



## N O T E S   &   T R E N D S

### CASELAW SUMMARIES FROM THE DECEMBER 2002 *BENCH & BAR*

#### ADMINISTRATIVE LAW

##### JUDICIAL LAW

■ **ENVIRONMENTAL ASSESSMENT WORKSHEET.** The Court of Appeals examined the question of whether the Department of Natural Resources (DNR) was required to prepare an environmental assessment worksheet (EAW) for four off-highway vehicle (OHV) system plans it developed that set out potential OHV trails in state forests. An EAW is required for “projects” according to Minnesota rules. The court held that a “project” is a “definite, site-specific action that contemplates on-the-ground environmental changes in the nature of the use.” Applying its definition the court decided that the system plans were not projects, but that several of the trails identified in the plans satisfy the definition of project and require preparation of an EAW. ***Minnesotans for Responsible Recreation v. DNR***, CX-02-404, C8-02-420, C5-02-441, (Minn. App. 10/01/02). <http://www.lawlibrary.state.mn.us/archive/ctappub/0210/cx02404.htm>

■ **DATA PRACTICES.** The Supreme Court decided that a school district had released private personnel data of a teacher contrary to the Minnesota Government Data Practices Act. The Court noted that prior to a final disciplinary action, the act authorizes release of only the existence and status of complaints against public employees, but not the quality or characteristics of the complaints. So an administrator’s letter to parents describing stories from students about the teacher’s class as “sometimes alarming” violated the act. The Court observed that while unrecorded mental impressions are not government data, disclosure of mental impressions derived directly from personnel data in some physical form is private data. Therefore, an administrator’s comments to a reporter, based upon letters to parents that disclosed specific facts surrounding complaints, was private data. The Court also held that emotional damages are recoverable under the act, but that the defendant is entitled to submit evidence of a preexisting condition. ***Navarre v. South Washington County Schools***, C4-00-2242, (Minn. 10/10/02). <http://www.lawlibrary.state.mn.us/archive/supct/0210/c4002242.htm>

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#### CIVIL LITIGATION

##### JUDICIAL LAW

■ **DRAM SHOP; MILLER-SHUGART SETTLEMENT; GARNISHMENT.** The Minnesota Court of Appeals refused to allow the intricacies of garnishment proceedings to be used as a defense to preclude litigating the merits of a declaratory judgment action over insurance coverage.

Plaintiff Nordstrom was injured in a car accident which she alleged was the result of a violation of the dram shop act by Lakeside. Lakeside tendered the defense of Nordstrom’s lawsuit to Fireman’s Fund Insurance Companies, which then denied coverage to Lakeside.

Nordstrom and Lakeside thereafter entered into a *Miller-Shugart* settlement in which Lakeside stipulated to a \$900,000 judgment, with Nordstrom agreeing to satisfy the judgment from only the Fireman’s policy, or Lakeside’s insurance agent. The court approved the settlement and entered judgment.

The Court of Appeals disapproved of the sequence of the following proceedings. Nordstrom served a garnishment summons on Fireman’s to collect on her judgment. Fireman’s Fund returned a disclosure denying any indebtedness to Lakeside. Nordstrom then commenced a declaratory judgment action against Fireman’s to determine whether Lakeside had liquor liability insurance coverage with Fireman’s. Nordstrom served a second garnishment summons on Fireman’s, which again responded by denying any indebtedness to Lakeside. Finally, Fireman’s moved for summary judgment in a declaratory action on the ground that it had been discharged, by operation of the garnishment

statute, from any obligation to Nordstrom. The trial court granted Fireman's summary judgment motion.

The Court of Appeals recognized that a practice had developed whereby parties similarly situated to Nordstrom would attempt to attach insurance proceeds by way of a garnishment proceeding. The court disapproved of those procedures, saying the "best practice" would be to first proceed with the merits of the declaratory judgment action to establish insurance coverage. If persons such as Nordstrom successfully established coverage, then they could serve a garnishment summons on the insurance company.

The Court of Appeals reversed and remanded to the trial court for proceedings consistent with its opinion. *Nordstrom v. Eaton d/b/a Lakeside Music Café*, C7-01-2200, C3-02-339 (Minn. App. 10/10/02). <http://www.lawlibrary.state.mn.us/archive/ctappub/0210/c7012200.htm>

— STEVEN J. KIRSCH

— ANDREW T. SHERN

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## CRIMINAL LAW

### JUDICIAL LAW

■ **SEARCH AND SEIZURE; AUTOMOBILE; TINTED WINDOW; UNCONSTITUTIONAL STATUTE; EXCLUSIONARY RULE.** A deputy stopped respondent for driving with an excessively tinted window; he could not see through its rear window. Following the stop, respondent was arrested for driving without a license and the car was impounded. During an inventory search, officers found methamphetamine and evidence of manufacture. A warrant was secured to search the car more extensively and additional evidence of drug manufacturing was found. A search warrant was then obtained for the home, which revealed yet additional evidence of drug manufacturing.

The district court held a contested omnibus hearing, after which Minn. Stat. §169.71 subd. 4 (3) was found unconstitutional as violating the equal protection provision of the Minnesota Constitution by permitting people driving vans or pick-up trucks — but not cars — to drive with excessively tinted rear and side windows. The court then applied the exclusionary rule to dismiss all the derivative evidence subsequent to the stop.

Held, the resulting search was permissible and did not violate the exclusionary rule. The Court of Appeals follows the United States Supreme Court's holding in *Michigan v. DeFillippo*, 441 U.S. 31, 99 S. Ct. 2627 (1979). In that case, an arrest was based upon an ordinance which was later found unconstitutional. However, the Supreme Court held that the exclusionary rule is an inappropriate remedy when an arrest is based on a presumptively valid statute. In following *DeFillippo*, the Court of Appeals finds that law enforcement officers in this case played no role in the legislation of a statute, which is later found to be unconstitutional. Hence, there was no police misconduct implicating the exclusionary rule. *State v. Michelle Marie Smith, et al*, C2-02-204, (Minn. App. 10/15/02). <http://www.lawlibrary.state.mn.us/archive/ctappub/0210/c202204.htm>

■ **SENTENCE; RESTITUTION; OBJECTION; TIMELINESS; NOTICE BY COURT.** At sentencing, the trial court judge reserved restitution because it had not yet received a restitution request from one of the victims. The appellant agreed to this reservation, waived the PSI, and began serving his sentence. Subsequently, on January 23, 2001, appellant received a memorandum from the Department of Corrections notifying him that the court had ordered \$1,940.70 in restitution, which included the installation of a new security system. On March 13, 2001, appellant received notice that judgment had been entered in that amount. Six months after receiving notification of the amount requested, the appellant filed a post-conviction petition contesting the restitution order. The petition was denied as untimely.

Held, the appellant's failure to challenge the restitution order within 30 days after receiving notification of the amount requested bars his challenge to the restitution order. Minn. Stat. §611A.045, subd. 3 allows a defendant to challenge restitution by submitting a detailed affidavit within 30 days of receiving written notification of the amount requested, or within 30 days of sentencing, whichever is later. The trial court in this case did not specifically mention the 30-day limit, but the Court of Appeals holds that the appellant's ignorance of the 30-day requirement does not excuse his failure to comply. Courts are under no obligation to inform the criminal defendant of these procedural obligations in challenging restitution. The Court of Appeals, however, states that "The better practice is to inform defendants of critical time requirements." The Court of Appeals urges the Department of Corrections to assume this task. *Oscar James Mason v. State*, C4-02-673, (Minn. App. 10/22/02). <http://www.lawlibrary.state.mn.us/archive/ctappub/0210/c402673.htm>

— FREDERIC R. BRUNO

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## EMPLOYMENT & LABOR LAW

### JUDICIAL LAW

■ **EDUCATORS; COLLECTIVE BARGAINING.** The Court of Appeals ruled that a teacher's technician could not pursue an arbitration claim that she was actually performing higher level duties and was entitled to a higher pay level. Since job descriptions were not referenced in her union's collective bargaining agreement, the claim was not subject to the grievance-arbitration clause. ***District 318 Service Employees Association v. Ind. School Dist. No. 318***, 649 N.W.2d (Minn. App. 2002).

