycled after 90 days in accordance with its regular retention policy, some months before plaintiff's case was filed. The trial court, ruling before *Stevenson* was decided, found that Union Pacific "did not intentionally destroy the tape," but that it had acted in "bad faith" in allowing the tape to be destroyed, because it was "on notice" that litigation was likely to ensue. The trial court gave the jury an adverse inference instruction, plaintiff was awarded \$8 million by the jury, and Union Pacific appealed.

The 8th Circuit held that the district court's "bad faith" finding was insufficient to warrant an adverse inference in light of its determination that the tape had not been destroyed "intentionally." The court also found no evidence that Union Pacific had selectively preserved evidence favorable to its case (as in *Stevenson*). Accordingly, the 8th Circuit held that the district court had erred in giving the adverse inference instruction, and remanded the case for a new trial.

This decision serves to reinforce the rule announced in *Stevenson*, and it is evident that an adverse inference instruction is no longer permitted within the 8th Circuit based upon a finding of negligence or even bad faith. **Morris v. Union Pacific Railroad**, 373 F.3d 896 (8th Cir. 2004).

■ **SANCTIONS IMPOSED; FED. R. CIV. P. 26(G) AND 37(B); 28 U.S.C. §1927; INHERENT POWER.** In a scathing and lengthy opinion, Magistrate Judge Nelson imposed more than \$64,000 in sanctions against one defendant and its present counsel for a series of improper acts.

Magistrate Judge Nelson's opinion recounts a litany of bad acts by defendant Pinnacle and its counsel, summarized as a "history of incidents of abuse, incompetence, defiance, and misconduct," including a "lack of candor ... tantamount to bad faith" relating to Pinnacle's motion to dismiss for lack of personal jurisdiction, a "failure to obey" an order for the production of relevant discovery, "bad faith harassment" of a deposition witness, and a "failure to conduct a reasonable inquiry" to obtain documents responsive to discovery requests.

Magistrate Judge Nelson imposed separate sanctions of \$4,492.70 solely against Pinnacle, representing 20 percent of the plaintiff's costs relating to the personal jurisdiction motion, \$10,137.47, representing 10 percent of plaintiff's discovery-related expenses, an additional \$50,000 in motion and hearing-related expenses, and specified that Pinnacle was to pay 75 percent and its present counsel 25 percent of the latter two amounts. In addition, Pinnacle was ordered to reimburse the plaintiff for all attorney fees and costs relating to redeposing

certain witnesses. Finally, Magistrate Judge Nelson ordered Pinnacle's counsel to write a letter of apology to the harassed witness and the plaintiff. **Rottlund Co. v. Pinnacle Corp.**, 2004 WL 1494579 (D. Minn. 2004).

■ **OTHER NOTEWORTHY DECISIONS.** The 8th Circuit found that an award of \$5 million in punitive damages in a wrongful death case was excessive where the jury had awarded only \$500,000 in compensatory damages, and offered the plaintiff the choice of a new trial or a remittitur to \$2 million in punitive damages. **Stogsdill v. Healthmark Partners, L.L.C.**, 2004 WL 1636426 (8th Cir. 2004).

Securities fraud plaintiffs had mixed results over the last several months on motions to dismiss under the PSLRA, with Judges Rosenbaum and Kyle granting motions to dismiss in two cases, and Judge Kyle denying a motion to dismiss in a third case. **In Re Nash Finch Co. Sec. Lit.**, 2004 WL 1462458 (D. Minn. 2004); **Vohs v. Miller**, 2004 WL 1490177 (D. Minn. 2004); **In Re Stellent, Inc. Sec. Lit.**, 2004 WL 16465000. Minn. 2004).

Judges Tunheim and Frank both found that they lacked subject matter jurisdiction over motions related to attempts to enforce settlement agreements. **Snap Edge Corp. v. Avon Plastics, Inc.**, 2004 WL 1630775 (D. Minn. 07/16/04); **United States v. South Half of the Southwest Quarter of Section 21, Township 45, Range 25, Aitkin County**, 2004 WL 1465826 (D. Minn. 06/28/04).

Judge Tunheim denied the defendant's motion for permission to file an interlocutory appeal under 28 U.S.C. §1292(b), finding that a denial of summary judgment on the basis that material facts remained in dispute "can hardly be considered a controlling question of law on which there is a substantial difference of opinion." **In Re St. Jude Medical, Inc.**, 2004 WL 1630786 (D. Minn. 07/15/04).

Judge Magnuson granted plaintiff's Fed. R. Civ. P. 9(b) motion (which he described as a request for a "more definite statement"), finding that the counterclaim did not properly set forth the "who, what, when, where and how" behind the alleged fraud. **D.B. Indy LLC v. Talisman Brookdale LLC**, 2004 WL 1630976 (D. Minn. 07/20/04).

— JOSH JACOBSON
Law Office of Josh Jacobson PA

INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **PATENT CLAIM CONSTRUCTION.** The Court of Appeals for the Federal Circuit will finally address unsettled issues of patent claim construction. The Federal Circuit will soon hear this case *en banc* to determine the correct method for construing disputed claim terms. In particular, the Federal Circuit will try to settle the disputes over the proper role of dictionaries versus the patent's written description, the role of prosecution history and expert testimony in claim construction, and the extent to which the court should defer to trial courts' interpretations of disputed claim terms. Stay tuned. **Phillips v. AWH Corp.**, Nos. 03-1269, 03-1286, 2004 U.S. App. LEXIS 15065 (Fed. Cir. 07/21/04).

■ **TRADE NAME; LANHAM ACT; PERSONAL V. CORPORATE INTEREST.** A company president does not have automatic rights to market a product under the corporate name. The Court of Appeals for the 8th Circuit affirmed Judge Doty's order enjoining Dr. Nora from further publication, sale, or promotion of his book of poetry under the Mid-List Press (MLP) name. Dr. Nora was the company president when he began selling his book under the MLP name. The appellate court rejected Dr. Nora's argument that the MLP trade name was his personal property, holding that he could not have a personal interest in the trade name because it only existed insofar as it is associated with the corporation. When he circumvented the corporation's established procedures for publication, Dr. Nora was acting in his own interest and not on behalf of the corporation. Dr. Nora's actions violated the Lanham Act by falsely designating the book's origin. The court also held that evidence of actual consumer confusion is not a necessary element of a false-designation-of-origin claim. **Mid-List Press, v. Nora**, No. 03-3229, 2004 U.S. App. LEXIS 14159 (8th Cir. 07/09/04).

