



## NOTES & TRENDS

### CIVIL LITIGATION

#### JUDICIAL LAW

■ **INSUFFICIENCY OF SERVICE — JOINT VENTURE AND JOINT ENTERPRISE PARTNERS.** In a recent case, the Minnesota Supreme Court has examined whether or not personal service upon one joint venture partner or joint enterprise partner is sufficient to satisfy service upon the other partners. The Court concluded that such service is not sufficient, and that in order to effectuate service on all the joint venture or joint enterprise partners, one must serve each and every one of them in a manner authorized by the Rules of Civil Procedure or as otherwise authorized by statute.

In the case, a subcontractor sought to enforce a mechanic's lien against a land developer and the owner of the land being developed. The landowner's sole shareholder was the son of the land developer's president and sole shareholder. The subcontractor filed its lawsuit to foreclose on a lien and personally served the land developer/son with the lawsuit. It did not serve the landowner/father. Nevertheless, the landowner/father answered the complaint and asserted the affirmative defense of lack of personal jurisdiction. The landowner/father actively participated in discovery and the litigation, and the landowner/father moved for summary judgment arguing that the court lacked personal jurisdiction. Thereafter, the subcontractor personally served its summons and complaint on the landowner/father. The lower courts held that because the son and father were undertaking the development of the property as a joint venture, and because the father received actual notice and was not prejudiced, service via the son as a joint venture partner was effective. The Supreme Court overruled these holding, stressing that service requirements must be strictly adhered to and refusing to construe the Rules of Civil Procedure "to allow service on a party through service on its joint-venture partner." *Ryan Contracting, Inc. v. JAG Investments, Inc.*, 634 N.W.2d 176, (Minn. 10/11/01).

■ **OFFERS OF JUDGMENT — AWARD OF ATTORNEYS' FEES.** Plaintiffs sued the defendant business school for damages arising from allegedly false and misleading advertising relating to a sports-medicine-technician program. One of the claims was brought under the private attorney general statute, Minn. Stat. § 8.31, subd. 3a (2000). Before trial, the school made an offer of judgment for \$200,000 "together with any cost and disbursement allowed by the District Court." Plaintiffs sought approximately \$128,832 in attorneys' fees. The Court of Appeals affirmed the lower court's ruling that plaintiffs were the prevailing party on all claims. Finding federal case law instructive, the court noted that although the plaintiffs had brought multiple claims, and only some of those claims authorized an award of attorneys' fees, the plaintiffs were the prevailing party on all their claims when they accepted defendant's offer of judgment. Thus, they were entitled to attorneys' fees under the private attorney general statute. The Court of Appeals then addressed whether the action had benefited the public at large. Relying on federal case law, it held that prevention of false and misleading advertising is a public benefit justifying an award of attorneys' fees. The court remanded to the district court for a determination of reasonable attorneys' fees. *Collins v. Minnesota School of Business*, C7-01-690, 636 N.W.2d 816, 2001 WL 1608750 (Minn. App. 12/10/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0112/c701690.htm>

— EMILY E. DUKE  
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### CRIMINAL LAW

#### JUDICIAL LAW

■ **INTENT: "WILLFUL": CHILD NEGLECT.** Minn. Stat. § 609.378, subd 1(a) (1) defines child neglect to include the phrase "willfully deprives." At trial, the appellant argued that the term "willfully" means "with a bad purpose or an evil intent," citing *State v. Bowers*, 228



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N.W. 164 (1929). The court, however, gave an instruction essentially equating “willfully” with “intentionally.”

Held, the *Bowers* court was construing a criminal code and historical period which was vastly different from current times. In fact, in 1963, when Minnesota revised its criminal code, terms such as “willful” were abandoned in defining criminal intent. The current child neglect law uses the anachronistic term “willful.” The Court of Appeals concludes that “willful” simply means “voluntary and intentional, but not necessarily malicious.” *State v. Verna Marie Cyrette*, CX-01-294, 636 N.W.2d 343 (Minn. App. 12/4/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0112/cx01294.htm>

■ **EVIDENCE: IMPEACHMENT: CRIME OF DISHONESTY: ADMISSIBILITY: DISCRETION.** It was error for the trial court judge to *not* allow defense counsel to impeach a witness with a conviction for providing false information to a police officer. Rule 609(a)(2) of the Rules of Evidence does not provide trial courts with discretion to exclude evidence of a prior conviction on the basis that it is prejudicial and outweighs the probative value, citing *State v. Sims*, 526 N.W.2d 201 (Minn. 1994). There was no other basis on which the trial court could have excluded the evidence, based upon the record. Evidence of the exclusion of such impeachment evidence is, however, subject to the harmless error analysis, and the Court of Appeals concludes that the trial court’s error in excluding this impeachment evidence was harmless beyond a reasonable doubt, in light of defense counsel’s cross-examination which elicited the fact that the witness had supplied the police with a false name and date of birth, and had received payments from the police in connection with her testimony, as well as a dismissal of the lawyer in charge against her. *State v. Ronald Lewis Greer*, C9-99-1550, C7-00-2154, \_\_\_ N.W.2d. \_\_\_ (Minn. 11/01/01).

<http://www.lawlibrary.state.mn.us/archive/supct/0111/c9991550.htm>

■ **FIREARMS: HANDGUN: PLACE OF BUSINESS: MOBILE OCCUPATION.** The appellant was a courier, which required him to spend 95 percent of his workday in a vehicle, using the phone and a computer. On a felony stop, he was found to possess a loaded uncased handgun, for which he had no permit. Appellant claimed that Minn. Stat. § 624.714, subd. 9(a), which allows individuals to carry a handgun about the person’s place of business, means that the appellant could have the gun in his vehicle, because his vehicle is his “place of business.”

In this case of first impression, the Court of Appeals holds that the statutory language of “place of business” shows an intent to define this term as a fixed location, such as a dwelling, premises, and land possessed. Hence, the term “place of business” cannot apply to a vehicle or mobile business. *State v. Mark Christian Palmer*, C9-01-559, 635 N.W.2d 82 (Minn. App. 12/4/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0112/c901559.htm>

■ **PROCEDURE: JURY QUESTION: “HOUSEKEEPING ITEM”: CONTACTING ATTORNEYS: RESPONSE.** The presiding judge was not present in court while a substitute judge received a note from the jury which stated: “If we do not reach a consensus by the end of the day, what happens?” It is undisputed that the attorneys were neither notified of the question nor consulted regarding a response to the question. Furthermore, the original record does not include the question or any answer that may have been given by the substitute judge. The presiding judge was not notified of the situation. The jury returned a guilty verdict.

Held, in this case of first impression, case law or other rules do not require a court to notify the attorneys to consult with them when a jury question does not concern the facts or law of the case, but rather arguably concerns a housekeeping question. Next, a failure to respond to this housekeeping question does not, similarly, constitute error. *State v. Herbert Lee Hendry II*, C7-00-2008, 636 N.W.2d 158 (Minn. App. 12/4/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0112/c7002008.htm>

■ **JUVENILE: AGE FOR JURISDICTION: RESTITUTION.** The child-appellant was charged with first-degree arson and failed to appear at his trial, set for 6/23/98. The child had fled from detention. On 4/8/99, the child turned 18. On 9/13/99, a warrant was issued for his arrest. On 4/13/00, the child appeared in court for the detention hearing. On 5/31/00, the case was tried. On 9/13/00, the court issued an order adjudicating the child delinquent. The child appeared at a disposition hearing on 10/25/00, which was continued to 1/11/01. The child did not appear at this final hearing, during which the court issued a final order requiring the child to pay restitution.

Held, the restitution order must be vacated. The juvenile court did not have jurisdiction to impose a disposition order after the child’s 19th birthday, unless one of the three exceptions under Minn. Stat. § 260B.193 applies. Two of those exceptions apply only to EJJ cases, while the third one allows disposition orders up until the child’s 21st birthday where the person “has been adjudicated delinquent.” Because the child in this case had not been adjudicated delinquent until after his 19th birthday, no exception applies, and the restitution order must be vacated. *In re BJM*, C1-01-376, 636 N.W.2d 155 (Minn. App. 12/4/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0112/c101376.htm>

■ **DWI/IMPLIED CONSENT: BLOOD TESTS, ADMINISTRATION WITHIN TWO HOURS.** Minn. Stat. § 609.21, subd. 1(4) does not require that a blood test for alcohol concentration be accurately measured within two hours of the time of driving. The Legislature intended only that the



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blood sample be collected within two hours of driving, and there is no need to perform the actual test within that time period. *State v. Nicole Renee Gebeck*, C7-01-26, C9-01-44, 635 N.W.2d 385 (Minn. App. 10/30/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0110/c70126.htm>

■ **SENTENCE: APPRENDI: PATTERNED SEX OFFENDER: SENTENCE ENHANCEMENT.** Minn. Stat. § 609.108, subd.2 (2000), as applied to the defendant convicted of first-degree criminal sexual conduct and sentenced to an enhanced 40-year prison term, as opposed to the 30-year maximum for first-degree criminal sexual conduct, upon findings made by the sentencing court alone on a preponderance of the evidence, violates due process, and is unconstitutional. A jury found appellant guilty of first-degree criminal sexual conduct, which carries with it a 30-year maximum. At a sentencing hearing, the court found that findings required by Minn. Stat. § 609.108 were met, namely, that the appellant was motivated by sexual impulse, was predatory, and a significant danger to the public in need of long-term treatment or supervision. Because the respondent was entitled to a jury determination of that issue, the extra ten years is vacated, and the Court of Appeals was correct in remanding this case for imposition of the statutory maximum 30-year prison term. *State v. Jay Joseph Grossman*, C8-00-459, 636 N.W.2d 545 (Minn. 12/13/01).

<http://www.lawlibrary.state.mn.us/archive/supct/0112/c800459.htm>

■ **CONTEMPT: 5TH AMENDMENT: SEPARATE PROCEEDINGS: STATE VERSUS FEDERAL PROSECUTION: IMMUNITY.** The appellant pleaded guilty to second-degree murder, without any agreement as to sentence or to assist in the prosecution of codefendants. Appellant subsequently testified against one codefendant, but did not, at sentencing, receive a sentence reduction. In a later prosecution against a third defendant, the appellant refused to testify, asserting her 5th Amendment privilege. The district court found the appellant in contempt because she had "waived" her 5th Amendment privilege by testifying in the other codefendant's trial.