Educators in early childhood family programs are not "public employees" under the state Public Employees Labor Relations Act (PERA). the Court ruled that because they worked part-time and the classes were not required by law, the teachers could not be members of public sector labor unions. ***Education Minnesota v. Ind. Sch. Dist. No. 695, Chisholm***, 649 N.W.2d 474 (Minn. App. 2002).

■ **LEAVES OF ABSENCE.** A police chief whose medical condition was discussed in public by the members of the city council after he returned from medical leave cannot sue for invasion of privacy or other wrongdoing. In the instant case, elected officials discussed the chief's treatment by a psychologist due to work-related stress, a condition that the court deemed was not so offensive in light of the well-known pressures faced by law enforcement personnel. ***Cooksey v. Boyer***, 289 F.3d 513 (8th Cir. 2002).

An employee who was misinformed about the beginning date of a leave of absence and fired when he did not return to work when the leave expired can assert estoppel against the employer in a claim under the Family & Medical Leave Act (FMLA). The employee was on short-term disability leave for several months after a work-related injury. The employer then informed the employee that the 12-week period of FMLA leave would begin later. When the employee contacted the employer and asked about the FMLA leave, he was told that the information was erroneous, that the previous leave of absence had expired, and that the employee was fired for not returning after the leave ended. The 8th Circuit, following a precedent from the 2nd and 7th circuits, held that the employer was estopped from terminating the employee because the employee reasonably relied upon the information about the beginning date of his FMLA leave, even though it was erroneous. ***Duty v. Norton-Alcoa Proppants***, 293 F.3d 481 (8th Cir. 2002)

■ **RACIAL DISCRIMINATION.** An African-American college professor can sue for failure to achieve a promotion, even though he did not apply for the vacancy. The 8th Circuit Court held that a claimant, who was chairman of the department, can proceed with a lawsuit after he was wrongfully denied the position of dean, a vacancy which had been filled by a white man. Although the African-American claimant did not apply for the position, there was "direct evidence of racial discrimination" stemming from the school's lack of any clear-cut procedures for applying, or any statements of the timing and/or deadlines for applications in the official announcement of the vacancy. ***Lockridge v. Board of Trustees of the University of Arkansas***, 301 F.3d 958 (8th Cir. 2002).

### LEGISLATION

Portions of a rule under the Federal Occupational Safety & Health Act (OSHA) that would require certain employers to provide detailed records of all illnesses and injuries suffered by workers on the job may be delayed another year for reconsideration by the U.S. Department of Labor. The rule revises and simplifies OSHA requirements that employers keep detailed "illness and injury logs" and make them available to governmental inspectors. The Labor Department proposed delaying provisions governing recording of injuries causing musculoskeletal disorders so that OSHA can determine whether to change its definition of the phenomenon for record-keeping purposes and, if so, what definition is appropriate for these types of injuries. The department also proposed delaying a rule that establishes criteria for recording work-related hearing loss in order to allow more time for gathering relevant data.

A proposal to bar mandatory arbitration for claims of employment discrimination has been introduced in the House of Representatives, H.R. 2282. Another bill, H.R. 815, would give employees the right to decide whether to use arbitration *after* a dispute arises, but would prohibit employers from requiring employees to agree to arbitration as a condition of employment. The two measures would overturn the ruling of the U.S. Supreme Court in ***Circuit City Stores, Inc. v. Adams***, 121 S.Ct. 1302 (2001), upholding mandatory arbitration clauses in employment agreements.

## ENVIRONMENTAL LAW

### JUDICIAL LAW

■ **ENVIRONMENTAL REVIEW; OFF-HIGHWAY VEHICLE TRAILS.** The Minnesota Court of Appeals recently held that the Minnesota Department of Natural Resources (“DNR”) did not need to prepare an environmental assessment worksheet (“EAW”) for four off-highway vehicle system plans, but did need to prepare EAWs for construction of certain trails proposed under those plans.

In June 2000, the DNR made available for review by the public four system plans for potential off-highway vehicle trails. The plans identified more than 30 potential trails, connections and extensions, but none contained a detailed assessment of the potential environmental impacts. Minnesotans for Responsible Recreation (“MRR”) identified nine proposed trails that allegedly posed danger to the environment and filed a declaratory judgment action under the Minnesota Environmental Protection Act (“MEPA”) to force the DNR to complete EAWs for the system plans.

MEPA and rules promulgated thereunder require an EAW to be prepared for any governmental action or “project” that may have significant environmental effects. Minn. Stat. §116D.04, subd. 2a(c); Minn. R. 4410.1100, subp. 1. The parties to the lawsuit disagreed as to the nature and extent of a governmental action that would trigger MEPA’s requirements. The Court of Appeals resolved the dispute by holding that something more than just planning is required before a governmental action, or “project”, would be found to exist.

In reversing the district court’s grant of summary judgment to MRR, the Court of Appeals held that a “project” for purposes of MEPA is a “definite, site-specific, action that contemplates on-the-ground environmental changes, including changes in the nature and use.” The Court of Appeals concluded that the system plans themselves were not “projects” under MEPA because they were not definite, site-specific actions and did not effectuate on-the-ground environmental changes or changes in the nature of the use. The system plans proposed potential trail sites, but according to the court, were “too broad and speculative to provide the basis for meaningful environmental review.”

The court came to the opposite conclusion after applying its “project” definition to eight of the nine trails identified by MRR. According to the court, the proposed construction of these trails was sufficiently definite to allow for environmental review, and demonstrated definite, site-specific action and on-the-ground changes that warranted preparation of EAWs. The DNR had already proceeded with preparation of an EAW for the ninth trail, rendering the issue moot with respect to this trail. *Minnesotans for Responsible Recreation v. Dept. of Natural Resources*, 651 N.W.2d 533 (Minn. App. 2002).

■ **CLEAN WATER ACT; ANIMAL FEEDLOTS.** The 9th Circuit Court of Appeals recently affirmed a district court decision that manure-spreading vehicles, manure storing fields, and ditches used to store and transfer waste from livestock operations are part of a concentrated animal feeding operation (“CAFO”) and, therefore, subject to permit requirements of the Clean Water Act (“CWA”). The court also upheld a \$171,500 civil penalty against the defendant dairies and an award of \$428,000 in attorneys’ fees for the citizen group that brought the suit.

The citizen group alleged that two adjacent dairies in the state of Washington, which have more than 5,000 cattle between them, discharged pollutants into a drain leading to the Yakima River without a National Pollutant Discharge Elimination System (“NPDES”) permit, as required under the CWA. An NPDES permit is required for all “point sources” that discharge pollutants into waters of the United States. 33 U.S.C. §1311(a), 1342(a). The term “point source” is defined to include CAFOS. 33 U.S.C. §1362(14).

The dairies’ owner acknowledged that portions of his dairies constituted CAFOS and thus point sources under the CWA, but argued that manure-spreading equipment, fields where manure is stored, and the ditches within those fields are not components of the CAFOS. The 9th Circuit disagreed, citing a holding by the 2nd Circuit Court of Appeals that point source is to be broadly defined and reasoning that defining a CAFO to include such aspects of dairy operations serves the purpose of the CWA to control the disposal of pollutants in order to restore and maintain the waters of the United States. *Community Ass’n for Restoration of the Environment v. Bosma*, 305 F.3d 943 (9th Cir. 2002).

■ **CLEAN AIR ACT; ENFORCEMENT; ETHANOL PRODUCTION.** Twelve ethanol producers in Minnesota recently entered into consent decrees with the EPA and MPCA, agreeing to modify their plants to reduce air emissions discovered during testing by the MPCA last year. The modifications will cost approximately \$2 million per plant, and each producer is expected to be in compliance with new emissions limits within three years. Additionally, each plant will pay a civil penalty ranging from \$29,000 to \$39,000. The MPCA investigation, which was initiated due to complaints by citizens about odors, revealed that the plants were emitting certain pollutants in far greater quantities than previously believed. The investigation also revealed that the plants were emitting

pollutants that had not been anticipated. EPA plans to seek similar consent decrees with ethanol producers nationwide. For additional information, see [http://www.usdoj.gov/opa/pr/2002/October/02\\_enrd\\_569.htm](http://www.usdoj.gov/opa/pr/2002/October/02_enrd_569.htm).