■ **PATENTS; INSTRUCTIONS AND DIRECTIVES; NO PHYSICAL NEXUS TO U.S.** Instructions and directives are not infringement when the subject matter of those instructions never enters the United States. In a matter of first impression, the Court of Appeals for the Federal Circuit held that components of a patented invention that are manufactured outside U.S. borders and never physically shipped to or from the United States do not infringe a U.S. patent even when the components are designed and invoiced in the United States. Pellegrini argued that Analog induced infringement of his patent because the components of the accused device were designed in the United States and company executives in the United States made development and production decisions. It was undisputed, however, that Analog did not make, use, sell, or offer for sale the components in or from the U.S. "[S]upply[ing] or caus[ing] to be supplied" in §271(f)(1) clearly refers to physical supply of components, not simply to the supply of instructions or corporate oversight. In other words, although Analog may be giving instructions from the United States that cause the components of the patented invention to be supplied, it is undisputed that those components are not being supplied in or from the United States." **Pellegrini v. Analog Devices, Inc.**, No. 04-1054, 2004 U.S. App. LEXIS 14017 (Fed. Cir. 07/08/04).

— TONY ZEULI
— KELLI DEASY
Merchant & Gould

JUVENILE LAW

JUDICIAL LAW

■ **CHILD'S BEST INTEREST; NAME CHANGE.** In an unpublished decision, the Minnesota Court of Appeals held that where a child has had her father's surname for 14 years, but has voluntarily chosen to use her mother's surname for the last five of those years, and where the district court found that the child was bright and articulate, had not been coerced, and would likely change her

name in a few years regardless of the court's decision, where the child and her father have had little relationship over the years, and the district court found that the name change would have little effect on that relationship with her father, the Court of Appeals concluded that the district court did not abuse its discretion in determining that the child's best interest supported the granting of the name change. *In the matter of the Application of Mary Susan Gilman on behalf of Kallie Rose Queen*, A03-2029 (Minn. App. 07/27/04) (unpublished). <http://www.lawlibrary.state.mn.us/archive/ctapun/0407/opa032029-0727.htm>

■ **ADOPTION SUBSIDIES; NO SET OFF AGAINST CHILD SUPPORT; NEW HAMPSHIRE.** In an important case addressing the interplay of adoption subsidies with child support, the New Hampshire Supreme Court recently affirmed the appellate court's ruling that an adoption subsidy would not count as a set off against the noncustodial parent's child support obligation and found that there was not sufficient basis in the existence of the subsidy to allow for deviation from the state child support guidelines. The court reasoned that because adoption subsidies qualify as gross income, the petitioner was not entitled to a credit for the payment so as to reduce his child support obligation. Adoption assistance payments do not, in and of themselves, justify deviation from the child support guidelines. *In re Hennessey-Martin*, 2003-531 (N.H. 06/30/04)

■ **ADOPTION BY HOMOSEXUALS; FLORIDA.** The 11th Circuit Court of Appeals, by a 6 to 6 decision, declined to reconsider the January decision in the *Lofton* case that upheld Florida's prohibition on adoption by homosexuals. Florida has the only such blanket ban in the country. A majority vote of the court's judges was required to grant a rehearing of the case. The American Civil Liberties Union, which filed the motion requesting the reconsideration, said it was disappointed by the July decision and will explore further legal options. *Lofton v. Sec. Dept. of Children and Family*, 01-16723 (11th Cir. 07/21/04).

■ **ADOPTION; BEST INTERESTS; JOINT CUSTODY.** The Colorado Court of Appeals on July 1, 2004, unanimously affirmed a ruling by a district court judge granting a woman joint parental custody of the adopted daughter of her former lesbian partner. The two women had decided to adopt the child as a couple, although only one of them legally filed the adoption papers. The two women raised the child together until one of the women converted to Christianity and renounced homosexuality. After the couple split up, the adoptive parent claimed sole parental rights. The court found that the non-adoptive woman had become a "psychological parent" to the child, and that it was in the child's best interest to not break that bond. *In the Interest of E.L.M.C., a Child*, No. 03CA1121 (Co. Ct. App., 07/01/04).

LEGISLATION

On July 21, 2004, Senators Hillary Rodham Clinton (D-New York) and Olympia Snow (R-Maine) introduced the "Kinship and Caregiver Support Act." The bill attempts to address the financial, logistical, and emotional challenges of the more than 6 million children being raised by grandparents or other relatives other than their parents. Specifically, the bill calls for three-year grants to state agencies, agencies in metropolitan areas, and others in tribal areas to establish "Kinship Navigator Programs." Such programs are intended to connect kinship caregivers with information about, and access to, available services and to foster partnerships between agencies. The bill also requires states to notify relatives when children enter the foster care system, and creates a subsidized guardianship option with the Federal Foster Care System Title IV-E Funds. *Evan B. Donaldson Adoption Institute Newsletter*, Tuesday, August 3, 2004.

The Minnesota Legislature amended **Minn. Stat. §256.01** by adding a new subdivision 14(a) that allows the Department of Human Services to conduct a demonstration program under a Federal Title IV-E waiver to show the impact of a single benefit level on the rate of permanency for children in long-term foster care through transfer of permanent legal custody or adoption. The agency is authorized to waive enforcement of related statutory program requirements, rules and standards in one or more counties for the purpose of this demonstration. The demonstration must be cost-neutral to the state. DHS may accept and administer county funds and transfer state and federal funds among the affected programs as necessary to conduct the demonstration. This amendment to the statute became effective August 1, 2004.

Minn. Stat. §260C.212, subd. 5 was amended to provide that a relative's decision not to be a placement resource at the beginning of the case will no longer affect the relative being considered for placement of the child later. It also adds language stating that the relative search shall include both maternal relatives of the child and paternal relatives, if paternity is adjudicated. DHS is required to develop a best practices guide and specialized staff training to assist the responsible social services agency in performing and complying with relative search requirements. This statute also became effective August 1, 2004.

Minn. Stat. §260C.007, subd. 18 was amended to delete the current definition of "foster care" and replace it with the federal definition, which states that foster care means 24-hour substitute care for children placed away from their parents or guardian and for whom a responsible social services agency has placement and care responsibility. The definition also includes a list of the types of placements that are covered and those that are not. This amendment became effective August 1, 2004.

Minn. Stat. §260C.201, subd. 11, was amended to clarify that time spent by a child under the protective supervision of the responsible social services agency in the home of a noncustodial parent pursuant to an order counts towards the requirement of holding a permanency hearing not longer than 12 months after the child is placed in foster care or the care of a noncustodial parent. This became effective August 1, 2004.

Minn. Stat. §626.556, subd. 10, was amended to require the agency assessing or investigating a child maltreatment report to inform the alleged offender of the complaints or allegations made against the individual in a manner consistent with laws protecting the rights of the reporter. This change was made pursuant to the recommendations from a federal audit and became effective May 30, 2004.