Held, appellant is correct, and is supported by the weight of secondary authorities and federal cases, that a waiver of her 5th Amendment privilege in one proceeding does not prevent her from asserting that privilege in another proceeding. Further, in this case, there is no waiver by guilty plea, because the appellant is also subject to federal prosecution under the theory of dual jurisdictions or dual sovereigns. Finally, Minn. Stat. § 609.09, compelled use immunity, was not properly invoked by the prosecuting attorney. The case also cast some doubt upon the constitutionality of this statute. *In re Contempt of Ecklund*, C2-01-385, 636 N.W.2d 585 (Minn. App. 12/11/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0112/c201385.htm>

■ **SEARCH AND SEIZURE: AUTOMOBILE STOP: WEAVING WITHIN LANE: SUFFICIENCY.** At 2:00 a.m. a state trooper noted that the appellant was traveling at 45 MPH in a 55 MPH zone and was weaving noticeably within its traffic lane. The district court denied the motion to suppress, ruling that the trooper had a reasonable articulable suspicion to stop the appellant.

Held, weaving within one's own lane and continuously is enough, by itself, to provide a reasonable articulable suspicion to stop an automobile. The court distinguishes *State v. Brechler*, 412 N.W.2d 367 (Minn. App. 1987), which held that swerving *once* within one's own lane is sufficient to stop. *State v. Karen Joy Dalos*, C6-01-261, 635 N.W.2d 94 (Minn. App. 11/06/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0111/c601261.htm>

■ **SEARCH AND SEIZURE: PROBATION OFFICER: HOME VISIT: PLAIN VIEW.** The appellant's minor child was on "enhanced probation," which required regular home visits by a probation officer. At the time of the search, district court had given Ramsey County Community Human Services Department temporary custody of the child. The probation officer had visited 30-40 times in the past several months, always accompanied by a police officer. On the day in question, the child opened the door for the probation officer and police officer, turned around, and went into the apartment. The probation officer and the police officer followed the child into the apartment. In meeting with the child, the probation officer needed to speak with the parents. He went to an open doorway to summon the parents and saw the father smoking opium. The father was subsequently arrested.

Held, the child's actions at the door constitute implicit consent for the entry of the probation officer and police officer. The entry was in no way protested, and was similar to prior entries by the agents. Secondly the observations of the appellant smoking the opium were in plain view, while the agents were permissibly in the dwelling. Hence, the opium may not be suppressed. *State v. Kua Vang*, C4-01-288, 636 N.W.2d 329 (Minn. App. 11/20/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0111/c401288.htm>

— FREDERIC BRUNO  
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ELDER LAW



## NOTES & TRENDS

### ADMINISTRATIVE RULEMAKING

#### ■ NEW FIGURES AS OF JANUARY 1, 2002.

Maximum Community Spouse Asset Allowance: \$89,280

Minimum Community Spouse Asset Allowance: \$25,247

Cap for minimum income allowance: \$2,232

Personal Needs Allowance: \$71

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### EMPLOYMENT & LABOR LAW

#### JUDICIAL LAW

■ **DISCRIMINATION CLAIMS.** A discrimination lawsuit under the Federal Age Discrimination Employment Act, (ADEA), and parallel age discrimination provisions of the Minnesota Human Rights Act was remanded for trial by the 8th Circuit Court of Appeals in *Yates v. Rexton, Inc.*, 2001 U.S. App. LEXIS 21527 (8th Cir. 2001). The court reversed the dismissal of the lawsuit based primarily upon two considerations: comments made by three supervisors that the employee, who was 62 years old, would be retiring soon were admissible as admissions by a party opponent, and the claim that termination was due to poor performance was belied by a showing of good performance by the employee. Therefore, the dismissal of the lawsuit by the trial court was reversed and the case sent back for trial.

The doctrine of *laches* was invoked to prevent a plaintiff from pursuing a claim of racial discrimination under Title VII of the Federal Civil Rights Act after the claimant did not seek a Right-To-Sue letter until six years after filing a complaint with the Equal Employment Opportunity Commission in *Brown-Mitchell v. Kansas City Power & Light*, 2001 U.S. App. LEXIS 21511 (8th Cir. 2001). The six-year lapse was prejudicial because the plaintiff could not recall details about a number of her contacts with the employer, and several witnesses also had diminished memories regarding the details of the employee's work. Thus, the plaintiff's failure to diligently pursue her claims was properly dismissed due to *laches*.

But *laches* did not preclude delay in a determination of discrimination under the Minneapolis civil rights ordinance in *Humbertel v. Private Sector Systems, Inc.*, 2001 Minn. App. LEXIS 1143 (Minn. App. 2001) (unpublished). The Minnesota Court of Appeals affirmed a determination of age discrimination made at a hearing that took place nearly three and one-half years after the initial filing of the charge, which was pending for two and one-half years before probable cause was found and another year nearly before a hearing. The court held that *laches* was inapplicable.

A pair of 8th Circuit disability discrimination claimants lost their cases, for different reasons, under the Americans with Disabilities Act (ADA). In *EEOC v. Woodbridge Corp.*, 263 F.3d 812 (8th Cir. 2001), the court held that an employer did not violate the ADA by withdrawing job offers made to a group of 19 assembly line workers after preemployment physicals indicated they were susceptible to carpal tunnel syndrome. The court ruled that the testing did not transgress the clause of the ADA that includes discrimination as the perception of disability. In *Stafne v. Unicare Homes*, 2001 U.S. App. LEXIS 21230 (8th Cir. 2001), the court upheld a jury verdict against an arthritic Minnesota nurse who asserted that her employer nursing home failed to give her a reasonable accommodation of a sedentary job in lieu of her job duties that required substantial mobility. The court held that the nurse was not covered by the ADA because she could not perform the "essential duties" of her job even with the accommodation she requested of using a motorized cart on the job, which the employer refused.

An employee prevailed in an ADA claim in *Webner v. Titan Distrib. Inc.*, 2001 U.S. App. LEXIS 21575 (8th Cir. 2001), because the employer failed to accommodate his back pain. While upholding compensatory damages and emotional distress damages of nearly \$40,000, the court overturned a \$200,000 punitive damage award on grounds of lack of "maliciousness" by the employer.

■ **ARBITRATION.** In a rare reversal of an arbitration award, the Minnesota Court of Appeals overruled an arbitral decision reinstating a discharged policeman to his job in *City of Brooklyn Center v. Law Enforcement Labor Servs., Inc.*, 2001 Minn. App. LEXIS 1146 (Minn. App. 2001). The court held that the officer, who was accused of a pattern of sexual harassment, should not have been reinstated and the arbitrator's ruling allowing him to return to work was contrary to the "public policy" against sex harassment in the workplace.

■ **WORKERS' COMPENSATION.** The Minnesota Supreme Court recently resolved a series of issues regarding the subrogation rights under the Workers Compensation Law Answering certified questions from the U.S. District Court, the Court in *Conwed Corp. v. Union Carbide Chemicals and Plastics Co.*, 2001 Minn. LEXIS 698 (Minn. 2001) held that subrogation claims against a third-party tortfeasor may be asserted only for employees with current compensable claims and not for potential future claims. It also ruled that the subrogation



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action may recover prejudgment interest.

A claim for nonpayment of accrued wages was not arbitrable under a pair of agreements between an employee-minority shareholder and the company for which he worked. In *Brekke v. THM Biomedical, Inc.*, 2001 Minn. App. LEXIS 1127 (Minn. App. 2001) (unpublished), the Court of Appeals held that an employee is not obligated to arbitrate a claim for nonpayment of accrued wages. The parties entered into two agreements, a shareholder agreement that contained an arbitration clause, and an employment agreement that did not. Since the wage claim arose under the employment agreement, and not the shareholder agreement, it was not arbitrable.

■ **BENEFITS.** In *Mueller v. Commissioner of Economic Security*, 633 N.W.2d 91 (Minn. App. 2001), the Court of Appeals held that an employee who has an affliction that requires that they work less than the normal hours for a job is not "available for employment," as required by Minn. Stat. § 268.085 and, therefore, is ineligible for unemployment compensation benefits. The case concerned a receptionist who, due to a medical disability, could work only three hours per day, a condition that made her ineligible for benefits.

Deferring to the commissioner of economic security's determination of a car salesman's credibility, the appellate court upheld a determination that the car salesman, who allegedly violated conflict-of-interest policy by selling cars out of his own home for his own benefit, was disqualified from receiving unemployment compensation benefits. In *Ellsner v. Jeff Belzer's Chevrolet Dodge Geo, Inc.*, 2001 Minn. App. LEXIS 1047 (Minn. App. 9/8/01) (unpublished), the appellate court upheld the commissioner's reversal of a determination by an unemployment compensation judge to award unemployment benefits to the fired salesman, although the evidence against him consisted "solely of hearsay of accusations of colleagues." The court held that the commissioner's determination that the claimant was not credible was proper under the limited scope of appellate review. The case boiled down to a credibility clash between the denial of impropriety by the former car seller and the unsworn written statements of colleagues refuting his protestations. Not surprisingly, the car dealer lost the battle of believability.

### LOOKING AHEAD

■ **U.S. SUPREME COURT.** The Court has a heavy docket of employment law cases on its agenda during its current term. Workplace-related cases include one from the Minnesota Supreme Court as well as another from the 8th Circuit Court of Appeals, which deal with the statute of limitations for age discrimination under the Federal Age Discrimination Employment Act (ADEA) and the notification requirements imposed upon the employer under the Federal Family Medical Leave Act (FMLA). They are among a number of significant employment cases that will be decided by the High Court during the 2001-2 term. The employment cases that have been accepted for review as of the beginning of the term include the following:

■ Where a federal statute tolls the statute of limitations on a state-law claim against a state, does this violate the 11th Amendment? *Raygor v. Regents of the University of Minnesota*, No. 00-1514. Certiorari granted 6/4/01. Ruling below: 620 N.W.2d 680 (Minn. 2001).