■ **CLEAN AIR ACT; EMISSIONS STANDARDS FOR NONROAD ENGINES.** On September 13, 2002, EPA Administrator Christine Todd Whitman signed a rule setting emission standards for engines in non-road vehicles. The rule is scheduled to take effect in 2006. The rule will require manufacturers to achieve a 50 percent reduction in hydrocarbons by 2010 and a 30 percent reduction in carbon monoxide. Vehicles covered by the rule will include large industrial spark-ignition engines, such as forklifts and electric generators; recreational vehicles, such as snowmobiles, off-road motorcycles, and all-terrain vehicles; and diesel engines over 50 horsepower in recreational marine craft, such as yachts and cruisers. For additional information, see <http://www.epa.gov/otaq/regs/nonroad/2002/cleanrec-final.htm>.

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## FAMILY LAW

### JUDICIAL LAW

■ **CHILD SUPPORT; WORKERS COMPENSATION SETTLEMENT.** The parties dissolved their marriage in 1998. When the marriage was dissolved, husband was unemployed because of a 1996 employment-related neck injury. The stipulated decree provided that husband would pay guideline child support once he returned to full-time employment. In November, 2000, husband received a workers compensation settlement resulting from his neck injury. However, husband stopped paying child support in September 2001 and wife moved to modify husband's child support obligation. The child support magistrate granted the motion, concluding there had been a substantial change of circumstances because husband's settlement gave him sufficient resources to pay child support. Husband appealed, citing *Lenz v. Wergin*, 408 N.W.2d, 873 (Minn. App. 1987) for the proposition that the court should apportion his settlement money over the remainder of his obligation and that only his lost future wages should be used to calculate support.

On appeal, the Court of Appeals noted that, when considering a child support modification, courts must statutorily consider all earnings, income, and resources of the parents, including real and personal property. "Income" for support purposes is defined to include periodic payments of workers compensation benefits and "resources" include money received in workers compensation settlements. Since Minn. Stat. § 518.551, subd. 5(c)(1) specifically permits courts to consider all resources when determining a child support obligation, it follows that the statute contemplates that these resources may be used to meet the obligation. In addition, the Minnesota Supreme Court has upheld obligations that require the obligor to use some of his or her assets to meet the obligation. Thus, *Lenz* encompasses all resources received in settlement regardless of their purpose. Affirmed. *Kalbakdalen v. Kalbakdalen*, C5-02-455 (Minn. App. 10/08/02) (unpublished). <http://www.lawlibrary.state.mn.us/archive/ctapun/0210/455.htm>

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## FEDERAL PRACTICE

### JUDICIAL LAW

■ **DIVERSITY; TIMELINESS OF REMOVAL; REMAND.** Plaintiff filed a sexual harassment action in the Missouri courts, asserting claims only under Missouri law. Some time later, plaintiff amended her state court complaint to include a claim under the Americans with Disabilities Act. Defendant then removed the case to the Western District of Missouri, citing federal question jurisdiction as the sole basis for removal. Plaintiff then sought leave to file an amended complaint dismissing the ADA claim, and moved to remand the action to state court. Those motions were granted, and the defendant appealed, arguing that the existence of diversity jurisdiction barred the federal court from remanding the action to the Missouri courts.

The 8th Circuit rejected the defendant's argument, finding that 28 U.S.C. §1446(b) requires that removals based on diversity must be filed within 30 days of the time that diversity jurisdiction is established and no more than one year after the case is commenced, and that the defendant had met neither of those deadlines, meaning that the defendant was "barred from asserting diversity jurisdiction as a basis for remaining in federal court." Accordingly, the order remanding the action to the Missouri courts was affirmed. *Lindsey v. Dillard's, Inc.*, No. 02-1455, 306 F.3d 596 (8th Cir. 10/07/02).

■ **RULE 11 SANCTIONS; “SAFE HARBOR”**. In the first of these sanctions cases, defendants served their motion for Rule 11 sanctions on the plaintiff on June 11, 2002, triggering the 21-day “safe harbor” provision found in Fed. R. Civ. P. 11(c)(1)(A). Thirty days later, plaintiff filed a voluntary notice of dismissal pursuant to Fed. R. Civ. P. 41(a)(1). Five days after the dismissal, defendants filed their Rule 11 motion with the court. Judge Tunheim subsequently ordered the parties to file briefs on the whether the court retained jurisdiction to hear the Rule 11 motion following dismissal. Judge Tunheim subsequently determined that he had jurisdiction to entertain the Rule 11 motion, but held that “even if a violation of Rule 11 did occur, the Court declines to award sanctions.” *Kinney v. County of Hennepin*, 2002 WL 31163092 (D. Minn. 09/25/02).

In a second sanctions case, failure to comply with Rule 11’s “safe harbor” provisions was fatal to defendants’ Rule 11 motions. Defendants served the plaintiff with “several letters” warning that Rule 11 motions would be filed if the action was not dismissed, and each defendant served a “Notice of Intent” detailing the alleged defects in the plaintiff’s pleadings. However, defendants did not serve or file their motion until 30 days after judgment was entered, and Judge Kyle found that neither defendants’ correspondence and “Notice of Intent,” nor the post-judgment filing of the motions, complied with Rule 11’s “safe harbor” provisions. *TRI, Inc. v. Boise Cascade Office Products, Inc.*, 2002 WL 31108190 (D. Minn. 09/30/02).

■ **OTHER NOTEWORTHY DECISIONS**. The 8th Circuit reversed as an abuse of discretion the dismissal with prejudice of plaintiffs’ claims as a sanction for their failure to respond to discovery, holding that in the absence of a finding of “willfulness and bad faith” by the district court, it had erred in not considering a lesser sanction. *Hairston v. Alert Safety Light Products, Inc.*, No. 01-3606, 307 F.3d 717 (8th Cir. 10/10/02).

The 8th Circuit affirmed Judge Montgomery’s denial of a motion to remand, agreeing with Judge Montgomery that the defendant union was a “nominal party” and was therefore not required to join in the petition to remove filed by the other defendant. *Thorn v. Amalgamated Transit Union*, No. 01-3085 305 F.3d 826 (8th Cir. 09/30/02).

The 8th Circuit found no abuse of discretion in the trial court’s decision to exclude certain expert testimony when the experts’ conclusions were not disclosed “until well into the trial” and the delay in disclosure was not “substantially justified.” *Arabian Agriculture Services Co. v. Chief Industries, Inc.*, No. 01-3052, \_\_\_ F.3d \_\_\_, 2002 WL 31306915 (8th Cir. 10/16/02).

The 8th Circuit reversed for a second time Chief Judge Rosenbaum’s distribution of *cy pres* funds in a class action, finding that the previously-ordered distribution to the National Association for Public Interest Law was not “closely related to the origin” of the class action, and that any further distribution of *cy pres* funds should “relate, as nearly as possible, to the original purposes of the class action and its settlement.” *In Re Airline Ticket Commission Antitrust Lit.*, 307 F.3d 679 (8th Cir. 2002).

Judge Tunheim adopted Magistrate Judge Noel’s Report and Recommendation recommending that a settlement agreement in a patent infringement action be enforced. In the course of his opinion, Judge Tunheim determined that motions to enforce settlement agreements are “dispositive” for purposes of the Local Rules, and that the enforceability of the alleged settlement agreement was to be decided under state law, rather than federal common law. *Transclean Corp. v. MotorVac Technologies, Inc.*, 2002 WL 31185886 (D. Minn. 09/30/02).

Judge Montgomery rejected plaintiff’s argument that the timeliness of her state law claims was governed by federal law, and held that plaintiff’s state law claims were time-barred where service was not completed prior to the expiration of the statute of limitations, even though her complaint was filed with the federal court prior to the statute of limitations expiring. *Kimble-Parham v. Minnesota Mining and Manufacturing*, 2002 WL 31229572 (D. Minn. 10/02/02).

#### CORRECTION

In the November issue of *Bench & Bar* this column incorrectly attributed authorship of *Johnson v. Moundsvista, Inc.*, 2002 WL 2007833 (D. Minn. 08/28/02) to Judge Montgomery. The opinion was actually authored by Judge Frank.