— GARY A. DEBELE
Walling, Berg & Debele, PA

REAL PROPERTY

JUDICIAL LAW

■ **MARKETABLE TITLE ACT.** On April 1, 1898, grantors conveyed land to a railroad company to be used for right of way and railway purposes. Between 1985 and 1987, the railroad company discontinued service across the property and abandoned its railroad line, thereby removing all tracks, bridges and ties from the land. The DNR purchased the land from the railroad company and received a quit claim deed dated September 13, 1991. Since December 1991, the DNR has used the land for a public, recreational trail known as the Paul Bunyan State Trail. In 1998, two adjacent landowners blockaded the trail where it crossed their properties. In February 2002, the state of Minnesota through the DNR commenced this quiet title action to determine the ownership of the land. The district court granted the DNR's motion for summary judgment concluding that the DNR owns the land in fee simple. The Court of Appeals reversed; holding that the 1898 deed conveyed an easement. Agreeing with the district court, the Supreme Court concluded that the DNR owns the land in fee simple absolute. First, the Court established that grantors conveyed a fee simple determinable interest in the land, not an easement. This fee interest in real property is subject to the limitation in which the land "reverts to the grantor upon the occurrence of a specified event." In construing the deed, the Court determined that its granting language ("hereby grant, bargain, sell and convey unto the said company") evidences the grantors' intent to convey an ownership interest rather than the mere use of the land. The deed also contains a *habendum* clause stating that the conveyance "shall continue in force [, so] long as" the land is used for a railroad right of way, which is typical of a determinable fee conveyance. Furthermore, in the deed grantors expressly granted an easement to the railroad company to erect snow fences along the railway, thus indicating that grantors understood the distinction between the conveyance of a fee simple and an easement. Lastly, the grantors released their dower rights, which was customary upon the conveyance of a fee interest, not the grant of an easement. The Court further determined that the Marketable Title Act, Minn. Stat. §541.023, extinguished any possibility of reverter in the 1898 deed; therefore the DNR owns the land in fee simple absolute as a matter of law. The Court reasoned that a fee simple determinable estate is a recognized source of title under the Act and it had been of record for at least 40 years. In addition, there is no record that a notice of claim based on the possibility of reverter has been filed of record. ***State of Minn. through its Dept. of Natural Res. vs. Hess, et al.*** C4-02-2049 (Minn. 07/29/04). <http://www.lawlibrary.state.mn.us/archive/supct/0407/op022049-0729.htm>

■ **REAL ESTATE LISTING AGREEMENTS.** In July 1997, broker entered into an agreement with a marketing company in which broker agreed to sell condominium units owned by the developer. The contract identified the real estate, described the responsibilities of broker as a "sales person" and set forth the commissions to be paid to broker. The contract did not contain an expiration date. The development consisted of four phases and broker sold units in phases one and two between 1997 and 2000. Broker began to sell units for phase three in September 2000; however, in February 2001, the marketing company terminated broker's services. The marketing company did not pay any commissions to broker in connection with the 38 purchase or reservation agreements broker claims he secured prior to his termination, so broker commenced this lawsuit. Affirming the district court decision, the Court of Appeals ruled that the contract was valid because it complied with essential requirements of a listing agreement under Minn. Stat. §82.195; nevertheless it was terminable at will and broker was paid all commissions owed to him. The Supreme Court agreed that written listing agreements need only substantially comply with the provisions of Minn. Stat. §82.195; as a result, this contract is valid and enforceable. Moreover, because both parties substantially performed pursuant to the contract, they satisfied the statute of frauds. Even though the contract lacked a termination date, rendering it terminable at will, the Supreme Court reversed the Court of Appeals decision that broker was not due commissions related to the sales broker claims he secured prior to his termination but that closed after his termination. The Court remanded the issue of whether broker earned certain commissions pursuant to the common law procuring cause remedy, since the contract did not contain an override clause. ***Rosenberg d/b/a Shelter Consultants vs. Heritage Renovations, LLC and Heritage Marketing, LLC***, C7-03-94 (Minn. 07/29/04). <http://www.lawlibrary.state.mn.us/archive/supct/0407/op030094-0729.htm>

■ **MECHANICS' LIEN.** Contractor built and installed custom-made cabinets in homeowners' house, completing the work on January 25, 2002. Homeowners did not pay the full contract price to contractor, so on Friday, May 24, 2004, contractor mailed a mechanics' lien claim statement to the Dakota County Recorder for recording and sent a copy of the statement by certified mail to homeowners. The county recorder recorded the statement on May 28, 2002, however homeowners did not receive the mechanic's lien statement until May 30, 2002. Pursuant to Minn. Stat. §514.08, subd. 1, a claimant 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 right terminates. Service may be done personally or sent by certified mail. The district court granted homeowners' motion for partial summary judgment finding that pursuant to the mechanics' lien statute, service by certified mail is effective upon receipt, thus contractor's mechanics' lien was untimely. The Court of Appeals affirmed. Reversing the Court of Appeals decision, the Supreme Court held that service of a mechanics' lien claim statement by certified mail pursuant to Minn. Stat. §514.08, subd. 1 is effective upon mailing, not delivery. Therefore, contractor effectively served the mechanics' lien claim statement upon homeowners within the statutory 120-day period. ***Eischen Cabinet Company v. Hildebrandt, et al.*** A03-358 (Minn. 07/29/04). <http://www.lawlibrary.state.mn.us/archive/supct/0407/opa030358-0729.htm>

— MELISSA BAER
Moss & Barnett

TAX

JUDICIAL LAW

■ **REAL PROPERTY; VALUATION.** The Minnesota Tax Court increased the valuation of a meat processing plant for the assessed years 2002 and 2003. The plant was assessed in 2002 at approximately \$790,000 and in 2003 at \$1,133,000. The appraisals submitted by the

county placed an estimated market value of \$1,380,000 for 2002 and \$1,750,000 for 2003. The taxpayer's appraisal pegged the fair market value at \$650,000 for both years. The court found that the fair market value of the property was \$1,450,000 in 2002 and \$1,750,000 for 2003. The values were increased based on the credible testimony and appraisals of the county and were supported by a sales comparison method and a cost of replacement approach. **SLC TB Acquisition LLC, v. County of Murray**, C2-03-121 & C4-03-248, 2004 WL 1459339 (Minn. T. Ct. 06/15/04).

■ **REAL PROPERTY; DISMISSAL FOR FAILURE TO FOLLOW "60 DAY RULE."** The Minnesota Tax Court granted the county's motion to dismiss for failure to comply with the "60 Day Rule" in Minn. Stat. §278.05(6)(a). The Tax Court rejected the taxpayer's argument that financial statements were not available within the 60 days after filing the Notice of Appeal and would therefore excuse the defect. **Nicollet Restoration, Inc. v. The County of Ramsey**, C5-02-11628 (Minn. T. Ct. 07/08/04).