■ Where an employer failed to notify an employee that her paid disability leave and FMLA leave would run concurrently, can it fire her for failing to return after her paid leave expired? *Ragsdale v. Wolverine Worldwide*, No. 00-6029. Certiorari granted 6/25/01. Ruling below: 218 F.3d 933 (8th Cir. 2000).

■ Can the Postal Service fire a worker based on previous disciplinary actions that the worker is appealing? *Gregory v. U.S. Postal Service*, No. 00-758. Certiorari granted 2/20/01. Ruling below: 212 F.3d 1296 (Fed. Cir. 2000).

■ Even though some racial discrimination occurred more than 300 days before the plaintiff filed his Title VII claim, can he still sue for it under a "continuing violation" theory? *National Railroad Passenger Corp. v. Morgan*, No. 00-1614. Certiorari granted 6/25/01. Ruling below: 232 F.3d 1008 (9th Cir. 2000).

■ Where an EEOC regulation permits a discrimination charge to be amended after the statute of limitations has expired, is this valid? *Edelman v. Lynchburg College*, No. 00-1072. Certiorari granted 6/25/01. Ruling below: 228 F.3d 503 (4th Cir. 2000).

■ Is carpal tunnel syndrome a disability under the ADA? *Toyota v. Williams*, No. 00-1089. Certiorari granted 4/16/01. Decided 1/8/02. Ruling below: 224 F.3d 840 (6th Cir. 2000).

■ Must an employer accommodate a disabled worker under the ADA even if doing so would violate its seniority rules? *US Airways, Inc. v. Barnett*, No. 00-1250. Certiorari granted 4/16/01. Ruling below: 228 F.3d 1105 (9th Cir. 2000).

■ Where an employee has signed an arbitration agreement with his employer, can the EEOC still sue the employer on the employee's behalf in federal court? *EEOC v. Waffle House*, No. 99-1823. Certiorari granted 3/26/01. Ruling below: 193 F.3d 805 (4th Cir. 1999).

■ **LEGISLATION.** A couple of pieces of proposed legislation may substantially change the status of arbitration agreements in the workplace. The laws are intended to address and modify the ruling of the U.S. Supreme Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), in which the Supreme Court, by a 5-4 margin, upheld the validity of such agreements under the Federal Arbitration Act.

The bill in the House of Representatives, H.R. 1489 and its Senate companion, S. 163, would amend the federal civil statutes to prohibit invol-



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untary arbitration of employee discrimination claims. Additionally, H.R. 815 and the House of Representatives would amend the Federal Arbitration Act to allow employees to accept or reject in writing the use of arbitration to resolve employment disputes. In particular, the bill would require that both parties agree to arbitrate an employment dispute after the dispute has arisen, which is distinct from the *Circuit City* ruling, which upholds predispute arbitration clauses. Another measure in the House, H.R. 2282, seeks to amend the act to make employment arbitration agreements unenforceable unless they are agreed upon after the claim arose or are part of a collective bargaining agreement.

The measure would apply to all employers and would particularly affect multistate employers, who are also subject to varying obligations under state arbitration and other state court laws and court rulings.

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### ENVIRONMENTAL LAW

#### ADMINISTRATIVE REGULATIONS

■ **DEADLINE FOR FEEDLOT REGISTRATION PASSES.** Farmers who failed to register their feedlots with the state by January 1, 2002, will not be able to take advantage of extended time periods to install pollution controls or waivers of civil penalties for past violations. Under Minn. R. 7020.0350, farmers with feedlots or manure storage areas capable of serving 50 or more animal units (ten or more animal units for farms located in shorelands), who were not already listed on a feedlot inventory were required to submit completed general information forms to either the MPCA or their county feedlot officers or apply for a feedlot permit by the end of 2001. Farmers with feedlots holding fewer than 300 animal units who registered their feedlots by the deadline became eligible to receive an “open lot certification” under Minn. R. 7020.2003. Certification under that rule gives the farmers five years to address runoff problems at their facilities and provides a conditional waiver of civil penalties for past discharge violations. These same farmers also may be eligible for some limited state assistance to make modifications to their facilities. Farmers who failed to satisfy the registration requirements by January 1 are not eligible for the open lot certification and must correct feedlot pollution hazards in two years or less.

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■ **LIMITED COURT AUTHORITY; MERLA.** The Court of Appeals, in an unpublished opinion, found that a trial court exceeded its authority under the Minnesota Environmental Response and Liability Act (MERLA) when it approved deferral of a balloon payment under a contract for deed until the sellers had removed all contamination from the property in question. The Palmes (sellers) sold an 11-acre parcel to the Blairs (buyers) in October 1996 under a contract for deed. The contract required the Blairs to make monthly payments and certain balloon payments to the Palmes after the initial downpayment. The Blairs later discovered debris that indicated the presence of hazardous substances on the property and sued the Palmes, asserting MERLA, common law and statutory consumer fraud violations. Although a jury found in the Palmes’ favor on the fraud claims, the district court found them to be responsible parties under MERLA. The court ordered judgment against the Palmes for investigation and response costs, past economic losses, and MERLA-related expenses. The court retained jurisdiction because the cleanup was not complete at the time.

One year later, the Blairs asked the court for declaratory relief, including a request that they be relieved of an upcoming balloon payment obligation until six months after the MPCA issued its certificate of completion regarding the cleanup. The court had previously denied this same request in a pretrial motion made the year before. The court granted the requested relief the second time, however, thereby enjoining the Palmes’ enforcement of the contract for deed.

The Court of Appeals pointed out that the attorney general may seek injunctive relief under MERLA in only two instances: to compel responsible persons to clean up contamination or to prevent the release or threatened release of hazardous substances, pollutants, or contaminants. As neither of these instances applied in this case, the Court of Appeals held that the district court inappropriately expanded the available remedies under MERLA when it enjoined the Palmes’ enforcement of the contract for deed. The Court of Appeals nonetheless acknowledged that the Blairs might have an equitable defense if the Palmes sought to cancel the contract for deed for failure to make the balloon payment. *Blair v. Palme*, CX-01-778, 2001 WL 1464562 (Minn. App. 11/20/01).

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### FAMILY LAW

#### JUDICIAL LAW



## NOTES & TRENDS

■ **CHILD SUPPORT — PERCENTAGE OF NET INCOME, MODIFICATION.** The parties' decree provided that husband would pay 30 percent of his net weekly income as child support and that if husband failed or refused to meet his child support obligations, wife could seek "automatic wage withholding" of a specified dollar amount without notice or hearing. Husband later became a shareholder in his employer, which had incorporated and elected subchapter S status for tax purposes. Husband received \$8,070 as a ssc distribution but did not notify wife or pay 30 percent of that distribution to her as child support. Husband also received income tax refunds for several years but did not pay 30 percent of the refunds to wife. Wife moved, *inter alia*, to amend the decree to specify that the 30 percent child support obligation applied to ssc distributions; determine that husband was in arrears because he failed to pay 30 percent of the ssc distribution and his income tax refunds; and modify child support by converting from a percentage to a specific dollar amount. The district court initially found that husband was not in arrears and denied wife's request to modify child support to a specific dollar amount, finding that wife had failed to establish a substantial change in circumstances. Following wife's motion for amended findings, the district court modified child support to require husband to pay 30 percent of the net amount received on all future ssc distributions from his employer. Husband appealed the modification issue and wife filed a notice of review, arguing that the district court erred in not finding arrears and in not modifying child support from a percentage to a fixed dollar amount.

Noting that there is no definitive treatment of ssc distributions for child support purposes in Minnesota case law and that cases have essentially treated the question as one of fact, the Court of Appeals remanded because the district court made contradictory conclusions regarding past and future ssc distributions. On remand, if the district court determines that the ssc distributions are part of husband's "other compensation," it must apply the determination consistently, find husband in arrears, consider future distributions as income, and modify child support to a specific dollar amount. If not "other compensation," husband is not in arrears and future ssc distributions are excluded from the child support calculation. The Court of Appeals also noted that wife's alternative ground for modification of child support to a specific dollar amount was based on Minn. Stat. § 518.64, subd. 2(b)(4), which provides a rebuttable presumption that there has been a substantial change in circumstances where child support is in the form of a percentage. A remand was necessary on this issue because the district court did not consider the statutory presumption and its effects. Affirmed in part, reversed in part, and remanded. *Williams n/k/a Fischer v. Williams*, C5-01-705, \_\_\_ N.W.2d \_\_\_ (Minn. App. 11/6/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0111/c501705.htm>

■ **PURPORTED MARRIAGE VOID.** The parties, originally from Nigeria, met in 1980 and began living together in 1982. In 1983, appellant married another man in a civil ceremony in Minneapolis. Without dissolving that marriage or obtaining a marriage license, appellant married respondent in a religious ceremony in 1984. In 1989, they obtained a marriage license and married in a civil ceremony in Minnesota. Three children were born of this relationship. After appellant took the children to Nigeria in 1994, respondent obtained a default dissolution, alleging that the parties had no children and that he did not know appellant's whereabouts. Appellant returned to Minnesota and successfully moved the district court to vacate the default judgment. In its order, the district court noted the potential problems created by appellant's undisclosed 1983 marriage. Respondent then commenced a dissolution proceeding in Nigeria. While that matter was pending, appellant brought a dissolution action in Minnesota. In 1997, the district court dismissed appellant's dissolution proceeding but the Court of Appeals reversed and remanded. On remand, the district court entered judgment, *inter alia*, that the parties' marriage was void.

The Court of Appeals affirmed, noting that, with limited exceptions, marriages are "absolutely void" if entered into before dissolution of a prior marriage. Here, the Court of Appeals held that the missing spouse exception to Minn. Stat. § 518.01 did not apply. Since appellant's prior marriage was for immigration purposes, she did not have a good faith belief that her prior spouse was dead and, as a result, she lacked capacity to remarry. The Court of Appeals also declined to apply *In re Appeal of O'Rourke*, 310 Minn. 373, 246 N.W. 2d 461 (1976) to balance, on policy considerations, which of appellant's marriages should be deemed valid. Any *O'Rourke* analysis would be limited to balancing the policy favoring the children's legitimacy (and appellant's possible claims for property and maintenance) against the policy disfavoring marriages entered into solely for immigration purposes. The court reasoned that ruling that appellant's first marriage was superseded by her second marriage could make Minnesota a haven for immigration-related marriages. Affirmed. *Nnebedum v. Nnebedum*, C0-01-630, \_\_\_ N.W.2d \_\_\_ (Minn. App. 11/13/01).