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## INTELLECTUAL PROPERTY

### JUDICIAL LAW

■ **PATENT TERMS; “ORDINARY MEANING”.** The Court of Appeals for the Federal Circuit has emphasized the importance of using dictionaries, encyclopedias, and treatises during a court’s construction of the ordinary meaning of a patent term: “these materials may be the most meaningful sources of information to aid judges in better understanding both the technology and the terminology used by those skilled in the art to describe the technology.” Courts and lawyers have long struggled with the proper role these materials should play when a court construes the disputed terms of a patent. For years, these materials were categorized with other materials — “extrinsic evidence” — having a limited role, if any, during construction of the claim terms. No longer. “[C]ategorizing [dictionaries, encyclopedias, and treatises] as ‘extrinsic evidence’ or even a ‘special form of extrinsic evidence’ is misplaced and does not inform the analysis,” wrote the court. *Texas Digital Systems, Inc. v. Telegenix, Inc.*, 2002 U.S. App. LEXIS 21567 (Fed. Cir. 10/16/02),

■ **TRADEMARKS; EQUITABLE LIEN.** Judge Tunheim ordered an equitable lien placed on defendants’ trademarks. An equitable lien may be placed on a trademark to secure a judgment. In this case, plaintiff had obtained two judgments against the defendants, but had been unable to collect because of defendants’ questionable conveyances. Defendants’ only remaining assets of value were certain trademarks using in whole or part the mark NORTON. Defendants argued that the lien would violate the established-rule against sales of trademarks “in gross” — that is, apart from the business or goodwill with which the mark has been associated. But the court rejected that argument finding it inapposite and holding nothing in Minnesota law was contrary to the court’s power to impose an equitable lien on a trademark. The court delayed for 60 days the sale of the trademarks, but awarded plaintiff its attorneys’ fees and costs. *Cieslukowski v. Norton Motors Int’l, Inc. et al.*, 99-1056 (D. Minn. 9/10/02),

■ **PATENT INFRINGEMENT; INEQUITABLE CONDUCT DEFENSE; SUBMISSION OF MATERIAL INFORMATION.** Judge Frank granted plaintiff’s partial motion for summary judgment dismissing defense of inequitable conduct. Advanced Respiratory, Inc. sued Electromed for infringement of two patents. The defense of inequitable conduct, if proved, may render a patent unenforceable for the life of the patent. Electromed’s defense alleged that Advanced had not submitted material information to the Patent Office during prosecution of one of the two patents. The court rejected Electromed’s defense because that material information had been provided to the Patent Office during prosecution of an earlier-filed “parent” application — an application that shares the same specification and filing date as the later-filed “continuation” application. Citing the Manual of Patent Examining Procedure (MPEP) and Federal Circuit case law, the court held that information submitted to the Patent Office in a parent application need not be resubmitted in a continuation application. *Advanced Respiratory, Inc. v. Electromed, Inc.*, 00-2646 (D. Minn. 10/22/02),

— TONY ZEULI  
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## REAL PROPERTY

### JUDICIAL LAW

■ **HISTORIC DESIGNATION.** Based on a consultant report and city staff recommendation, the Minneapolis Planning Commission recommended historic designation of the Harmon Place Historic District (HPHD). Prior to the final action, city staff submitted a second report which recommended markedly different boundaries for the HPHD that excluded certain properties and documented the City Council’s approval of the University of St. Thomas’s appeal, which allowed the university to demolish several buildings originally proposed for inclusion in the HPHD. Subsequently, the City Council approved the designation on terms different from the second report recommended by city staff and the Planning Commission. The property owner, Billy Graham Evangelistic Association, appealed for a writ of certiorari, challenging the City Council’s designation, asserting that the city’s choices to include or exclude properties from historic designation were arbitrary and capricious, and alleging that the process was flawed because of lack of public participation and lack of findings. The appellate court held that the designation of the historic district by the city was arbitrary and capricious because the designation was devoid of articulated reasons explaining why similarly situated property was treated differently for purposes of the historic district designation. Reversed. *Billy Graham Evangelistic Association v. City of Minneapolis*, C1-01-2127 (Minn. App. 10/08/02). <http://www.lawlibrary.state.mn.us/archive/ctappub/0210/c1012127.htm>

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**TAX**  
JUDICIAL LAW

■ **CERTIFIED MAIL NOT INADMISSIBLE HEARSAY.** Court granted IRS motion to dismiss for lack of jurisdiction. Postmark on envelope that contained taxpayers' Tax Court petition, as shown by certified mail list, was more than 90 days after the mailing date of the notice of deficiency. Court held against taxpayers who argued that the certified mail list was hearsay, stating that certified mail list is a record of regularly conducted activity under Fed. R. Evid. 802(6) and is self-authenticated by accompanying declarations under Fed. R. Evid. 902(11). *Clough v. Commissioner*, No. 6836-02, 119 T.C. No. 10 (U.S.Tax Ct. 10/18/02).

■ **TAXPAYERS MAY NOT APPEAL DECISION LETTER ISSUED AFTER EQUIVALENCY HEARING.** Taxpayers submitted timely request for CDP hearing with regard to Notice of Federal Tax Lien mailed May 7, 2001. In same request, taxpayers requested CDP hearing with regard to Final Notice of Intent to Levy mailed February 9, 2001, with regard to tax liability of the same year. Appeals office conducted an administrative hearing with regard to the Notice of Federal Tax Lien and an equivalency hearing with regard to the levy notice. Court held that appeals office was not obligated to provide taxpayers with an appeals hearing as contemplated by Code Sec. 6330 because taxpayer's request with regard to the levy notice was not timely. Equivalency hearing does not result in a determination within the meaning of Code Secs. 6230 or 6330 and therefore this court lacks jurisdiction. Court did not impose a penalty per Code Sec. 6673 but warned that such penalty is applicable to this type of case. *Nelson v. Commissioner*, T.C. No. 5323-02L, 2002 WL 31269539 (U.S.Tax Ct. 10/10/02).

■ **REVENUE RULING A BINDING CONCESSION ON IRS.** Married taxpayers in a general partnership owned stock warrants in a corporation and assigned them to four charitable institutions. Court held that the sale of stock was not taxable per anticipatory assignment of income doctrine and that taxpayers were not legally bound and could not be compelled to sell the stock at the time of assignment. The court treated Rev. Rul. 78-197, 1978-1 CB 83 as a binding concession on the IRS. *Rauenhorst v. Commissioner*, No. 1982-00, 119 T.C. No. 9 (U.S.Tax Ct. 10/07/02).

■ **PRO RATA PORTION OF ATTORNEY FEES AWARDED.** Married taxpayers substantially prevailed on the question of whether they realized discharge of indebtedness income for a loan cancelled by Federal Deposit Insurance Corporation. Court held that IRS position on discharge of indebtedness income was substantially justified as issuance and filing of Form 1099-C could be characterized as evidence of an intention to cancel the loan. On the other hand, Court held that IRS position on penalty issue was not substantially justified as IRS erroneously determined that taxpayer's position was unreasonable. Court concluded that taxpayers were entitled to an award of pro rata portion of their attorney fees. *Owens v. Commissioner*, No. 672-01, 2002 WL 31194556 (U.S.Tax Ct. 10/03/02).

■ **FORMAL DISCOVERY STAYED; INFORMAL DISCOVERY PREREQUISITE.** Court granted petitioner's motion for protective order staying formal discovery initiated by IRS. Court directed parties to participate, in good faith, in informal conferences during the next 90 days. After such time, if there are unsettled matters, parties may resort to formal discovery provisions of the Tax Court rules. Court held that formal discovery prior to informal conference between parties did not comply with Tax Court rules. *Schneider Interests, L.P. v. Commissioner*, No. 200-02, 119 T.C. No. 8 (U.S.Tax Ct. 09/30/02).

■ **COURT IMPOSES DELAY PENALTY.** Court noted that taxpayer's failure to cooperate with Respondent, comply with the Rules, and comply with orders of the court due to taxpayer's willfulness, bad faith, or fault was a sufficient basis to dismiss taxpayer's action. Court determined case on its merits finding: taxpayer failed to substantiate business expenses and addition to tax for late-filed return warranted. Furthermore, court found constitutional argument frivolous noting that taxpayers were thoroughly familiar with precedent, which denied validity of their position. Court thereby imposed a delay penalty in the amount of \$7,500. *Nunn v. Commissioner*, No. 16165-99, 2002 WL 31163099 (U.S.Tax Ct. 09/30/02).