■ **PROCEDURE; WHO CAN REPRESENT A CORPORATION IN TAX CASE?** A complaint signed by a nonlawyer on behalf of a corporation may be amended to add an attorney's signature when the corporation acts in good faith, said the Minnesota Court of Appeals. Good faith is shown by the factors that the corporation acts in initially filing the complaint without knowledge that the omission of an attorney's signature was improper, the corporation diligently corrects the mistake by obtaining counsel, the nonlawyer's participation in the legal proceeding was minimal, and the complaint as filed duly notifies the adverse party of the corporation's claims. The lack of an attorney's signature was curable and a nonjurisdictional defect that related back to the original pleading. **Save Our Creeks v. City of Brooklyn Park**, 682 N.W.2d 639 (Minn. 2004),

■ **PROCEDURE: COST AND DISBURSEMENTS IN PROPERTY TAX CLAIM.** The Minnesota Tax Court granted cost and disbursements submitted by the taxpayer for filing fees, postage, trial depositions, witness fees, filing fees, service of process fees and copy costs. The Tax Court did not allow reimbursement for appraisal services. **DDD Motel Corporation v. County of Nicollet**, CX-02-88, 2004 WL 1461251 (Minn. T. Ct. 06/24/04),

■ **INCOME TAX: REFUND CLAIM BARRED BY STATUTE OF LIMITATIONS:** The Minnesota Tax Court held that the taxpayer's claim for refund based on filing an income tax return for year 1997 on May 22, 2003, was barred under Minn. Stat. §289A.40, Subd. 1 (1997). The taxpayer was 15 months late in so doing. The statute provides for a claim for refund to be timely it must be filed within 3.5 years from the date prescribed for filing the return or one year from the date of a return made by the commissioner, whichever period expires later. The Tax Court did not have the power to grant equitable relief to waive the statutory deadline. **Christopher Michael Faust v. Commissioner of Revenue**, No. 7630-R (Minn. T. Ct. 07/16/04).

■ **SALES TAX: CAPITAL EQUIPMENT — SERVICE BUSINESS.** Pursuant to *Sprint Spectrum, LP v. Commissioner of Revenue*, 676 N.W.2d 656 (Minn. 2004), the Minnesota Tax Court reversed its prior decision and granted sales and use refunds for capital equipment used for manufacturing tangible personal property to be sold ultimately at retail. **XO Communications, Inc. v. Commissioner**, 7430-R and 7442-R, 2004 WL 1713827 (07/06/04).

■ **TAX PROTESTER'S ARGUMENTS REJECTED.** The Minnesota Court of Appeals affirmed the district court in holding that the taxpayers' claims of injunctive relief and violation of Minnesota tax statutes on wrongful collection were rejected. Taxpayers had income but did not file returns so the DOR commissioner filed returns. When the taxpayers did not appeal, the DOR filed a lien and proceeded to lien and collection and the taxpayers paid. The taxpayers then filed suit in the Ramsey County District Court claiming injunctive relief, that the DOR's actions constituted conversion and intentional interference with contract, and were a violation of Minn. Stat. §270.69. Taxpayers' main contention was that they had federal or U.S.-created corporations and they had a valid security interest in the stock or assets, and therefore were not liable for the levy. The claim for injunctive relief was dismissed as not briefed on appeal and waived. The claims of DOR's acts of conversion and intentional interference with contract were at odds with the unambiguous language of the Minnesota Tort Claim Act in Minn. Stat. §3.736(3)(c), which prohibited such an action, and therefore was barred. The assertion of a violation of Minn. Stat. §270.69 was also rejected since that provision did not provide for a civil action based on a violation of the statute. Any violation by the officials of the DOR on collection activities were provided for in Minn. Stat. §270.70(12). Lastly, the district court's dismissal and granting of summary judgment to the DOR was sustained since taxpayers' claims of a security interest in U.S. corporations were speculative and no concrete evidence was presented. **Jacques Michael Strohbeen and Guy Michael Strohbeen v. The State of Minnesota**, A03-1056, 2004 WL 1191778 (Minn. App. 06/01/04),

■ **INCOME TAX: COMMISSIONER'S DOMICILE RULE.** The Minnesota Court of Appeals held that Minnesota's statutory and regulatory provisions used to determine the domicile of a taxpayer, who was convicted of filing fraudulent Minnesota personal income tax returns, tax evasion, and failure to pay motor vehicle sales taxes, were not unconstitutionally vague. A reasonable person in the taxpayer's position would have adequate notice as to what is required by law to change domicile. In addition, the state's method of calculating days spent in Minnesota was not preempted by federal law that addresses the nondomiciliary status of air carrier employees because the state law was not in irreconcilable conflict with the federal provisions. The decision followed that in *Randall Wayne Enyeart v. State of Minnesota*, 02012943, 2004 WL 557347 (Minn. App., 03/23/04 (commissioner's domicile rule constitutional and not preempted by federal law, 49 U.S.C. §40116 (2000))). **Mattmiller v. State of Minnesota**, A03-472, 2004 WL 1244040 (Minn. App. 06/08/04),

■ **S CORPORATION; LOSSES TO BANKRUPTCY ESTATE, NOT SHAREHOLDER.** In a case of first impression, the U.S. Tax Court held that an S corporation shareholder, who filed for bankruptcy before the end of the corporation's tax year, could not use the operating losses sustained by it during the year in which he filed for bankruptcy. The court said that these losses had to be reported by his bankruptcy estate because the Code's bankruptcy rules take precedence over the rules that otherwise apply for allocating losses of S corporation. **Lawrence G. Williams**, 123 TC No. 8 (2004),