<http://www.lawlibrary.state.mn.us/archive/ctapun/0111/630.htm>

— STEPHEN R. ARNOTT  
CHAIR, FAMILY LAW SECTION, MSBA

FEDERAL PRACTICE  
JUDICIAL LAW



## NOTES & TRENDS

■ **MOTIONS TO REMAND: DISPOSITIVE OR NONDISPOSITIVE?** A recent decision by Judge Montgomery highlights the continuing confusion in the District of Minnesota as to whether motions to remand are to be treated as dispositive or nondispositive motions.

Almost a decade ago, Judge Doty ruled that motions to remand were nondispositive motions which could be decided by magistrate judges. *Banbury v. Omnitrition, Int'l, Inc.*, 818 F. Supp. 276 (D. Minn. 1993). This position was endorsed by Judge Alsop in a subsequent published opinion. Judge Montgomery also described a motion to remand as nondispositive in *Reko v. Creative Promotions, Inc.*, 70 F. Supp. 2d 1005 (D. Minn. 1999).

No published opinion has criticized Judge Doty's conclusion in *Banbury*. However, in the last several years, Judges Tunheim and Frank have both issued published opinions in which they adopted reports and recommendations by magistrate judges on motions to remand. See *AG Acceptance Corp. v. Nelson*, 103 F. Supp. 2d 1129 (D. Minn. 2000) (Frank, J. adopting Report and Recommendation of Erickson, M.J.); *Banovetz v. King*, 66 F. Supp. 2d 1076 (D. Minn. 1999) (Tunheim, J. adopting Report and Recommendation of Erickson, M.J.); *Peterson v. BASF Corp.*, 12 F. Supp. 2d 964 (D. Minn. 1998) (same). Thus, it would appear that Judges Tunheim and Frank view motions to remand as dispositive.

Moreover, Judge Montgomery has now joined Judges Tunheim and Frank in treating a motion to remand as a dispositive motion. After defendants removed the action alleging the presence of a federal question, plaintiffs moved to remand. The motion was referred to Magistrate Judge Boylan, who issued a Report and Recommendation recommending that the action be remanded to the Hennepin County District Court. One defendant filed objections to the Report and Recommendation, and Judge Montgomery then conducted a *de novo* review of the Report and Recommendation, noting that "a grant of a motion to remand is dispositive of the case in federal court."

Unless and until the present members of the court reach agreement on how motions to remand are to be treated, counsel intending to file a motion to remand in the district may be best advised to inquire as to their judge's preferences prior to filing that motion. *Abfalter v. Scott Cos.*, 2001 WL 1517035 (D. Minn. 11/27/01).

■ **SANCTIONS; FAILURE TO PARTICIPATE IN COURT-ORDERED ADR.** Plaintiff asserted Title VII claims against the defendant. At the pre-trial scheduling conference, the parties consented to ADR with a court-appointed mediator in accordance with the Local Rules for the Eastern District of Missouri. The district court's subsequent order referring the case to ADR required the parties to provide the mediator with a settlement memorandum prior to ADR, and required persons with settlement authority to attend the ADR conference. Defendant failed to file a settlement memorandum, and its corporate representative at the ADR had only \$500 in settlement authority. After the ADR conference, the mediator informed the district court of these facts, and the district court issued an order directing the defendant to show cause why its should not be sanctioned for failing to participate in the ADR in good faith. After a hearing, defendant was sanctioned more than \$4,000.00. After it filed a motion for reconsideration, the defendant was sanctioned an additional \$2,500.00.

Reviewing the district court's orders under an abuse of discretion standard, the 8th Circuit found that the district court had authority to impose sanctions under Fed. R. Civ. P. 16(f) and the applicable local rules, and found no abuse of discretion in the district court's decision to sanction the defendant.

This decision highlights the risk in failing to participate to the fullest extent in court-ordered ADR. *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001).

■ **OTHER NOTEWORTHY DECISIONS:** Addressing the propriety of *ex parte* contact with former managerial employees under Minn. R. Prof. Conduct 4.2, Judge Doty adopted the "flexible approach" previously endorsed by Magistrate Judge Erickson in *Olson v. Snap Products, Inc.*, 183 F.R.D. 539 (D. Minn. 1998), and held that plaintiff's counsel had not violated the rule when it communicated with the defendant's former CEO. *FleetBoston Robertson Stephens, Inc. v. Innovex, Inc.*, 172 F. Supp. 2d 1190 (D. Minn. 2001).

The 8th Circuit granted defendants' request for a writ of mandamus to review a district court's order that the attorney-client privilege had been waived under the crime-fraud exception to the privilege, and found that the district court had abused its discretion in ordering the disclosure of 11 documents without first conducting an *in camera* review of those documents. *In Re BankAmerica Corp. Sec. Lit.*, 270 F.3d 639 (8th Cir. 2001).

Judge Frank declined to exercise jurisdiction over a defendant's counterclaims under the rarely used *Colorado River* abstention doctrine. *Beardmore v. American Summit Financial Holdings, LLC*, 2001 WL 1586785 (D. Minn. 12/10/01).

The 8th Circuit reversed Judge Rosenbaum's striking of plaintiff's expert's testimony under *Daubert* and entry of summary judgment for the defendant, finding that the expert's testimony was admissible under *Daubert*. *Lauson v. Senco Products, Inc.*, 270 F.3d 681 (8th Cir. 2001).

The 8th Circuit held that an ambiguous offer of judgment under Fed. R. Civ. P. 68 was to be construed against the drafter, and that the plaintiff was entitled to an award of attorney's fees on her FDCPA claim where the offer of judgment did not explicitly exclude a subsequent award of attorney's fees. *Hennessy v. Daniels Law Office*, 270 F.3d 551 (8th Cir. 2001).



## NOTES & TRENDS

— JOSH JACOBSON  
LAW OFFICE OF JOSH JACOBSON PA

### INTELLECTUAL PROPERTY

#### JUDICIAL LAW

■ **COPYRIGHT; SCENES A FAIR AND MERGER DEFENSES.** In *Taylor Corp. v. Four Seasons Greetings LLC*, Civ. 01-1293 (D. Minn. 10/31/01), Judge Doty granted plaintiff's motion for a preliminary injunction in a copyright lawsuit despite defendant's merger and *scenes a fair* defenses. Taylor owns several registered copyrights for greeting card designs and sued Four Seasons for infringing six of those copyrights. Four Seasons raised the doctrines of *scenes a fair* and merger as defenses to plaintiff's claims. Under the merger doctrine, a court will not protect a copyrighted work from infringement if the underlying idea can be expressed in only one way. Similarly, under the *scenes a fair* doctrine, copyright protection may be precluded where the work contains features which are indispensable or standard for such a work. The rationale behind both doctrines is that there should be no monopoly on an underlying idea.

Taylor overcame both defenses by showing the court between 10 and 33 ways, other than the copyrighted design, to express the idea contained in each card. Finding that Taylor's copyrighted designs were "not at all compelled by the underlying idea," the court held that the merger and *scenes a fair* doctrines did not defeat plaintiff's likelihood of success in proving copyright infringement.

■ **PATENT; CERTIFICATE OF CORRECTION.** In *Superior Fireplace Co. v. Majestic Products Co. and Vermont Castings, Inc.*, 270 F.3d 1358 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit, which hears all patent-related appeals, affirmed the district court's holding that the patent claim at-issue was invalid because a certificate of correction impermissibly broadened the claim. Superior owns a patent covering a new gas fireplace. The original issued claim included the term "rear walls." Superior changed that term to the singular "rear wall" by use of a certificate of correction, a common instrument for correcting typographical errors in issued patents. The Patent Office granted the request issuing a corrected claim. Majestic argued that the claim as corrected was invalid because the change was not supported by the patent's specification and history at the Patent Office.

Applying the clear and convincing standard, the Court of Appeals held that the certificate of correction, and the claim at-issue, were invalid. The court reasoned that because the change broadened the claim from rear walls to rear wall, it was not the type of change that is permissible through use of a certificate of correction.

■ **PATENT INFRINGEMENT; BONA FIDE PURCHASER DEFENSE.** In *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp. and Monsanto Co.*, 2001 U.S. App. LEXIS 24812 (Fed. Cir. 11/19/01), the Court of Appeals for the Federal Circuit held that federal common law, not state law, governs the bona fide purchaser defense to patent infringement. Consistent with its recent holding that federal law governs whether an offer occurred relative to the on-sale bar defense, the Court again cited the need for national uniformity in patent law when it held that federal law also governs whether a bona fide purchaser defense may be asserted. The bona fide purchaser defense to patent infringement provides that one who acquires an interest in a patent for valuable consideration from the legal titleholder, without notice of an outstanding equitable claim or title, is entitled to retain the purchased interest free from any equitable encumbrance. In addition to holding that federal law governs, the court also held that the defense is available to licensees — where there has been no transfer of title.

■ **UTILITY PATENTS; PLANT BREEDS.** In *J.E.M. Ag Supply, Inc. d/b/a Farm Advantage, Inc. et al v. Pioneer Hi-Bred International, Inc.*, No. 99-1996 (S.Ct. 12/10/01), the United States Supreme Court recently held that newly developed plant breeds may be the subject of a utility patent. The Supreme Court resolved that neither the Plant Patent Act of 1930 nor the Plant Variety Protection Act, statutes specifically providing patent protection for newly developed plants, limits the scope of coverage provided by the general patent laws.

— TONY ZEULI  
— JIM LARSON  
MERCHANT & GOULD

### JUVENILE LAW

#### JUDICIAL LAW

■ **MINNESOTA FATHERS' ADOPTION REGISTRY — UNTIMELY REGISTRATION BARS CLAIMS.** In *Heidbreder v. Carton and M.J.P. et al.*, C0-01-739, 636 N.W.2d 833, 2001 WL 1570267 (Minn. App. 12/11/01), appellant putative father appealed grant of summary judgment in favor of adoptive parents, and the Court of Appeals affirmed.