■ **IRS GRANTED SUMMARY JUDGMENT, DELAY PENALTY IMPOSED.** Court found for Respondent holding: appeals officer review at hearing of MFTRA-X transcript alone satisfies verification requirements. Furthermore, agent's declaration identifying documents contained in taxpayer's administrative file, albeit without personal knowledge of notices being mailed, is sufficient evidence of satisfaction of assessment mailing requirements. Court imposed \$7,500 delay penalty noting that taxpayer has advanced this same type of groundless argument in past cases. *Standifird v. Commissioner*, No. 8977-01L, 2002 WL 31151194 (U.S.Tax Ct. 09/26/02).

■ **VALUE OF ASSETS TRANSFERRED TO FAMILY LIMITED PARTNERSHIP INCLUDED IN DECEDENT'S GROSS ESTATE.** Executrix petitioned for redetermination of estate tax deficiency arising from IRS' determination to include family limited partnership assets in decedent's estate thus increasing taxable

liability. Tax Court held that date of death value of assets transferred to the family limited partnership was includable in decedent's gross estate because decedent retained a life estate in such assets. Value of assets transferred by other partners and not the decedent was not includable in decedent's gross estate. **Thompson v. Commissioner**, No. 7578-99, 2002 WL 31151195 (U.S.Tax Ct. 09/26/02).

■ **IRS ENTITLED TO PROCEED WITH COLLECTION ACTION, DELAY PENALTY IMPOSED.** Taxpayer received timely notice of deficiency and disregarded the opportunity to file a petition for redetermination. This alone generally bars a taxpayer from challenging the existence or amount of the underlying tax liability. The court rejected taxpayer's argument that the notice is invalid because respondent's Service Center director is not properly authorized to issue notice of deficiencies as frivolous and groundless. Appeals officer satisfied verification requirements of Code Sec. 6330 by reviewing transcripts and Forms 4340 for the tax years in question. Notices of balance due sent on the same dates that IRS made assessments for the tax years in question satisfied notice and demand for payment requirements. Finally, the court noted that taxpayer received copy of *Pierson v. Commissioner*, 115 T.C. 576 (2000) during the administrative process and under such circumstances found that taxpayer "regarded this proceeding as nothing but a vehicle to protest the tax laws of this country and to espouse his own misguided views." Delay penalty of \$1,000 imposed. **Horejs v. Commissioner**, No. 9681-01L, 2002 WL 31116653 (U.S.Tax Ct. 09/25/02).

■ **INDIVIDUAL'S PURCHASE OF STOCK IN NON-PUBLICLY TRADED CORPORATION ON BEHALF OF IRA NOT A DISTRIBUTION.** Taxpayer petitioned for redetermination of deficiencies arising from deemed distribution from his IRA. Taxpayer had a self-directed IRA and requested funds be invested in non-publicly traded corporation. IRA custodian delivered check made payable to the non-publicly traded corporation to taxpayer to be subsequently delivered to the corporation. Court held that taxpayer acted as a conduit for the IRA custodian and therefore delivery of check to taxpayer was not a taxable distribution. **Ancira v. Commissioner**, No. 425-01, 119 T.C. No. 6 (U.S.Tax Ct 09/24/02).

■ **FAILURE TO TIMELY FILE; FAILURE TO MAINTAIN ADEQUATE RECORDS.** Taxpayer petitioned for redetermination of deficiencies. IRS is allowed to reconstruct taxpayer's income by bank deposit method where taxpayer failed to maintain adequate books and records. Lack of records to substantiate travel, meal, and entertainment expenses preclude itemized deductions, which require heightened substantiation. Excessive work for legal center was not reasonable cause for lack of records and inability to timely file. Taxpayers were rightfully liable for failure to timely file penalties and accuracy-related penalties for failure to maintain adequate books and records. **Johnson v. Commissioner**, No. 20299-98, 2002 WL 3113876 (U.S.Tax Ct. Sept. 24, 2002).

■ **STATE TAX TREATMENT OF GAMBLING LOSSES IS STATE ISSUE.** Plaintiffs alleged nine causes of action against Minnesota and Wisconsin arising from state tax treatment of gambling income and losses. U.S. District Court dismissed action holding that neither state waived its sovereign immunity under the 11th Amendment, thus barring plaintiff's claims for compensatory and punitive damages. Moreover, the Tax Injunction Act and general principles of comity barred taxpayer's claims in federal court, as remedies in state court and administrative alternatives are available. Finally, the 11th Amendment and Tax Injunction Act bar the court's exercise of subject matter jurisdiction and the court declined to exercise supplemental jurisdiction. *Kraemer v. Minnesota Department of Revenue*, No. CIV. 02-649 MJD/JGL, 2002 WL 31116645 (D.Minn. 09/24/02).

■ **REFUND OF EXCESS TAX PAID PLUS INTEREST AND COSTS.** In previous case, taxpayer challenged the reclassification of his residence from homestead to non-homestead property. Per previous order of this court taxpayer prevailed; classification of property changed from non-homestead back to homestead. Petitioner now argues for costs and disbursements. Court awarded court filing fee, court reporter fee, copying costs, mailing costs, and parking fees. **Frisch v. County of Brown**, No. C9-01-917, 2002 WL 31084721 (Minn.Tax 09/05/02).

■ **60-DAY TIME LIMIT TO APPEAL ORDER; NONRESPONSE OF COMMISSIONER TO TAXPAYER REQUEST.** Taxpayers failed to file appeal within 60 days of date of issuance of orders. Therefore, court lacked jurisdiction to hear taxpayers' appeal regarding April 11, 2002, orders. As to orders dated June 15, 2001, taxpayers began, within 60 days, the informal administrative appeal process. Court ruled in favor of taxpayers finding that they did not abandon their informal appeal but rather that the commissioner failed to follow through with their requests for a meeting. Thus, taxpayers appeal to this court on November 30, 2001, was timely filed and can be heard. Finally, court held that commissioner has the authority to prepare tax returns for taxpayers who do not file, however present evidence at trial of valid marriage and birth require commissioner to order new returns showing the correct number of exemptions. **Lifer v. Commissioner**, No. 7417, 2002 WL 31084934 (Minn. Tax 09/05/02).

■ **PREVAILING PARTY ENTITLEMENT TO ATTORNEYS' FEES AND COSTS; SPECIAL RATES.** A corporation that was the prevailing party in underlying tax litigation with the government was entitled to a

portion of its requested attorneys' fees and costs. The government conceded that the taxpayer was entitled to reasonable costs from the date that it submitted a qualified offer. Although the taxpayer was entitled to costs and attorneys' fees, the court found the amount it sought was not reasonable. The court concluded that no special factors existed to warrant awarding fees at a higher rate than set by law. **Trucks, Inc.**, (DC Ga.), 2002-2 USTC ¶150,723.

■ **VEBA TRUST; UNRELATED BUSINESS INCOME TAX.** Unrelated business taxable income (UBTI) realized by a tax-exempt employee health plan trust that qualified as a Voluntary Employees' Beneficiary Association (VEBA) was subject to tax calculated using the Code Sec. 1(e) trust tax rates, rather than the more favorable Code Sec. 11 corporate tax rates. According to the court, an informed reading of the tax code, guided by dominating principles of statutory construction, established Congress' intent to impose trust rates on the VEBA trust's UBTI. The taxpayer's nonexempt income was taxable as if it were earned by a nonexempt entity. Because it was organized as a trust and its ordinary income was concededly subject to federal income tax, that income should be taxed as amounts earned by a trust pursuant to a trust rate schedule. **The Sherwin-Williams Company Employee Health Plan Trust**, DC Ohio, 2002-2 USTC ¶150,721

#### ADMINISTRATIVE MATTERS

■ **ESTATE TAXES: ADMINISTRATION.** Notice provides clarification in computing and administering the Minnesota estate tax where an estate is required to file a Minnesota estate tax return (gross estate in excess of \$700,000) but is not required to file a federal estate tax return (gross estate of less than \$1,000,000). Minnesota Department of Revenue #02-16: "Estate Tax — Issues for Estates Required to File a Minnesota Return but not a Federal Return" (09/30/02).