- **QUALIFIED IRA; EXCLUSION FROM DEBTOR'S ESTATE.** In response to a certified question, the Minnesota Supreme Court held that Minn. Stat. §550.37, Subd. 24 (2002), exempts a debtor's interest in an Individual Retirement Account and Individual Retirement Annuity, each as defined in IRC §408, as limited by the terms of subdivision 24(a) to an indexed present value and sums reasonably necessary for the support of the debtor and the debtor's spouse or dependents. *Clark v. Lindquist*, A03-2951, 2004 WL 1632565 (Minn. App. 2004)
- **TAXES PAID PENDING RESOLUTION OF DISPUTE DO NOT REDUCE ACCUMULATED TAXABLE INCOME.** The 9th Circuit held that a contested tax liability that is paid before the legal contest is resolved does not accrue in the taxable year in which it was originally assessed. Therefore, the taxes do not reduce the taxable income for that year for purposes of calculating the taxpayer's accumulated earnings tax liability. *Metro Leasing and Development Corp. v. Commissioner*, 02-73933, 2004 WL 1637028 (9th Cir. 2004),
- **NONELECTING SPOUSE'S INTERVENTION NOT LIMITED TO CHALLENGES TO RELIEF:** The U.S. Tax Court held neither IRC §6015 nor U.S. Tax Court Rule 325 precludes a nonelecting spouse from intervening in a proceeding before the Tax Court for the purpose of supporting the electing spouse's claim for relief from joint and several liability. *Van Arsalen v. Commissioner*, 123 T.C. No. 7 (2004).
- **OVERPAYMENT NOT REDUCED BY UNDERPAYMENT INTEREST:** A final decision by the U.S. Tax Court that there was an overpayment of estate tax precludes the commissioner from reducing the refund due the estate by applying part of the overpayment to interest that allegedly accrued prior to the date of the estate's payment. *Estate of Smith v. Commissioner*, 123 T.C. No. 2 (2004).
- **TAX SHELTER DOCUMENTS PROTECTED BY ATTORNEY-CLIENT PRIVILEGE.** In a widely publicized case involving a crackdown by IRS on tax shelters, the Illinois District Court ruled that the accounting firm BDO Seidman does not have to disclose various documents to IRS because they are protected by either the attorney-client privilege or the work-product doctrine under IRC §7525. *U.S. v. BDO Seidman, LLP*, 02 C 4822, 2004 WL 1470034 (D.C. Ill. 06/29/04),
- **CABLE TV INSTALLERS; INDEPENDENT CONTRACTORS UNDER §530 SAFE HARBOR:** A U.S. District Court granted summary judgment relief to a business that treated the people it engaged to install cable television services in subscribers' homes as independent contractors rather than employees. The company was entitled to relief under the Section 530 "safe harbor" because it was standard industry practice to treat these workers as independent contractors. *KM Systems, Inc. v. U.S.*, 93 AFTR2d 2004-2458 (D.C. N.J. 05/10/04).
- **SPLIT-DOLLAR INSURANCE DEDUCTION; LACK OF DISCLOSURE.** Where the taxpayer appealed a Tax Court judgment denying them charitable contribution deductions for their payments to the National Heritage Foundation in 1997 and 1998, the central question was whether IRC §170(f)(8) disallowed the deductions. The receipts substantiating the transfers to the NHF stated the taxpayer received no consideration though they expected the NHF to use their funds to pay part of the premiums on life insurance benefiting their trust pursuant to a split-dollar arrangement. IRC §170(f)(8) bars the deductions and the court therefore affirmed the decision of the U.S. Tax Court. *Addis v. Commissioner*, 02-73628, 374 F.3d 881 (9th Cir. 07/08/04).
- **LAWYER-ACTOR CANNOT DEDUCT ACTING EXPENSES IF INCOME FROM ALL SOURCES EXCEEDS \$16,000.** An attorney taxpayer, who had adjusted gross income of more than \$16,000 from all sources including his practice of law, was not entitled to deduct expenses related to his acting activities even though his income from acting was less than \$16,000. Under IRC §62(a)(2)(B) and (b)(1), a "qualifying performing artist" may deduct from gross income employee business expenses related to his or her work as a performing artist if, *inter alia*, the individual has adjusted gross income (before deducting those business expenses) of not more than \$16,000. The taxpayer contended that "adjusted gross income" in IRC §62(b)(1)(C) included only adjusted gross income from the performance of services as a performing artist. *Fleischli v. Commissioner*, 123 T.C. No. 3 (2004).
- **PARTNERSHIP NOT TERMINATED PENDING RESOLUTION OF SUIT RE: WINDING UP METHODS.** A partnership does not terminate for federal tax purposes where the managing partner purportedly winds up its affairs by using procedures apparently contrary to those set out in the partnership agreement. Another partner sued to compel compliance with the agreed procedures, and a resolution of that lawsuit may reasonably lead to the partnership's reporting in a subsequent year significant income, credit, gain, loss, or deduction. *Harbor Cove Marina Partners Partnership v. Commissioner*, 123 T.C. No. 4 (2004),
- **AIRLINE'S OFFICER LIABLE FOR UNPAID TICKET EXCISE TAX.** A District Court in Iowa, on a motion for summary judgment, ruled that the president and chief financial officer of a financially troubled airline was a responsible person liable for the airline ticket excise tax collected but not paid over by the airline to IRS under IRC §6672. *Donald R. Ferguson v. U.S.*, 93 AFTR2d 2004-2228, (D.C. Ia. 05/06/04).
- **AUTHORITY, NOT EXERCISE OF CONTROL, IS TEST FOR "RESPONSIBLE PERSON" PENALTY.** A Florida District Court, reversing a Bankruptcy Court order, has held that the responsible person penalty could be asserted against an "accommodation" corporate officer, who did not actually exercise any control over the daily operations and decisions of the corporation under IRC §6672. The fact that taxpayer did not exercise her control over corporate decisions did not avoid liability. It was also of no consequence that she was president in name only and essentially served at the whim of another corporate officer. The court intimated that this is akin to the "Nuremberg defense," *i.e.*, that she was just following orders. *U.S. v. Marino*, 93 AFTR 2d 2004-2435 (D.C. Fla. 05/12/04),
- **IRA EXEMPT FROM DEBTOR'S BANKRUPTCY ESTATE?** The U.S. Supreme Court agreed to consider whether and to what extent individual retirement accounts are exempt from a debtor's bankruptcy estate under Bankruptcy Code §522(d)(10)(E). There is a split among the circuits on the issue: the U.S. Courts of Appeals for the 2nd, 5th, 6th, and 9th Circuits have interpreted Section 522(d)(10)(E) to permit exemptions for payments from IRAs; the 8th Circuit "holds that IRAs are categorically excluded from exemption"; and the U.S. Court of Appeals for the 3rd Circuit exempts IRA payments received by persons who have already reached the statutory age that entitles them to withdraw funds from IRAs, while the IRAs of debtors under that age are included in the bankruptcy estate. *Rousey v. Jacoway*, U.S. 03-1407, *cert. granted* (07/07/04).
- **SEVERANCE PAY IS SALARY OR WAGES UNDER IRC § 6331:** The U.S. Tax Court held that an individual's severance pay con-

stituted salary or wages within the meaning of IRC §6331(e) and because the continuing wage levy was initiated before the effective date of IRC §6330, the Tax Court lacked jurisdiction to review the IRS's levy of the individual's severance pay. **Meehan v. Commissioner**, 122 T.C. No. 23 (2004).

■ **TAX INJUNCTION ACT NO BAR TO CHALLENGES TO STATE CREDIT.** The U.S. Supreme Court held that federal courts have jurisdiction over a constitutional challenge to an Arizona law allowing tax credits for contributions to organizations that provide tuition grants to religious schools. Neither the Tax Injunction Act nor the doctrine of comity barred federal court jurisdiction over an action brought by Arizona taxpayers challenging the constitutionality of the state's tax credit program for "school tuition organizations" that allegedly benefited religious schools. The plaintiff's action would not hinder the state's taxing ability but would enhance tax collection. **Hibbs v. Winn**, No. 02-1809, 124 Sct 2276 (06/14/04).