In an issue referenced in the February, 2001 "Notes & Trends," the Minnesota Court of Appeals issued the first definitive and published opinion on the issue of untimely registrations on the Minnesota Fathers' Adoption Registry. According to Minn. Stat. § 259.52, the Minnesota Putative Father's Adoption Registry, putative fathers who are not otherwise entitled to notice of an adoption proceeding must



## NOTES & TRENDS

register within 30 days of a child's birth to be entitled to notice of an adoption or to maintain an interest in the child. See Minn. Stat. § 259.52, subd. 1, 7.

Heidbreder, a putative father, registered on the 31st day after the child's birth, and claimed that he was entitled to notice of the adoption and to assert a claim to the child based upon his arguments that he was (a) openly living with the mother; (b) it was "impossible" under the statute for him to register earlier, due to his claims of fraud by the biological mother; and (c) Minn. Stat. § 259.52 violated his constitutional rights to Equal Protection and Due Process. In a published and unanimous opinion, the Court of Appeals affirmed the trial court's grant of summary judgment to the adoptive parents.

The Court of Appeals concluded that under the plain language of the statute, only putative fathers who are "openly living" with the biological mother or the child after the child's birth are entitled to notice, and therefore that brief cohabitation earlier during the pregnancy did not entitle Heidbreder to notice of the adoption.

Further, the Court of Appeals concluded the undisputed facts supported the trial court's findings and conclusion that it was possible for Heidbreder to register earlier. Furthermore, in considering Heidbreder's claim that fraudulent representations by the biological mother made it impossible for him to register earlier, the Court of Appeals concluded that not only did the Legislature decline to create a fraud exception in the plain language of the statute, but had specifically eliminated a putative father's defense that he did not know of the birth or pregnancy.

Finally, the Court of Appeals concluded the registry statute did not violate Heidbreder's constitutional rights to due process and equal protection.

As the first definitive and published opinion on the issue of untimely registrations upon the Fathers' Adoption Registry, and as the opinion affirms the plain language of the Registry that only those exceptions allowed in the Registry statute will be allowed, the opinion represents a major step in clarifying the rights of all parties in adoption litigation, and should provide significant guidance to practitioners, adoptive parents, biological mothers, putative fathers, and adoption agencies.

—JESSICA MAHER  
WALLING & BERG PA

### REAL PROPERTY

#### JUDICIAL LAW

■ **STATUTORY HOME WARRANTIES.** Homeowners discovered problems with the drainage and heating system more than two years after they moved into their newly constructed home. The Court of Appeals upheld the district court decision finding that homeowners may bring a claim for breach of the statutory home warranties under Minn. Stat. § 327A.02, subd. 1(b) after the two-year warranty period expires, if the action is brought within two years of the *discovery* of the defect as provided in § 541.051, subd. 4 and the homeowners report the loss or damage to the homebuilder within six months of discovery of the damage or when such damage should have been discovered as set out in § 327A.03(a). *Koes et al. vs. Advanced Design, Inc.*, C8-01-715, 636 N.W.2d 352 (Minn. App. 12/4/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0112/c801715.htm>

■ **PRACTICAL LOCATION OF BOUNDARIES.** Pratt and the Church own neighboring parcels of land. Pratt brought an action against the Church to establish the boundary line and thus acquiring a portion of land between the parcels. The Court of Appeals held that Pratt did not prove by clear and unequivocal evidence that the alleged boundary line was "acquiesced in for a sufficient length of time to bar a right of entry under the statutes of limitations." Acquiescence occurs when both neighboring property owners intend for a fence or wall, located between the parcels, to accurately reflect the property line for at least 15 years. *Pratt Investment Company vs. Lake Vadnais Free Church* C6-01-664, \_\_\_ N.W.2d \_\_\_ (Minn. App. 12/18/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0112/c601664.htm>

■ **NEGLIGENCE.** Landowner installed a swimming pool, waterslide, diving board, and deck in his backyard. An invited guest hit the bottom of the pool, while using the waterslide, injuring his back. In determining whether landowner owed a duty of care to the guest, the Supreme Court found that a landowner has a duty to use reasonable care for the safety of all those invited to enter the property unless the condition or activity is obviously dangerous except if landowner could have anticipated the harm. The matter was remanded to the district court. *Louis et al. vs. Louis*, C3-00-1325, 636 N.W.2d 314 (Minn. 12/6/01).

<http://www.lawlibrary.state.mn.us/archive/supct/0112/c3001325.htm>

■ **ZONING.** American Tower requested a CUP application from the city. The city's two-sided application contained a notice on the back side extending the deadline required by Minn. Stat. § 15.99 which requires a city to give notice to the applicant of the denial of the zon-



## NOTES & TRENDS

ing request within 60-days of receipt of the application. The application provided to American Tower did not contain page two which contained the 60-day extension notice. The city denied the application more than 90 days after American Tower filed it with the city. The court held that while a municipality could extend the 60-day deadline it must be done by providing written notice of the extension after the application is submitted and before the expiration of the time limit. *American Tower, L.P. vs. City of Grant*, C1-00-786, 636 N.W.2d 309 (Minn. 12/6/01).

<http://www.lawlibrary.state.mn.us/archive/supct/0112/c100786.htm>

— MELISSA BAER  
MOSS & BARNETT PA

### TAX

#### JUDICIAL LAW

■ **“IN LIEU OF” ALL OTHER TAXES ARGUMENT REJECTED.** The Minnesota Tax Court held that the business that marketed refined petroleum was not exempt from the Minnesota franchise (income) tax because it also paid Minnesota gasoline tax. The court rejected the taxpayer's claim that the gasoline tax was in lieu of all other taxes on the gasoline business. *Amoco Oil Company and Affiliates v. Commissioner of Revenue*, 7223-7231, 2001 WL 1298197 (Minn. T. Ct. 10/23/01).

■ **PROPERTY TAX REFUND FOR DEPENDENTS.** The Minnesota Tax Court held that a divorced mother, having custody of two children but pursuant to the divorce decree allocated only one child exemption, could not claim two property tax refunds for dependents in Minnesota. In order for the dependent to be eligible for the property tax refund, the child must have received (or be treated as having received) more than one-half of his or her support from the taxpayer. Since the taxpayer had released her claim to a dependency exemption for one of her two daughters to her husband, she can claim only one Minnesota property tax refund for the child allocated to her. The commissioner's reading of the property tax statute was also not a violation of the taxpayer's constitutional rights to Equal Protection and Uniformity. *Shelly J. Cristello v. Commissioner of Revenue*, 7312-R, 2001 WL 1666438 (Minn. T. Ct. 12/4/01).

■ **SPECIAL ASSESSMENT DID NOT INCREASE PROPERTY VALUE.** The Minnesota Court of Appeals affirmed a lower court ruling that street improvements did not increase the market value of the business's property for tax purposes and thus an increased assessment was not uniform and was properly set aside. *Matter of Eastside Development*, C4-01-582, C6-01-583, 2001 WL 1035280 (Minn. App. 9/11/01).

■ **PROPERTY TAX EXEMPTION; DUAL HOMESTEAD.** The Minnesota Tax Court held that there was no requirement of a business need or employment necessity in the dual homestead property tax exemption statute of Minn. Stat. § 273.124(1e) other than that a spouse's place of employment be at least 50 miles distant from the other spouse's place of employment. Relying on the plain wording of the statute, the employment of the taxpayers and the real properties were more than 50 miles apart and therefore qualified. *Judd & Rebecca Ann Fulford v. County of Todd*, C4-01-279, 2001 WL 1359842 (Minn. T. Ct. 10/30/01).

■ **CLINIC QUALIFIES AS EXEMPT PUBLIC HOSPITAL FOR REAL PROPERTY TAXES.** The Minnesota Tax Court held that a clinic separated from the hospital was qualified along with the hospital as an exempt public hospital under Minn. Stat. § 272.02(1) for real property taxes. The clinic was open to the public, operated without private profit, was devoted to what a public hospital does, and was reasonably necessary for the accomplishment of the purposes of the hospital seeking the property tax exemption. *Ridgeview Medical Center v. County of Carver*, C3-00-590, 2001 WL 1359835 (Minn. T. Ct. 10/25/01).

■ **TAX INCREMENT FINANCING — PROPER PARTY TO SUE; TIF DISTRICT REQUIREMENTS.** The Minnesota Court of Appeals held that citizen-taxpayer suits for the improper inclusion of real property in a tax-increment-financing district and that property's continued retention within a TIF district could both be challenged under Minn. Stat. § 469.1771(1). The TIF financing expenditure must be for primarily a public purpose and this required a comparative analysis. A redevelopment TIF district was not properly established in violation of Minn. Stat. § 469.174(10) where minimal effort was made to ensure the thorough inspection of the properties, inaccurate and unprecedented methodology was used to establish the condition of the buildings, and the buildings found structurally substandard were not reasonably distributed throughout the district. *Walser Auto Sales, Inc. v. City of Richfield*, C4-01-694, 2001 WL 1402751 (Minn. App. 11/13/01).

■ **TAX COURT; PUBLIC ACCESS; PROPRIETARY INFORMATION.** The Supreme Court held that when a party claims that a Tax Court hearing must be closed to protect trade secrets or other proprietary information, the court should hold a hearing to determine if the information meets the definition of a trade secret or otherwise merits protection. *In re Rahr Malting Co. v. County of Scott*, CX-00-1676, 2001 WL 869350 (Minn. 2001).

■ **TIME FOR MOTION FOR COSTS AND DISBURSEMENTS.** The Minnesota Tax Court held that a request for costs and disbursements pursuant to Minn.



## NOTES & TRENDS

Stat. § 278.07 and § 271.19 and Rule 8610.0150 of the Tax Court Rules of Procedure must be made within 90 days of the date of a final order of the Tax Court. The Minnesota Rules of Civil Procedure Rule 6.05, which provide an extra three days for service, did not apply. Rule 6.05 applies to time periods calculated from the time of service by mail between the parties, not the time of filing of date of judgment. Since the request for costs and disbursements was made on the 93rd day, the request was denied as being untimely. *Space Center Enterprises, Inc. v. County of Ramsey*, C6-97-3361 et al., 2001 WL 561324 (Minn. T. Ct. 5/21/01).