■ **SALES TAX: DOCUMENT SCANNING.** Charges for the scanning of documents are subject to sales tax if the scanning process results in the transfer of tangible personal property. Thus, if the seller scans a document and transfers the information to a tape, disc, or another printed document, which is then transferred to the customer, the charge to the customer is subject to sales tax. If the information is being transmitted to the customer electronically, and no tangible personal property is transferred, then the charge for scanning is not subject to sales tax. Minnesota Department of Revenue #02-15: "Sales and Use Tax — Copies of Scanned Documents" (09/09/02).

■ **TELECOMMUNICATIONS EQUIPMENT PURCHASE EXEMPTION; INTERNET SERVICE PROVIDERS.** Internet service providers provide an information service and do not provide telecommunications services as defined in Minn. Stat., §297A.61, subd.24, par. (a). Therefore, Internet service providers cannot use the sales tax exemption to purchase machinery and equipment. Minnesota Department of Revenue #02-14: "Exemption for Purchases of Telecommunication Equipment — Internet Service Providers" (09/09/02).

■ **SALES TAX; GAME RELEASE CHARGES.** The entire charge for the privilege of hunting at game farms, shooting preserves, or hunting clubs is subject to Minnesota sales and use tax. This includes per bird or animal, additional bird or animal, and released bird or animal charges. Game farms, shooting preserves, and hunting clubs are required to pay sales tax on purchases of items used or consumed in the process of providing taxable services. Retail sales of slaughtered, dressed, and wrapped birds or animals that are not sold as part of an admission or membership fee are not subject to Minnesota sales or use tax. Minnesota Department of Revenue #02-13: "Sales and Use Tax — Game Farms, Shooting Preserves and Hunting Clubs — Game Release Charges" (09/09/02).

■ **SALES TAX; AGGREGATE MATERIAL.** Minn. Stat., §298.75 will define "aggregate material" for purposes of Chapter 297A. Thus, "aggregate material" includes, but is not limited to, sand, silica sand, gravel, crushed rock, limestone, granite, and borrow if transported on a public road, street, or highway, stone, boulders, uncrushed rock, rip-rap, crushed granite, crushed limestone, and coarse tailings from taconite plants that are being marketed as aggregate. Aggregate material does not include dimension stone, dimension granite, agricultural lime, or limestone used in taconite production of flux pellets. Minnesota Department of Revenue #02-12: "Sales and Use Tax — Taxable Delivery Charges — Aggregate Material" (09/09/02).

■ **EMPLOYER COMPENSATION PLANS; GRACE PERIOD DEDUCTIONS.** The IRS has determined that it is appropriate to waive the scope limitations of Section 4.02 of Revenue Procedure 2002-9 and modifies the application section of Revenue Ruling 2002-46. Revenue Ruling 2002-73.

■ **RENT- OR INTEREST DEDUCTIONS; ABUSIVE LILO TRANSACTIONS.** Ruling modifies and supersedes Revenue Ruling 99-14. Taxpayers may not deduct, under sections 162 and 163, rent or interest paid or incurred in connection with a lease-in/lease-out (LILO) transaction that properly is characterized as conferring only a future interest in property. The IRS will continue to disallow the tax benefits claimed in connection with lease-in/lease-out transactions where appropriate. Revenue Ruling 2002-69.

■ **QUALIFIED COVERED CALL OPTIONS.** Ruling provides guidance where a qualified covered call option holds a put on the same underlying equity. The issue is whether the straddle consisting of the underlying equity and the written call option are part of a larger straddle and therefore not excluded from straddle treatment by Code Sec. 1092(c)(4)(A). In each situation described by the ruling, the presence of the purchased put causes the stock and the qualified covered call option to constitute part of a larger straddle within the meaning of Code Sec. 1092(c)(4)(A). Revenue Ruling 2002-66.

■ **PRESERVING RETIREMENT SAVINGS.** Revenue Ruling 2002-62 provides relief to taxpayers who selected one of two safe-harbor methods described in Notice 1989-25 and now experience an unexpected drop in the value of their retirement savings. Two of the previous safe harbor methods required fixed amounts of distribution that could result in premature depletion of account assets due to decline in market value. New Revenue Ruling provides a third safe-harbor method under which fixed payment distribution amounts change from year to year based on the value of the account. CCH Group Tax Newsletter (10/04/02), IR-2002-104, Revenue Ruling 2002-62.

■ **CLASSIFICATION OF QUALIFIED ENTITY; COMMUNITY PROPERTY.** The IRS will accept the position that an entity is a disregarded entity for federal tax purposes where husband and wife, as community property owners, treat the entity as a disregarded entity for federal tax purposes. If treated as a partnership for federal tax purposes, the IRS will accept the position that the entity is a partnership. The IRS will treat a change in position as a conversion of the entity. Revenue Procedure 2002-69.

■ **MONTHLY DISTRIBUTIVE SHARE ACCOUNTING; PARTNERSHIPS.** This procedure modifies Revenue Procedure 2002-16, which outlined procedures for accounting on a monthly basis of a partner's distributive share when the partner satisfies the definition of an eligible partnership and made the relevant election. This procedure eliminates certain monthly statements that were required but does not eliminate the requirements that a partnership file Form 1065, U.S. Return of Partnership Income, and provide a Schedule K1 to each partner. Revenue Procedure 2002-68.

■ **RAILROADS; TRACK MAINTENANCE ALLOWANCE ACCOUNTING METHOD.** Sets forth safe harbor method of accounting, the track maintenance allowance method, for track structure expenditures paid or incurred by Class II or Class III railroads. This procedure includes method to obtain automatic consent to change to this accounting method and provides that qualifying taxpayers, whose treatment of track structure expenditures is at issue or under examination, may settle open taxable years using the track maintenance allowance method. Revenue Procedure 2002-65.

■ **SUBSTANTIATING EMPLOYEE LODGING, MEAL AND INCIDENTAL EXPENSES.** Procedure updates Revenue Procedure 2001-47, 2001-42 I.R.B. 332, by providing rules under which the amount of ordinary and necessary business expenses of an employee for lodging, meal, and incidental expenses or for meal and incidental expenses incurred while traveling away from home will be deemed substantiated under Regulations Sec. 1.274-5. Revenue Procedure 2002-63.

■ **TAX LIABILITY FOR SALE OF QEZ ASSETS.** Effective for sales of qualified empowerment zone (QEZ) assets occurring after December 21, 2001, revenue procedure explains how taxpayers may make an election under Code Sec. 1397B to defer recognition of certain gain on the sale of QEZ assets. Revenue Procedure 2002-62.

■ **OPTIONAL STANDARD MILEAGE RATES.** For employees, self-employed individuals, or other taxpayers, this revenue procedure provides optional standard mileage rates for use in computing deductible costs of operating an automobile. Also provides nonmandatory substantiation requirements for situations where employer provides mileage allowance under a reimbursement or allowance arrangement. Revenue Procedure 2002-61.

■ **SUBSTITUTE TAX FORMS.** IRS provides guidelines and general requirements for the development, printing, and approval of substitute tax forms. This revenue procedure will be reprinted as the next revision of IRS Publication 1167, "General Rules and Specifications for Substitute Tax Forms and Schedules." Revenue Procedure 2002-60.

■ **REINSURANCE ARRANGEMENTS; TAX AVOIDANCE.** Notice announced IRS and Treasury Department awareness of transactions used to shift taxpayer income to purported insurance companies that are subject to little or no U.S. federal income tax. Notice announces IRS intentions to challenge tax benefits from these transactions. IRS Notice 2002-70.

■ **CONTROLLED FOREIGN CORPORATIONS.** Notice provides guidance to be used by controlled foreign corporations for determining interest rates and appropriate foreign loss payment patterns in calculating qualified insurance income under Code Sec. 954(i). IRS Notice 2002-69.

■ **WEIGHTED AVERAGE INTEREST RATE.** For plan years beginning in October 2002, the weighted average for this period is 5.60 percent. The 90 percent to 110 percent permissible range is 5.04 percent to 6.16 percent. The 90 percent to 120 percent permissible range is 5.04 percent to 6.72 percent. IRS Notice 2002-68.

■ **TRANSITIONAL RELIEF FOR FOREIGN PARTNERSHIPS, WITHHOLDING AGENTS.** This notice extends the transitional documentation and reporting relief specified in Section IV of Notice 2001-4, 2001-2 I.R.B. 267, for foreign partnerships, Qualified Intermediaries, and U.S. withholding agents through the end of calendar year 2002. IRS Notice 2002-66.