■ **DISCOVERY TO ESTABLISH ALTER-EGO STATUS IN QUIET TITLE ACTION.** The determination of alter-ego status in an action to quiet title is not limited to the record compiled by the government when it files the lien. **Juno Investment Corp. v. U.S.**, No. 03-4540, 2004 WL 1278586 (D. Minn. 06/07/04).

■ **FAILURE TO TIMELY REQUEST SECTION 6330 HEARING; ENTITLEMENT TO APPEAL.** The U.S. Tax Court held that taxpayers, who failed to timely request an IRC §6330 hearing in response to a notice of intent to levy with respect to a tax year, are not entitled to appeal an adverse IRS decision letter issued following an equivalent hearing. This was so even though IRS subsequently issued a notice of intent to levy with respect to the same year and the next year and the taxpayers timely requested a IRC §6330 hearing in response to that notice. **Orum v. Commissioner**, 123 T.C. No. 1 (2004).

■ **VALUING CORPORATION; BUY-SELL AGREEMENT; CORPORATE-OWNED INSURANCE.** The U.S. Tax Court gave no effect to a buy-sell agreement and also included 100 percent of life insurance proceeds payable to the corporation in the corporation's fair market value, with no deduction for the redemption obligation. **Blount Est. v. Comr.**, T.C. Memo 2004-116 (2004).

■ **IRC §6330; COURT MAY LOOK BEYOND ADMINISTRATIVE RECORD.** The U.S. Tax Court held that abuse of discretion is the appropriate standard of review under IRC §6330 for a determination to proceed with collection. The court may consider evidence presented at trial that was not included in the administrative record. The court concluded that the IRS abused its discretion in declaring an offer in compromise in default and in determining to proceed to collection. **James M. Robinette v. Commissioner**, 123 T.C. No. 5 (2004).

ADMINISTRATIVE MATTERS

■ **TAX-EXEMPT ENTITIES' POLITICAL ACTIVITIES.** IRS Publication 1828, *Tax Guide for Churches and Religious Organizations*, is helpful for churches and other 501(c)(3)s concerning prohibited political activity. It is available at www.irs.gov.

■ **CAR DONATION PROGRAMS.** The IRS released two new publications with guidance relating to car donation programs.

■ Publication 4303, *A Donor's Guide to Car Donations*, provides information for donors concerning qualification for a tax deduction, determining the value of your car, recordkeeping requirements, and forms to be filed. It also includes information on state law requirements and sources of information about charities soliciting charitable contributions.

■ Publication 4302, *A Charity's Guide to Car Donations*, provides information for charities that engage in car donation programs. It discusses issues, such as the charity's use or disposition of the car, use of an agent, and affiliation with a for-profit. It also discusses filing requirements, acknowledgments, and state requirements and assistance.

■ **OFFERS IN COMPROMISE; TAXPAYERS IN BANKRUPTCY:** The IRS Office of Chief Counsel explained its policy against accepting an offer in compromise from a taxpayer in bankruptcy in Notice CC-2004-025. The notice also listed factors that may be considered to determine whether it is in the government's best interest to accept such an offer. In general, the notice provided it is not considered in the government's best interests to accept an offer in compromise when a taxpayer is in bankruptcy.

■ **POWERS OF ATTORNEY; PRACTICE BEFORE IRS.** The IRS revised and reissued IRS Publication 947, "Practice Before the IRS and Power of Attorney." It is available at www.irs.gov. Practitioners generally file IRS Form 2848, *Power of Attorney and Declaration of Representative*, when the taxpayer is designating an agent (for example, an attorney or a CPA) to deal with the IRS on his, her or its behalf. The publication also lists the requirements for a non-IRS power of attorney form.

■ **NEW SCHEDULE M-3 FOR REPORTING BOOK-TAX DIFFERENCES:** The IRS released a draft of the final version of the Schedule M-3, "Net Income (Loss) Reconciliation for Corporations With Total Assets of \$10 Million or More," meant for the largest companies filing Form 1120 to use in reconciling their accounting and tax income and losses, thereby increasing transparency. In conjunction with the new form, IRS issued Revenue Procedure 2004-45, simplifying the reporting of book-tax differences for businesses not required to complete the Schedule M-3.

■ **PROCEDURE FOR LATE S CORP AND LATE CORPORATE CLASSIFICATION ELECTIONS.** In Rev. Proc. 2004-48, 2004-32 IRB, a new IRS revenue procedure carries a simplified method for requesting relief for a delinquent S corporation election and a late corporate classification election.

■ **EXEMPT ORGANIZATION'S USE OF LLC TO PURSUE RELATED ACTIVITIES.** In Rev. Rul. 2004-51, under the situation described, a tax-exempt university offers summer seminars to enhance the skill level of grade school teachers. To do so, it forms an LLC with a company that provides interactive video training programs. The university and the company each nominate three directors to the governing board of the LLC. The IRS concluded that this arrangement does not jeopardize the exempt status of the university, and, because the training is in furtherance of its exempt purposes, it is not subject to unrelated business income tax.

■ **INFORMATION RETURN REMINDER.** The IRS is reminding taxpayers that they should not file downloaded copies of information returns found on www.irs.gov. Beginning this year, the IRS will post to www.irs.gov "information only" copies of Forms 1098, 1099, 5498, and W-2, with Copy A appearing similar to the official IRS form. Employers should not file the "information only" version with the IRS or the SSA. The IRS may impose a penalty of \$50 per information return if employers file paper forms that cannot be scanned. To order official IRS scannable forms, taxpayers may call 800-829-3476 or order on-line at *Forms and Publications By U.S. Mail*.

■ **GOLDEN PARACHUTE RULES; APPLICATION TO COMPANIES IN BANKRUPTCY.** In Rev. Rul. 2004-87, 2004-32 IRB, IRS provided guidance for determining whether a "change in ownership or control" occurs under the golden parachute rules when creditors acquire company stock in a bankruptcy reorganization. IRS also provided guidance as to how a company in a bankruptcy reorganization can satisfy the shareholder disclosure and approval requirements under the small business corporation exception to the golden parachute rules.

■ **INTERESTS IN DELAWARE STATUTORY TRUSTS; QUALIFYING LIKE-KIND PROPERTY.** In Rev. Rul. 2004-86, 2004 33 IRB, the IRS issued a revenue ruling that explained when interests in a multiowner Delaware statutory trust formed to hold rental real property may or may not be treated as qualifying property in a tax-deferred like-kind exchange under IRC §1031 for real property.