■ **MOTION FOR COSTS AND DISBURSEMENTS DENIED.** The Minnesota Tax Court rejected an intervenor's motion for costs and disbursements for copying charges because of inadequate documentation and denied the request for court reporter fees or legal fees because of a failure to meet statutory requirements. *Lake Superior Paper Industries v. County of St. Louis*, CX-96-600516, C4-97-600649, C1-98-600621, 2001 WL 1298205 (Minn. T. Ct. 10/17/01).

■ **BANKRUPTCY OFFSET OF MINNESOTA INCOME TAXES WAS PROPER.** The U.S. Bankruptcy Court, District of Minnesota construed Minn. Stat. § 270.07 and 11 U.S.C. § 553(a) of the Bankruptcy Code. The commissioner could properly offset a Minnesota income tax refund for the year 1999 against a Minnesota 1994 income tax liability that was discharged in bankruptcy since the commencement of the bankruptcy occurred in April, 2000. The three elements necessary to establish a right to set-off were shown: (1) the debt owed by the creditor arose prior to the commencement of the bankruptcy case; (2) the claim of the creditor against the debtor arose prior to the commencement of the bankruptcy case; and (3) the debt and claim were mutual or reciprocal obligations. *Ramirez v. Department of Revenue*, 266 B.R. 441 (Bankr. D. Minn. 9/14/01).

■ **MUTUAL PROPERTY AND CASUALTY COMPANY; QUALIFICATION FOR MINNESOTA PREMIUMS TAX.** The Minnesota Tax Court held that CUNA was not qualified to receive the lower tax rate on non-life premiums paid to certain "mutual property and casualty companies" for the purpose of Minn. Stat. § 60A.15. That statute generally taxes an insurance company's Minnesota premium receipts at a rate of 2 percent. The statute also provides a lower tax rate on non-life premiums paid to a mutual property and casualty company. The Tax Court also held that its construction of the statute did not violate the Equal Protection and Uniformity Clauses of the federal and Minnesota constitutions. *CUNA Mutual Insurance Society v. Commissioner*, 7219, 7220, 7277, 2001 WL 1009290 (Minn. T. Ct. 8/31/01).

■ **INCOME PRODUCING PROPERTY AND 60-DAY DISCLOSURE LAW.** The Minnesota Supreme Court affirmed that the Tax Court did not err in concluding that a parcel of land owned by the Metropolitan Airports Commission and released to Northwest was income-producing property for purposes of the 60-day filing requirement, and properly dismissed Northwest's Chapter 278 petition for failure to provide financial information within the time period prescribed in the statute. The Court also held that the commission's fee interest was subject to tax and not the lessee's leasehold interest. Property is to be valued at its market value, not at the value of the leasehold estate in the property or at some lesser value than market value. Market value is determined by capitalizing the income that the property generates. *Northwest Airlines, Inc. v. County of Hennepin*, 632 N.W.2d 216 (Minn. 2001).

■ **NON-PROFIT SALES TAX EXEMPTION REQUIRES SEPARATE CORPORATION.** The Minnesota Tax Court held that the education division of a non-exempt corporation seeking sales tax exemption under Minn. Stat. § 297A.25(16) as a nonprofit for itself as a division did not qualify. Under Minnesota law, the education division could not be considered a separate Minnesota corporation and that is what is required by the sales tax statute. *Minnesota Citizens Concerned for Life, Inc. Education Fund v. Commissioner of Revenue*, 7266, 2001 WL 1298208 (Minn. Tax Ct. 10/23/01).

■ **"REASONABLE CAUSE" FOR REOPENING STATUTE OF LIMITATIONS; REFUND CLAIMS.** The Minnesota Tax Court held that a taxpayer failed to establish "reasonable cause" for failing to timely file a refund claim for 1990 under Minn. Stat. § 289A.40, Subd. 1(a). The taxpayers failed to show that they exercised ordinary care and prudence but nevertheless could not file the return when it was due under the case *United States v. Boyle*, 469 U.S. 241 (1985). Therefore, the taxpayers' excuses or claims based on bankruptcy, loss of job, and poor health as establishing "reasonable cause" for the late filing were rejected. The taxpayers were able to work and file their federal income tax returns for 1990 and other tax years. *Ross M. Brouse and Michele A. Brouse v. Commissioner of Revenue*, 7282-R, 2001 WL 1667890 (Minn. T. Ct. 12/14/01).

■ **CHARITABLE DEDUCTION ADD-BACK FOR CONTRIBUTIONS TO NON-MINNESOTA CHARITIES; AMT REQUIREMENTS.** The Minnesota Tax Court ruled that the non-Minnesota charitable deduction add-back for the purposes of computing the Minnesota AMT is valid and constitutional. Minnesota taxpayers made contributions to an out-of-state "conduit" funding in one year. In later years, the "conduit" charity made charitable distributions to Minnesota charities. The Tax Court held that the charitable contributions were not made "to or for the use of" a Minnesota charity and therefore had to be added back for the Minnesota AMT. There were no instructions for the disbursement of the contributions nor a legal obligation on the part of the "conduit" charity at the time of the contributions to make the contributions in Minnesota. Lastly, the court held that Minnesota did not discriminate against the use of out-of-state "conduits" in favor of chari-



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table in-state “conduits” under the Equal Protection Clause or the Commerce Clause. The contributions to charities, whether to out-of-state “conduits” or in-state “conduits,” were equally deductible for Minnesota AMT purposes if made “to or for the use of” a Minnesota charity in the year of the contribution. *R. Austin Chapman and Nadin Chapman v. Commissioner of Revenue*, 7131-R, 2001 WL 1665943 (Minn. T. Ct. 12/19/01).

■ **PENALTIES, EMPLOYMENT TAXES, U.S. TAX COURT JURISDICTION.** The U.S. Tax Court held that it has jurisdiction over additions to tax for employment taxes, that a bakery’s workers were employees, and the bakery wasn’t entitled to relief under Section 530 of the Revenue Act of 1978. *Ewens and Miller, Inc. v. Commissioner*, 117 T.C. No. 22 (12/11/01).

■ **NEW MEXICO TAXES PROPERLY LEVIED ON SUBSIDIARY LICENSING INTELLECTUAL PROPERTY.** The assessment of New Mexico corporate income tax and gross receipts (sales) tax on royalties paid to a wholly owned Michigan subsidiary without physical contacts with Arizona by its parent corporation for the use of the subsidiary’s intellectual property did not violate either the Due Process Clause or the Commerce Clause of the U.S. Constitution. The subsidiary had an “economic presence” or functional presence in New Mexico. There was no need for a physical nexus. *Kmart Properties, Inc.*, 21, 140 (N.M. Ct. App. 11/30/01).

■ **IRS ASSESSMENT BASED ON DETERMINATION OF CONSTRUCTIVE DIVIDEND NOT TIME-BARRED.** Commissioner is not barred from determining constructive dividend income for taxpayers from their wholly owned corporation; notwithstanding that the period for assessment of a deficiency in the corporation’s income tax has expired. Court applied *Buffered v. Commissioner*, 506 U.S. 523 (1993), which held that adjustments to a shareholder’s income from an S corporation was governed by the shareholder’s statute of limitations and not the S corporation’s statute. *Robinson v. Commissioner*, T.C. 3328-98, 117 T.C. No. 25 (11/19/01).

■ **PENNSYLVANIA’S MANUFACTURING EXEMPTION: INVALID BUT SEVERABLE.** The manufacturing exemption for Pennsylvania’s corporate stock tax and franchise tax discriminates against interstate commerce and is unconstitutional. Proper remedy is not to expand the exemption or to invalidate the tax altogether, but to sever the exemption from the taxing statute. *PPG Industries Inc. v. Pennsylvania*, 87 MAP 1996, 2001 WL 1523839 (Pa. 11/30/01).

■ **INCOME REALIZATION FROM STOCK OPTIONS NOT PRECLUDED BY LOCKUP AGREEMENT.** Taxpayer, upon exercise of his stock option, realized compensation income in the amount of the difference between the fair market value of the shares received over the amount paid as the exercise price, and realization of income is not precluded by lockup agreement extending a sale restriction beyond the six-month term provided in 1934 Securities Exchange Act with respect to short-swing profits. *Tanner v. Commissioner*, T.C. 5738-00, 117 T.C. No. 20 (12/10/01).

■ **TIMELY MAILING/FILING RULE; APPLICATION TO TAX COURT PETITION MAILED FROM OVERSEAS.** U.S. Tax Court lacks jurisdiction over petition because it was not timely filed. Individual cannot rely on so-called timely mailing/timely filing rule of I.R.C. § 7502(a) because that rule does not apply to foreign postmarks. *Sarrell v. Commissioner*, T.C. 6044-01L, 117 T.C. No. 11 (9/25/01).

■ **ATTORNEYS’ FEES AWARDED UNDER ADEA TAXABLE TO COUPLE AS INCOME.** Statutory attorneys’ fees awarded by district court to couple’s attorney under fee-shifting provision of Age Discrimination in Employment Act and paid directly to the lawyer is taxable to couple as income. *Sinyard v. Commissioner*, 99-71369, 88 AFTR 2d 2001-6034 (9th Cir. 9/25/01).

■ **DISALLOWED LOSSES CLAIMED BY SHAREHOLDERS EXCEEDED RESPECTIVE BASIS IN S CORPORATION.** Disallowed losses claimed on taxpayers’ individual tax returns exceeded shareholders’ respective basis in an S corporation. An S corporation shareholder’s guarantee of a loan made by a third person to the S corporation is not treated as a debt from the S corporation to the shareholder that gives him basis so that he may deduct more of the corporation’s losses. The rule is the same where the corporate debt is secured by a mortgage on real property owned by the shareholder. *Estate of Bean v. United States*, 01-1501, 88 AFTR 2d 2001-6111 (8th Cir. 10/1/01).

■ **PART OF SETTLEMENT TAXABLE AS “DELAY DAMAGES” BASED ON COURT-IMPOSED RATIO TO TOTAL AWARD.** IRS correctly calculated that portion of settlement proceeds received in a personal injury lawsuit that represented taxable “delay damages” based on ratio of delay damages imposed by court to total award. “Delay damages” were not excludable from gross income under IRC Section 104(a)(2). *Francisco v. United States*, 00-1802, 88 AFTR 2d 2001-6513 (3rd Cir. 10/1/01).