■ **COLI PLANS; APPEALS SETTLEMENT INITIATIVE TERMINATED.** IRS announced that settlement initiatives with respect to broad-based leveraged Corporate Owned Life Insurance (COLI) plans purchased after June 20, 1986, will be terminated. The IRS and Department of Justice will vigorously defend and prosecute all future COLI litigation. IRS Announcement 2002-96.

■ **RESTORATIVE PAYMENTS TO PENSION PLAN DEDUCTIBLE BY EMPLOYER.** Per Code Sec. 162, restorative payments made by employer corporation were made to preempt claims arising in the ordinary course of business and as such IRS found them to be deductible under Code Sec. 162. IRS PLR 200241046 (10/11/02).

■ **ABUSIVE TAX SHELTER REGULATIONS.** IRS released temporary and proposed regulations dealing with tax shelter disclosure statements and the requirement that investor lists be maintained with respect to potentially abusive tax shelters. Both sets of regulations become effective January 1, 2003. CCH Group Tax Newsletter (10/18/02), T.D. 9017, T.D. 9018, NPRM REG-103735-00, NPRM REG-103736-00.

■ **PRIVACY; EMPLOYEE COMPLAINT AND ALLEGATION REFERRAL RECORDS.** IRS gave notice of final rule that exempts the "Employee Complaint and Allegation Referral Records" system from certain provisions of the Privacy Act of 1974. This system of records contains investigatory material compiled for law enforcement purposes. Final rule is effective October 9, 2002. CCH Group Tax Newsletter (10/09/02).

■ **MINNESOTA SALES AND USE TAX: AGGREGATE MATERIALS DELIVERY.** Charges for the delivery of aggregate materials and concrete block are subject to Minnesota sales and use tax regardless of whether the charge is billed by the seller or a third-party hauler. Delivery charges may be exempt under certain circumstances. Rev. Notice No. 02-17, MN. Dep't. of Revenue (10/21/02).

#### LEGISLATION

■ **TAX EXEMPTION REPORTING REQUIREMENTS; TAX EXEMPT STATUS:TERRORIST GROUPS.** On October 16, 2002, the House passed, by unanimous consent, HR 5596 modifying reporting requirements for committees that influence state and local elections. HR 5596 would exempt state, local, and candidate committees from providing documentation regarding their organizations' income and expenditures to the IRS. Political action committees would also be exempt from reporting requirements if they work solely on state and local elections. HR 5603 also passed by unanimous consents. This bill would remove designated terrorist groups from tax-exempt status disallowing deductions for contributions to such groups and barring judicial proceeding concerning their tax liability to challenge a terrorist designation. CCH Group Tax Newsletter (10/18/02).

■ **MILITARY TAX RELIEF.** House passed, by a 412-0 margin, Armed Forces Tax Fairness Bill (HR 5557) a significantly less costly bill than similar measure passed by the Senate (HR 5063). Senate passed its bill, Uniformed Services Exempt Status, by unanimous consent. In total, the Senate's bill grants \$1.06 billion in tax relief whereas the House's version grants \$265 million. The disparity is due to Senate's \$788 million above-the-line deduction for overnight travel expenses of National Guard and reserve personnel. No similar provision is contained in House's bill. CCH Group Tax Newsletter (10/10/02); CCH Group Tax Newsletter (10/04/02).

— JENNY RYAN

— KATHRYN SEDO

University of Minnesota Law School

#### TORTS & INSURANCE

##### JUDICIAL LAW

■ **NO-FAULT BENEFITS; SETTLEMENT OF CHIROPRACTIC EXPENSES.** On December 18, 2000, respondents Picasso and Ramirez suffered injuries in a car accident. They were treated at Rivera Chiropractic Center and claimed no-fault benefits from their insurer, appellant Progressive Northern Insurance (Progressive). In January 2001, respondents assigned their no-fault benefits to Rivera. Progressive denied their claims, respondent petitioned for no-fault arbitration, which ultimately awarded Picasso \$4,140 and Ramirez \$3,305 for their treatment at Rivera. Progressive did not pay the awards because it had settled the chiropractic bills with Rivera for less than the arbitration awards.

In January 2002, Picasso and Ramirez moved the district court to compel payment of the remain-

der of the awards, which the court subsequently confirmed and entered judgment against Progressive. The court ruled that Progressive had not satisfied the arbitration award because no-fault insurers may not coordinate benefits or enjoy the benefits of reduced medical expenses. Progressive appealed.

The Minnesota Court of Appeals affirmed. Judge Randall, writing for the panel, reasoned that the No-Fault Act's purpose is to require no-fault insurers to pay injured people's medical bills promptly rather than permitting them to wait and hope to negotiate a reduced amount. Further, he found that "Picasso and Ramirez' windfall is troubling to this court". Nevertheless, the panel reasoned that an insured should prevail with respect to receiving medical expenses over and above the discount given by a chiropractor rather than letting the insurer escape liability for which it collected a premium. Judge Randall opined that this is an area of the law that could benefit from review by the Legislature. **Picasso, et al v. Progressive Northern Insurance**, C8-02-465 (Minn. App. 09/10/02) (unpublished). <http://www.lawlibrary.state.mn.us/archive/ctapun/0209/465.htm>

■ **SUMMARY JUDGMENT; TRAIL RIDE ON HORSE.** Barton sued Irish and Passe for personal injuries stemming from a May 1, 1994, accident where Barton was thrown from a horse and injured. Irish owned the horse and Passe had saddled the horse. Barton alleged that Irish and Passe were negligent because the saddle used on the horse that day was defective, causing sharp metal pieces to dig into the horse's back, causing her to be thrown.

The district court granted summary judgment, ruling that there was no proof that the defective saddle was the proximate cause of Barton's injuries. The district court also had granted summary judgment in favor of Irish.

Barton appealed. The Minnesota Court of Appeals found that there was no record which established that Passe had any duty to Barton or relationship with Irish that would establish a legal duty toward Barton. Passe was merely a family friend to Irish, was not an employee, agent, or joint venturer. The Minnesota Court of Appeals therefore affirmed the grant of summary judgment to Passe.

The Court of Appeals reversed Judge Ring's ruling on Irish, however. The record showed that there was sufficient evidence before the court showing that Barton's injury may have been caused by a defective saddle, at least for the purpose of surviving a summary judgment motion. **Barton v. Irish, et al.**, C7-02-280, (Minn. App. 09/17/02) (unpublished). <http://www.lawlibrary.state.mn.us/archive/ctapun/0209/280.htm>

■ **SUBROGATION/UNDERINSURANCE CASE.** Nash injured Owusu in an automobile accident. Owusu was insured by Illinois Farmers Insurance Company ("Farmers"). Owusu served a *Malmin* notice on Farmers, but Farmers chose not to intervene. In December of 2000, the district court entered judgment for \$62,496 in favor of Owusu and against Nash. The Farmers' policy limit was \$50,000. Farmers paid Owusu the remaining \$12,496 of the judgment in underinsured motorist's benefits. In April 2001, Owusu executed and Nash filed a satisfaction of judgment. In May 2001, Farmers' attorney requested reimbursement in the amount of \$12,496 because the underinsured motorist carrier had a right for expenses paid in the matter.

The parties brought cross-motions for summary judgment. The district court granted Farmers' motion. The Minnesota Court of Appeals concluded that Farmers was not entitled to bring a subrogation action, and the matter was reversed and remanded for dismissal. The matter was reversed because the filed satisfaction of judgment defeated Farmers' subrogation right. The Court concluded that Farmers should not be allowed to "sleep on its rights when it had adequate opportunity to protect itself." **Illinois Farmers Insurance Company vs. Nash**, CX-02-290 (Minn. App. 09/24/02). <http://www.lawlibrary.state.mn.us/archive/ctappub/0209/cx02290.htm>

■ **DISCRETIONARY IMMUNITY.** On November 25, 1999, an unidentified driver hit a stop sign that controlled westbound traffic on Kanabec County Road 18. The driver cut the signpost at its base to free his vehicle. The driver set the sign in a grassy ditch where it was not visible to motorists. No one reported the damage to the stop sign to Kanabec County.