■ **SUBSIDIARY SALES FOLLOWED BY LIQUIDATIONS; REORGANIZATIONS.** The IRS issued guidance in Revenue Rule 2004-83, which allows tax-favored reorganization treatment for transactions in which a parent corporation sells the stock of a subsidiary to another subsidiary and the acquired subsidiary subsequently liquidates. Those transactions will qualify as reorganizations under IRC §368(a)(1)(D). Taxpayers must have an integrated plan and apply the step transaction doctrine.

■ **PAYMENT CARD REPORTING, WITHHOLDING.** Final and temporary rules were issued by IRS as T.D. 9136 to describe information reporting and backup withholding requirements for payment cards used for purchasing transactions in the course of business. The rules make some changes to better conform to business practice, but do not provide all that the industry wanted.

■ **DEFERRED COMPENSATION; OPTIONS TRANSFERS IN DIVORCE; FICA, FUTA.** In Revenue Rule 2004-60, the IRS stated that the transfer of interests in nonstatutory options and nonqualified deferred compensation from an employee to a nonemployee spouse in a divorce did not result in a payment of wages under the Federal Insurance Contributions Act and Federal Unemployment Tax Act. See also, Notice 2002-31 and Revenue Rule 2002-22.

■ **IDIT Income Taxed to Grantor, Not a Gift:** In Revenue Rule 2004-64, the IRS confirmed that a grantor in an IDIT is taxed on the income therefrom and that the payment of the income tax by the grantor does not create a taxable gift to the beneficiaries.

■ **TAX TREATMENT OF SETTLEMENT PAYMENTS:** In IRS Publication 4345, "Settlements-Taxability," the IRS provided guidance on the issue of taxes on settlement payments. Perhaps because there are so many different types of lawsuits and because IRS has numerous disputes with taxpayers over the proper tax treatment of damage awards and settlements, the IRS issued this new publication explaining the tax treatment of cash settlement awards. The summary of the rules is useful for practitioners, who have clients that have received or are negotiating a settlement.

LEGISLATION

■ **SUTA DUMPING PREVENTION ACT OF 2004.** In July, 2004, the House and Senate passed H.R. 3463, the "SUTA Dumping Prevention Act of 2004," clearing the way for the president's signature. The bill would, among other things, ensure that states take steps to curb employer "dumping" practices aimed at avoiding unemployment insurance taxes. The legislation is designed to have a coordinated effort to control abusive methods of lowering SUTA tax reduction by moving parts of the employer's work force to new affiliate entities.

■ **Anti SUTA-Dumping Provisions.** Section 2 of H.R. 3463 entitled "Transfer of Unemployment Experience Upon Transfer of Acquisition of a Business" would amend Section 303 of the Social Security Act (42 U.S.C. 503). This provision of the bill would require states to change their unemployment compensation laws to provide that:

1. Employers that transfer employees to another business must also transfer the "unemployment experience" of the first company if the two employers "are under substantially common ownership, management, or control."
2. One employer's unemployment experience won't be transferred to a new employer, if the transfer occurs primarily to lower the unemployment experience "rating."
3. Civil and criminal penalties will be imposed for knowing attempts to violate these rules and also will be imposed on those, who knowingly advise another person to violate such rules.

■ **Greater Agency Access to New Hire Info.** Section 3 of H.R. 3463 would amend Section 453(j) of the Social Security Act to allow state unemployment insurance agencies greater access to the Department of Health and Human Services' "National Directory of New Hires." This provision appears to tackle state unemployment insurance fraud/overpayments by allowing fast detection of individuals who continue to collect state unemployment compensation after returning to work (new hires).

■ **Penalties.** The bill also would provide for federal penalties against a state agency employee who misuses the new hire information.

LOOKING AHEAD

■ **INCOME TAX: DOR REPORT ON 1999 "INDIVIDUAL INCOME TAX GAP."** The Minnesota Department of Revenue on June 7, 2004, issued its study on under-reporting of taxes due for 1999. The DOR estimates a \$604 million gap between income tax paid and what should have been paid. This represents 11 percent of the total income tax due of \$5.7 billion for 1999. The DOR estimates that there were 670,000 filers (individual and married couples) responsible for this shortfall. In 1999 about 314,000 nonfilers caused \$125 million (21%) of the total gap and about 356,000 underreporters contributed to \$479 million (79%) of the total

gap. Nonwage income accounts for the vast majority of the total gap with \$536 million (89%) while wage income makes up \$6 million (11%) of the total. In the last four years, the DOR has taken vigorous steps to increase income tax compliance. The full study is available from the Department's Web site: www.taxes.state.mn.us/taxes/publications/press_releases/content/IT_gap_study.shtml

■ **INCOME TAX: IRS "STRATEGIC PLAN FOR 2005-2009."** The IRS issued its 2004 Strategic Plan for 2005-2009 and listed the goals of improved service to taxpayers, enhanced enforcement of the tax laws, and the use of modern technology and business processes. Contained in the Strategic Plan is a chart, which shows the tax gap on the federal level. The composition is:

32% or \$101B High-Income Individuals

31% or \$96B Other Individuals

23% or \$73B Employment Tax

8% or \$24B Large Corporations

3% or \$9B Small Corporations

3% or \$9B Estate & Gift & Excise

Taxes

This chart shows that there will be a shift to enforcement, similar to the Department of Revenue Report on "Individual Income Tax Gap." You and your clients must be prepared for new and vigorous compliance initiatives by the IRS and the DOR in the next five years. See http://www.irs.gov/pub/irs-utl/strategic_plan_05-09.pdf.

■ **KIMBELL DECISION MAY BREATHE LIFE INTO "FLPs":** The recent 5th Circuit decision of *Kimbell*, 93 AFTR2d 2004-2400 (CA-5, 2004), provides strong support for the continued use of FLPs in estate planning. In reversing a district court decision, the 5th Circuit may have paved the way for establishing the valuation discounts that are inherent in an FLP.

— JERRY GEIS
Briggs & Morgan

TORTS & INSURANCE

JUDICIAL LAW

■ **PERSONAL JURISDICTION: NONRESIDENT DEFENDANTS.** The district court granted defendant's motion to dismiss plaintiff's complaint and codefendants' cross-claims for lack of personal jurisdiction and the Court of Appeals affirmed. The Supreme Court reaffirmed Minnesota's five-factor test for determining whether the exercise of personal jurisdiction is consistent with due process. The test requires the court to evaluate:

1. The quantity of defendant's contacts with the forum state,
2. The nature and quality of those contacts,
3. The connection of the cause of action with those contacts,
4. The interest of the state providing the forum, and
5. The forum state's convenience to the parties.