■ **ADVANCE NOTICE FOR THIRD-PARTY CONTACTS.** IRC Section 7602(c)’s requirement that the commissioner give the taxpayer advance notice of third-party contacts on examination or collection activities is inapplicable with respect to examination activities that occurred before the January 19, 1999 effective date. *Seawright v. Commissioner*, T.C. 1796-00, 117 T.C. No. 24 (12/18/01).

■ **TAXPAYER RELIEVED FROM JOINT LIABILITY ARISING FROM SPOUSE’S SHELTER LOSSES.** Taxpayer whose husband invested in a cattle-breeding tax shelter limited partnership is entitled to relief from joint and several liability under IRC Section 6015(c) as she did not have actual knowledge of the items giving rise to the deficiencies. She is not entitled to relief to the extent she benefited from the disallowed partnership losses. *Mora v. Commissioner*, T.C. 6154-00, 117 T.C. No. 23 (12/17/01).



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■ **GIFT TAXES - FAMILY OWNED S CORPORATIONS - STOCK VALUATION.** The U.S. Tax Court's gift tax valuation of minority interest in family-owned S corporation stock, based on IRS expert's discounted cash flow analysis with zero "tax affecting" was affirmed. Court was entitled to choose between competing expert views. Tax affecting wasn't necessarily standard practice and perceived unfairness to taxpayers wasn't relevant to willing buyer/seller analysis. Fact that tax affecting may have been approved in earlier cases wasn't dispositive. Also, 25 percent lack of marketability discount based on IRS expert's well-reasoned analysis, and his use of post-valuation data over flawed earlier studies, was appropriate. *Gross Jr. v. Comm.* 99-2239/2257, 88 AFTR 2d 2001-6858 (6th Cir. 2001).

■ **DEFINITION OF "FIDUCIARY" NOT MODIFIED BY ERISA FOR EXCISE TAX.** Employee Retirement Income Security Act § 404(c) does not modify the definition of a "fiduciary" for purposes of the excise tax imposed on "disqualified persons" in IRC Section 4975. *Flahertys Arden Bowl Inc. v. Commissioner*, 01-1158, 88 AFTR 2d 2001-6850 (8th Cir. 11/16/01).

■ **U.S. TAX COURT NOT REQUIRED TO LOOK BEYOND FACE OF LEVY NOTICE IN DETERMINING JURISDICTION.** Tax Court, for jurisdictional purposes, need not look behind the IRS appeals officer's notice of determination sustaining a proposed levy to see whether taxpayers were afforded an appropriate hearing. Court's jurisdiction to review is premised on a notice of determination that is valued on its face and a timely filed petition. *Lunsford v. Commissioner*, T.C. 18071-99L, 117 T.C. No. 16 (11/30/01).

■ **NATIVE AMERICAN GAMING INCOME SUBJECT TO FEDERAL WAGERING TAXATION.** The U.S. Supreme Court ruled that Native American tribes conducting gaming operations do not enjoy the same exemption from federal wagering taxes accorded to states. *Chickasaw Nation v. United States*, 00-507, 122 S.Ct. 528 (2001).

■ **INTEREST IN DEBTOR-CREATED "CRUT" RULED PROPERTY OF BANKRUPTCY ESTATE.** Debtor's income interest in a self-settled charitable remainder unitrust, as well as his rights as an income beneficiary to remove and replace trustees and to amend the trust to protect its tax benefit status, are property of the bankruptcy estate. *Lindquist v. Mack (In re Mack)*, 01-4183 (Bankr. D. Minn. 11/2/01).

■ **ACCUAL METHOD; DEDUCTION OF EXPENDITURE ITEMS NOT BARRED.** Fixed, one-year items of expenditure that are ordinary, necessary, and recurring for the business in question, and that produced a benefit that will never extend beyond that term, are not to be capitalized. They are deductible as business expenses, even though the taxpayer uses the accrual method of accounting. *U.S. Freightways Corp. v. Commissioner*, 00-2668, 88 AFTR 2d 2001-6703 (7th Cir. 11/6/01).

■ **SECTION 1374 BUILT-IN GAINS TAX; "S" ITEM SUBJECT TO UNIFIED AUDIT AND LITIGATION PROCEDURES.** Temporary and Procedural Administrative Regulations § 301.6245-IT is valid, and built-in gain from tax imposed under IRC Section 1374 is Subchapter S item that must be determined in unified audit and litigation procedure for an S corporation. *New York Football Giants Inc. v. Commissioner*, T.C. 8563-00, 117 T.C. No. (10/30/01).

### ADMINISTRATIVE MATTERS

■ **MINNESOTA RELIEF FROM PENALTIES.** The commissioner indicated that the six-month period following the regular return date, April 15, will be treated as an extension period for purposes of imposing the late filing penalty for individual income tax returns for 2001 and thereafter. Therefore, the late filing penalty will not be imposed if the return is filed on or before October 15. MN Department of Revenue Notice 01-08 (11/13/01).

■ **MINNESOTA ADOPTION OF CORPORATION REGULATIONS.** The commissioner issued various rule changes on the corporate franchise tax. The adopted amendments cover issues of statute of limitations on audits, definitions of unitary business, combined group filing, third-party representation before the commissioner, and orders of the commissioner. Minn. Reg. 26 S.R. 435 (9/24/01).

■ **GUIDANCE ON MINNESOTA SPECIAL FUR TAX.** The commissioner set forth his position with respect to several terms and phrases used for the newly enacted special fur clothing tax. These include definitions of fur, clothing, and repair. Minnesota Department of Revenue Notice No. 01-04 (10/15/01).

■ **MINNESOTA INTEREST RATE.** The Minnesota DOR announced that the interest rate on the tax refunds and delinquent state taxes, other than property taxes, is 7 percent percent for 2002. News Release (11/21/01).

■ **PROPERTY TAX GUIDANCE.** The commissioner listed the statutory requirements in Minn. Stat § 273.124 for property homestead classification for real estate that is owned by a trustee under a trust agreement along with the application form to be submitted by December 15 of the assessment year to the county or city assessor to obtain the exemption. Revenue Notice No. 95-07 was revoked. Minnesota Department of Revenue Notice 01-07 (10/29/01).

■ **ASSIGNABILITY OF INCOME FROM EXERCISE OF EMPLOYEE STOCK OPTIONS TO MINNESOTA.** Two years ago Minn. Stat § 290.17(2) was amended to change the provision which assigned nonbusiness income for residents. The change was in response to the Minnesota Supreme Court decision in *Benda v. Commissioner of Revenue* 592 N.W.2d 452 (Minn. 1999). The amendment provided that compensation paid to an



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individual in a year in which he was not a Minnesota resident for any part of the year, *i.e.*, deferred “wages” (earned while an individual was a resident of Minnesota), was exempt from Minnesota taxation. Now the commissioner has laid out rules effectuating the statutory amendment in Minn. Stat § 290.17(2) and has revoked Revenue Notice No. 96-21. Essentially, the Revenue Notice provides that if the stock option is exercised while the taxpayer is a resident of Minnesota, all the income is assigned to Minnesota. If the option is exercised while the taxpayer is nonresident of Minnesota in a year when the taxpayer is a part-year resident of Minnesota, the income is prorated based on the number of days worked in Minnesota during the employment period over the total period. If the option is exercised in a year when the taxpayer is not a resident of Minnesota for any portion of the year, none of the income from the stock option exercise is assignable to Minnesota. Minnesota Department of Revenue Notice 01-10 (12/17/01).

■ **DEDUCTIBLE USE OF AUTO — OPTIONAL STANDARD MILEAGE RATE FOR 2002.** IRS released optional standard mileage rates for deducting auto usage for business, charitable, medical, or moving expenses in 2002. Further details are provided in Rev. Proc. 2001-54, 2001-48 IRB. (IR 2001-106).

■ **RESERVISTS AND NEW ENLISTEES MAY GET DEFERRAL FOR BACK TAXES.** The IRS reminds reservists called to active duty and new enlistees in the armed forces that they might qualify for a deferral of taxes owed if they can show that their ability to pay the taxes is impaired because of their military service. The Soldiers and Sailors Civil Relief Act provides this benefit. Details on applying for the tax payment deferral are in IRS Publication 3, Armed Forces’ Tax Guide. It is available by calling 1-800-829-3676 or by accessing the IRS web-site at: <http://ftp.fedworld.gov/pub/irs-pdf/p3.pdf>.

■ **EXEMPT ORGANIZATION ARTICLES FOR IRS AGENTS.** Every year the Exempt Organization section of the IRS publishes a series of articles for their division. It is intended to update the agents of the current issues within the exempt organizations area. For news releases: <http://ftp.fed-world.gov/pub.irs-news/ir-01-93.pdf>. See articles at: [http://www/irs/gov/bus\\_info/eof/fy2002cpe.html](http://www/irs/gov/bus_info/eof/fy2002cpe.html)

■ **HIGH-LOW PER DIEM METHOD FOR LODGING MEAL ALLOWANCES.** IRS has updated rules under which amount of ordinary and necessary business expenses of employee for reimbursed traveling expenses will be deemed substantiated, and for determining amount of deductible meals while traveling away from home. Rev. Proc. 2001-47, 2001-42 IRB.

■ **“PRINCIPAL RESIDENCE” FOR MORTGAGE INTEREST DEDUCTION.** IRS has issued a field service advice analyzing the question of what is a principal residence for purposes of the mortgage interest deduction for a taxpayer, who owns two residences and also has a third residence furnished to him by his employer in connection with his job. Field Service Advice 200137033.

■ **TRANSACTIONS INVOLVING “DISREGARDED ENTITIES” COULD BE STATUTORY MERGERS UNDER PROPOSED REGULATIONS.** IRS has reconsidered proposed regulations issued in May, 2001, and has issued new proposed regulations that would permit certain transactions involving disregarded entities to qualify as statutory mergers or consolidations under Code Sec. 368(a)(1)(A). The regulations would apply to transactions occurring after they are issued in final form. REF-126485-01; Prop Reg §1.368-2(b)(1).