Zaske, a minor, was a passenger in Lee's vehicle at this intersection on November 29, 1999. The county, which had not detected the missing stop sign until the second accident occurred, placed the stop sign immediately after the accident. Zaske sued the county for its alleged negligence in failing to detect and replace the missing stop sign.

It was undisputed there was no evidence the county had actual knowledge the sign was missing before the November 29 accident occurred. The trial court found evidence sufficient to create a genuine issue of material fact. The Minnesota Court of Appeals reversed. It found the county was immune by operation of statutory discretionary immunity from liability based on its policy for detecting problems with traffic signs. The evidence was insufficient to create a genuine issue of material fact about whether a county employee with a duty to detect a missing stop sign drove through the intersection and failed to detect or report the missing stop sign. Thus,

the district court erred by denying the county summary judgment motion. *Zaske v. Lee, et al*, C3-02-454, (Minn. App. 10/01/02).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0210/c302454.htm>

■ **INSURED REFUSES TO TENDER DEFENSE.** Meyer hired Loren Miller to plow his driveway. As Loren Miller was plowing Meyer's driveway, Meyer backed out of the garage, and collided with Michelle Miller's vehicle. Millers were insured by State Farm Mutual Insurance Company (State Farm). State Farm paid for the property damage to Michelle's vehicle, but Michelle also sustained out-of-pocket expenses from her \$500 deductible. State Farm attempted to recover from Meyer, but Meyer refused to disclose the identity of his insurer. State Farm and Michelle sued him. State Farm later learned that Meyer was insured by Cincinnati Insurance Company (Cincinnati), but Meyer had instructed Cincinnati not to provide coverage, pay the claim, or defend him.

State Farm filed a petition for arbitration pursuant to its intercompany arbitration agreement with Cincinnati. While Cincinnati admitted that it was a signatory to the agreement, it argued that the agreement only takes effect if Cincinnati's insured invokes coverage. State Farm moved to compel Cincinnati to arbitrate. The district court denied State Farm's motion, concluding 1) the disputed claim did not fall within the scope of the agreement, 2) Cincinnati was under no obligation to defend, indemnify, or arbitrate on its insured's behalf because its insured did not tender defense of the claim to it, and 3) the insurance policy between Cincinnati and the insured did not confer third-party-beneficiary status on State Farm, and 4) the Minnesota Unfair Claims Practices Act does not effect State Farm's claim. State Farm appealed.

The Minnesota Court of Appeals affirmed the trial court. It found that the parties' intercompany arbitration agreement was not applicable because Meyer refused to tender the defense to Cincinnati. It found this was a "condition precedent", thus Meyer's action did not amount to noncooperation under the agreement, and Cincinnati did not have a duty to arbitrate. Judge Randall wrote a compelling dissent. He would have required Cincinnati to go to arbitration, award State Farm reasonable attorney's fees for having to bring the matter to court, and remand to the district court to stay the underlying lawsuit between Michelle Meyer and respondent's insured, Glen Meyer.

Randall found it was questionable law and "bad public policy, egregious public policy" not to compel the arbitration. Randall found it "beyond comprehension" how 3.6 million different individuals could control Minnesota's mandatory liability-insurance law, giving people the power to "vest-pocket" their liability insurance. It appears the rationale of Meyer was that he wanted to refuse coverage to save himself money in future auto premiums. Randall found it bizarre to permit Meyer to avoid the problem that he created. The majority's logic challenges common sense. *State Farm Mutual Automobile Insurance Company, vs. Cincinnati Insurance Company*, C4-02-396, (Minn. App. 10/01/02).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0210/c402396.htm>

■ **MILLER-SHUGART AGREEMENTS UPHELD.** In January 1995, a fire started in the Tofte Cove townhome, which contains six townhomes. The fire was caused by an employee of Tofte Management using a hot air gun to thaw frozen pipes. As a result, Tofte Cove Homeowners Association ("Tofte Cove") sustained \$762,163 in property damage. Tofte Cove was compensated for the loss by its property insurer, St. Paul Companies.

In 1996, Tofte Cove, on behalf of St. Paul Companies, brought a breach of contract action against the subcontractors alleging defective construction. Respondents Lyle Ankrum and Bill Ermatinger were brought into that action in January 1997 when they were served with a second amended complaint. Both Ankrum and Ermatinger had commercial liability insurance policies with American States Insurance Company ("ASI"). Ankrum and Ermatinger tendered defense of the action to ASI. In March 1997, ASI sent Ankrum a reservation-of-rights letter notifying him that ASI reserved its right to disclaim coverage if it was later learned that the damages claim fell outside the policy coverage. In November 1997, ASI moved for default judgment in the declaratory judgment action based on Ankrum and Ermatinger's failures to answer. A mediation was conducted where \$450,000 in outstanding damages were unpaid.

In June 1998, Tofte Cove's attorney wrote ASI's attorney stating that Tofte Cove intended to pursue its claim against Ermatinger and Ankrum through entering into *Miller-Shugart* agreements with them and moving to vacate the default judgment in the declaratory judgment action. A jury trial in the Tofte Cove action was scheduled to begin on November 30, 1998. Tofte Cove had at least three experts prepared to testify against Ermatinger and Ankrum on the issues of liability, causation, and damages. The contractors who had settled with Tofte Cove had cross-claims pending answer. Ermatinger and Ankrum had experts prepared to testify that the drywall and sheetrock work had been performed negligently. On October 13, 1998, Ermatinger signed a *Miller-Shugart*

Agreement and Ermatinger later testified that he signed a similar agreement because he had been told it would get him out of the lawsuit and protect his assets. Ermatinger testified he did not understand that by signing the agreement, he was admitting liability in the amount of \$225,000 and that Tofte Cove could attempt to collect that amount from his insurer. Following the hearing, the district court entered judgment against Ankrum and Ermatinger in the amount of \$225,000 each. The evidence supported the jury's finding that Ankrum and Ermatinger were not engaged in a joint venture. It found the district court did not err in granting Tofte Cove's motion to intervene and vacate the default judgment or in finding that the *Miller-Shugart* agreements were reasonable and prudent and not the product of collusion. However, the district court erred in awarding Tofte Cove attorney fees. It found that ASI properly relied on the default judgment and accompanying order to determine that it did not owe a defense or coverage to Ankrum or Ermatinger. Therefore, Ankrum and Ermatinger would not have been entitled to attorney fees in the declaratory judgment action. ***American States Insurance Company vs. Ankrum, et al.***, C7-01-2195, (Minn. App. 10/01/02). <http://www.lawlibrary.state.mn.us/archive/ctappub/0210/c7012195.htm>

■ **CONCURRENT CAUSE DOCTRINE.** On March 4, 2000, Olene went to Mathias's home. Olene brought his car to Schmitt's home on a flatbed trailer owned by Olene. The car had to be lifted off Olene's trailer by motorized crane. The crane had a heavy-duty cable with a hook that attached to objects for lifting. When the vehicle was lifted from the trailer, Doug Schmitt noted oil was leaking from the car and placed a pan underneath the car to catch the oil. As he was coming out from underneath the car, the chain broke on a weld on one of the links. The vehicle fell on Olene, causing serious injury. Olene sued Mathias and Doug Schmitt who tendered defense of the lawsuit to Depositors and Midwest Family, their respective homeowner's liability insurers. Both insurers brought declaratory-judgment actions and they were not obligated to defend or indemnify the Schmitts, because of policy exclusions for injury arising out of "the ownership, maintenance, use, loading or unloading of motor vehicles, including trailers, owned or operated by or rental loaned to an 'insured.'"

Olene claimed the breaking of the chain was a divisible, concurrent cause covered under the Schmitt's homeowner's policy. The Minnesota Court of Appeals concluded that while negligent inspection of the chain was a factor in the cause of the accident, the factor operated inextricably with the use of the motorized crane to cause Olene's injury. The motorized crane was supposed to lift the vehicle off the ground and transport it across the scrap yard. It found because the injuries caused by a break in the chain were so intertwined with the use of the crane, the motor-vehicle exception in respondents' homeowners' policy applied, and there was no coverage for appellant's injuries. ***Midwest Family Mutual Insurance Company v. Schmitt, et al.***, C8-02-563, C8-02-580 (Minn. App. 10/08/02). <http://www.lawlibrary.state.mn.us/archive/ctappub/0210/c802563.htm>

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