The Supreme Court affirmed, holding that under the five-factor test, notions of fair play and substantial justice would be offended by asserting personal jurisdiction over a Japanese component part manufacturer whose product was manufactured and sold in Japan to a Japanese finished product manufacturer where the only claims to be tried are cross-claims for indemnity brought by Japanese finished product manufacturer. *Juelich v. Yamazaki Mazak Optonics Corp.*, A03-174, A03-228 (Minn. 06/24/04).

<http://www.lawlibrary.state.mn.us/archive/supct/0406/opa030174-0624.htm>

■ **AGREEMENTS; CHAMPERTY.** A lende assigned certain potential proceeds from litigation against her former employer to a lender in exchange for the lender's payment of litigation costs, and assigned a percentage of her daughter's benefits from tribal enrollment to the lender in exchange for payment of costs associated with enrollment. The lende also signed a promissory note for some of the funds advanced by the lender. After the lende recovered money to settle her litigated claims, the lender sued for payment and was awarded a judgment under both assignments and the note.

The Court of Appeals reversed, holding that because recovery under the two assignments depended on success in litigation in which the lender had no valid interest, the two assignments were champertous and were therefore void and unenforceable. The note, however, was valid and enforceable because the lender had an expectation of reimbursement for the expenses paid regardless of the outcome of the litigation. *Johnson v. Wright*, A03-1511 (Minn. App. 07/13/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0407/opa031511-0713.htm>

<http://www.lawlibrary.state.mn.us/archive/ctappub/0407/opa031511-0713.htm>

■ **LIABILITY RELEASE; EXCULPATORY CLAUSE.** Trustee for the heirs and next-of-kin of decedent brought a wrongful death claim alleging negligent supervision and instruction during a scuba diving class. The district court granted summary judgment for the defendant based upon an exculpatory clause in the release signed by the decedent.

The Court of Appeals affirmed, holding that the release was enforceable as a matter of law for three reasons. First, the court held that although the agreement contains extraneous language, the only reasonable interpretation of the release is that it exonerates the released party from liability only for acts of negligence and not for willful, wanton recklessness or intentional conduct. Second, the court held that because receiving instruction is an integral part of a scuba diving class, the scope of the release would rational-

ly include a claim for negligent instruction. Third, the court found that the release did not violate public policy because scuba diving lessons are neither public nor essential activities. The court noted that public policy may invalidate a liability release only if there is a disparity in bargaining power between the parties and if the type of services being provided are public or essential; it is not enough that the services implicate or affect the public interest. The Supreme Court affirmed without opinion. **Dailey v. Sports World South, Inc.**, A03-127 (Minn. 07/19/04). <http://www.lawlibrary.state.mn.us/archive/supct/0407/ora030127-0722.htm>

■ **NO-FAULT ACT; CONSOLIDATION OF CLAIMS; ARBITRATION REQUIREMENT.** An auto glass company performed automobile glass repair and replacement for two insurers' policyholders and submitted bills for repair directly to the insurers. As a result of different formulas used by the insurers and the glass company to arrive at the amount owed for the repairs, the glass company claimed it had been underpaid by more than \$1 million on 5,700 claims, and demanded arbitration. The insurer brought an action seeking a declaration that the glass company did not have a right to arbitrate, and the glass company counterclaimed for breach of contract. The district court ordered the parties to arbitrate each of the 5,700 claims before the same arbitration panel. The Court of Appeals affirmed, but held that the claims could not be arbitrated by the same panel.

However, the Supreme Court held that while the No-Fault Act requires the glass company to separately arbitrate each of the 5,700 claims against the insurer, the claims could be consolidated as such a practice would increase efficiency and avoid inconsistency. The Supreme Court ruled that because the insurer's policy does not provide protections equal to or greater than the No-Fault Act, and because the policy contains a conformity clause, the act governs the arbitrability of the policy dispute. The glass company could not defeat the No-Fault Act's arbitration requirement by consolidating the 5,700 individual claims because as an assignee of the claims, the glass company had no greater rights than individual policyholders who could not consolidate their claims.

The Supreme Court also held that failing to notify an assignee of its right to arbitrate does not waive the insurer's right to arbitration when arbitration under the insurer's policies is automatic and is not contingent on any event, and that a motion for declaratory judgment does not waive the right to arbitration because the action does not require the court to resolve the merits of the dispute. Finally, the Court recognized that to the extent the dispute is governed by the mandatory arbitration provision of the No-Fault Act, the district court does not have jurisdiction over the dispute and arbitration may not be waived. **Illinois Farmers Ins. Co. v. Glass Service Co., Inc.**, A03-109 (Minn. 07/22/04). <http://www.lawlibrary.state.mn.us/archive/supct/0407/opa030109-0722.htm>

■ **NO-FAULT INSURANCE; STATUTORY CONSTRUCTION.** Plaintiff sustained severe frostbite requiring amputation of several fingers as a result of an incident in which she drove home from a bar while intoxicated, hit a snowdrift and got stuck, exited her car (locking her keys inside), walked home, dug through a snow bank that blocked the entrance to her townhouse, slipped on ice and finally crawled behind a garage where she lay down — possibly sleeping — for 30 to 40 minutes. Defendant, her auto insurer, denied her claim for no-fault benefits. Following a jury trial, the district court held that plaintiff was entitled to benefits because the focus of no-fault is on the "actual use" of a vehicle, not on the behavior of the people involved.

The Court of Appeals affirmed, stating that the No-Fault Act requires payment of benefits to victims of automobile accidents without regard to who caused the accident. The court further held that plaintiff's frostbite injuries were a natural consequence of the use of her motor vehicle since weather elements are a fundamental part of the driving experience. **Dougherty v. State Farm Mutual Ins. Co.**, A03-1866 (Minn. App. 07/27/04). <http://www.lawlibrary.state.mn.us/archive/ctappub/0407/opa031866-0727.htm>

■ **CONSUMER FRAUD ACT; CAUSATION.** The plaintiff in a private consumer fraud class action alleged that defendant made oral misrepresentations in connection with the purchase of an automobile. Defendant brought a motion to dismiss the complaint for failure to state a claim. In granting defendant's motion, the district court ruled that plaintiff's allegations about oral misrepresentations could not be proven as a matter of law because plaintiff signed a written contract that contradicted the alleged oral misrepresentations. The Court of Appeals affirmed.

The Supreme Court reversed, holding that a plaintiff states a claim under the Consumer Fraud Act by pleading that the defendant engaged in conduct prohibited by the statute and that the plaintiff was damaged thereby. The Court further held that the existence of a written contract that contradicts a defendant's alleged oral misrepresentations in a private consumer fraud action does not, as a matter of law, preclude the potential for plaintiffs to prove a causal nexus between the alleged misrepresentations and consumer injuries. **Wiegand v. Walser Auto. Groups, Inc.**, A03-250 (Minn. 07/29/04).

— MICHAEL KLUTHO
Bassford Remele, A Professional Association