■ **WITHHOLDING AND REPORTING RULES FOR POST-2002 STATUTORY OPTION EXERCISES AND STOCK DISPOSITIONS.** IRS has issued proposed regulations and two notices of proposed rules that would provide guidance on FICA, FUTA, and income tax withholding issues related to the exercise of statutory stock options and dispositions of option stock. The proposed regulations would “clarify current law” regarding payroll tax and income tax withholding on the transfer of stock pursuant to the exercise of statutory stock options. REG 142686-01. At the same time, under authority contained in the proposed regulations, IRS issued two notices that provide “rules of administrative convenience” to help employers comply with the regulations. Notice 2001-73 addressed the payment of FICA and FUTA taxes. Notice 2001-72 addressed income tax withholding on a “disqualifying disposition” of stock received from the exercise of a qualified option.

■ **PENALTY WAIVER OFFERED FOR DISCLOSURE OF TAX SHELTER PARTICIPATION.** IRS issued a new initiative intended to encourage taxpayers to disclose tax shelters and other questionable items reported on their tax returns by waiving associated accuracy-related penalties. IRS will waive tax IRC Section 6662(b) penalties for items disclosed before they are raised during an examination, or April 23, 2002, whichever is earlier. In addition, IRS says it is providing additional internal guidelines to employees for the consideration of accuracy-related penalties for tax shelters. IRS News Release (IR-2002-121), Announcement 2002-2.

■ **EXPANSION OF CASH ACCOUNTING FOR SMALL BUSINESSES.** The IRS will allow certain small businesses with gross receipts of up to \$10 million to use the cash method of accounting for their income and expenses. Previously, it was unclear whether these businesses were required to use inventories and an accrual method of accounting. Taxpayers may rely on the proposed rules for tax years ending on or after December 31, 2001. Notice 2001-76, 2001-52 I.R.B.

■ **CHANGE OF CLASSIFICATION: ASSOCIATION TO PARTNERSHIP OR “DISREGARDED ENTITY.”** IRS has issued final regulations that provide guidance about the tax treatment of changes in entity classification from an association taxable as a corporation to a partnership or to



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a disregarded entity. T.D. 8970; REG § 301.7701-3(g)(2)(ii).

■ **POST-2001 FAILURE-TO-DEPOSIT PENALTY RULES.** A new revenue procedure provides guidance on how IRS will credit federal tax deposits to determine whether a failure-to-deposit penalty applies in situations where deposits have not been made in sufficient amounts to satisfy the cumulative deposit obligations as of at least one deposit due date. The new rules apply to deposits for deposit periods after December 31, 2001. Rev. Proc. 2001-58, 2001-50 IRB.

### LEGISLATION

■ **INTERNET TAX MORATORIUM EXTENSION.** On November 28, 2001, President Bush signed into law a two-year extension of the Internet Tax Freedom Act (ITFA) moratorium, which had expired on October 21, 2001. The moratorium on state and local taxes on Internet access and multiple or discriminatory state and local taxes on electronic commerce is extended until November 1, 2003. The grandfather provision, permitting Internet access taxes imposed prior to October 1, 1998, remains in place. P.L. 107-75 (H.R. 1552), Laws 2001, effective 11/28/01.

■ **VICTIMS OF TERRORISM TAX RELIEF ACT OF 2001.** The Victims of Terrorism Relief Act of 2001 became law in late December, 2001. The act provides income and estate tax relief along with death benefits, and disaster relief payments. It also contains new and controversial IRS disclosure rules on tax information. H.R. 2884.

■ **AIR TRANSPORTATION SAFETY AND SYSTEM STABILIZATION ACT.** The Air Transportation Safety and System Stabilization Act became law. This act contains income tax provisions that postpone the due date for certain airline-related tax deposits, and clarifies that federal loss-compensation funds paid to airlines by the act are not tax-exempt. P.L. 107-42 (11/22/01).

### LOOKING AHEAD

■ **LACK OF MINNESOTA CONFORMITY TO FEDERAL ESTATE TAX.** As a result of the generally poor economy and coupled with, in some cases, prior budgetary problems, many states are facing revenue shortfalls. Consequently, the phase-out of the IRC Section 2011 credit for state death taxes under provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 (P.L. 107-16) (2001 act) comes at a particularly difficult time. The 2001 act phases out the state death tax credits in the years 2002 through 2004. In 2005, the credit becomes a deduction. Minnesota estate tax (Minn. Stat § 291.005-(8)) refers to the Internal Revenue Code as of December 31, 2000, thereby freezing its tax as the credit allowed on December 30, 2000 (although other portions of the Minnesota statutes refer to the IRC as of June 15, 2001). Full federal conformity costs millions. Look for the Legislature to push for full adoption, however.

■ **CROSSCURRENTS AND SOLVING THE MINNESOTA DEFICIT.** The Minnesota deficit is expected to reach nearly \$2 billion dollars for the current biennium. A structural deficit of more than \$1 billion will carry over to 2004-2005 and beyond. Legislators and the governor will spend much of their time struggling to fill the gap in the 2002 Legislative Session. Making the problem murky is that the year 2002 is also an election year. Therefore, every legislator and all of Minnesota's statewide constitutional offices will also be up for grabs. The year 2002 is also the year for the Legislature to finalize the bonding bill for capital projects. The Capitol is scrambling for solutions. Suggested deficit options that are being discussed are: dip into various reserves, which total \$1 billion; reducing spending; boosting the new statewide property tax; enact a surcharge on the state income tax; and broadening the base of the sales tax to include services. The Legislature has a difficult task but should remember that Minnesota already is a high-spend state. To attract and retain business, grow jobs, and ensure a bright future for our residents; policymakers must make the most effective use of the existing resources before asking for more taxes.

— JERRY GEIS  
BRIGGS & MORGAN

## TORTS & INSURANCE

### JUDICIAL LAW

■ **INSURANCE — PRIORITY.** Harvieux was observing Smith change a tire on Swenson's van in Smith's barn. Smith knew the tire was the wrong size. Harvieux was injured when the tire exploded during inflation. Smith had a farm-liability policy, and that insurer settled the suit brought by Harvieux. The farm-policy insurer then brought a contribution action against the two insurers who wrote policies for Smith's vehicles and Swenson's van. The district court granted summary judgment in favor of the two automobile insurers not involved in the initial suit, ruling that the farm policy was closer to the risk.

On appeal, the Court of Appeals first held that the policy for Swenson's van did not cover Smith's negligence because (1) Smith was



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not a family member or spouse of the insured, (2) he was not “using” the van when he was changing the tire, and (3) a mechanic is not an agent of the vehicle’s owner.

In evaluating whether the farm policy or Smith’s auto policy was primary, the court noted that neither policy specifically described the accident-causing instrumentality (the tire), that the similar premiums for both policies did not establish that one contemplated greater exposure to risk than the other, and that both policies provided primary coverage for Harvieux’s injuries. The court then turned to the “total policy insuring intent” analysis. The auto policy insured against liability for bodily injury resulting from the maintenance of a car. The farm policy provided general insurance coverage for bodily injuries but excluded almost all forms of liability arising from maintenance of a motorized vehicle. Thus, the auto policy had priority, entitling the farm policy insurer to a \$50,000 contribution (the liability limits for bodily injury under the auto policy). *North Star Mutual Ins. Co. v. Midwest Family Mutual Ins. Co.*, C9-01-514, 634 N.W.2d 216 (Minn. App. 9/25/01). [The author’s firm, Bassford, Lockhart, Truesdell & Briggs, P.A., successfully represented Midwest Family Mutual Insurance Company (the insurer of Swenson’s van) in this matter.] <http://www.lawlibrary.state.mn.us/archive/ctappub/0109/c901514.htm>

■ **MEDICAL NEGLIGENCE — AMBULANCE SERVICE — PRE-EXISTING CONDITIONS.** Plaintiff was a pedestrian in a designated crosswalk when a vehicle struck her and she sustained multiple injuries, particularly to her left hip and pelvis. Thereafter, defendant ambulance service was called to the accident scene to transport plaintiff to the emergency room. Plaintiff sued and settled with the driver of the car. Plaintiff also sued the ambulance service, alleging it negligently allowed her left leg to slide off the gurney while attempting to assess her injuries in transport. The district court granted summary judgment for the ambulance service.

The Court of Appeals affirmed, holding that an expert doctor’s testimony that was speculative and lacked foundation could not support a verdict against the ambulance service for aggravation of preexisting injuries. The court found that the doctor’s testimony did not support plaintiff’s assertion of negligence because it did not sufficiently ascribe any of the claimed harm to the gurney incident in the ambulance.

The court also held that the ambulance service should not be subject to the Single Indivisible Injury (SII) rule. No Minnesota case has applied the SII rule to hold a medical defendant jointly and severally liable with the tortfeasor who caused the original injury for which treatment was provided; rather, a negligent medical defendant is a subsequent tortfeasor who can be held liable only for aggravating the original injury. To hold the ambulance service liable for injuries that occurred before the ambulance arrived on the scene would have a chilling effect on the provision of emergency care and is inconsistent with existing case law (compare current version of CIVILIG 91.40 which directly conflicts with this holding).

Finally, the court held that the standard of care applicable to common carriers (strict liability for injuries suffered during transport) was *not* the correct standard to be applied in this case. The court pointed out that the tasks performed by a licensed paramedic in an ambulance are not those commonly performed by lay people, but tasks performed by specially trained medical personnel, and therefore subject to the standard of care applicable to medical professionals.

*Bondy v. Allen*, C0-01-28, 635 N.W.2d 244 (Minn. App. 10/23/01) <http://www.lawlibrary.state.mn.us/archive/ctappub/0110/c00128.htm>

■ **INSURANCE COVERAGE — RES JUDICATA/CLAIM PRECLUSION, DECLARATORY JUDGMENT ACTIONS.** A church employee crashed her vehicle into a state trooper. The driver sought liability coverage from both her personal automobile insurance policy and the church’s excess insurance policy. The excess coverage policy provided coverage only for occurrences while employees were acting in the scope of their employment. The state intervened, seeking reimbursement for workers compensation benefits paid to the trooper. After two appeals and two jury trials, final judgment was entered against the driver and no one appealed.

The excess carrier commenced a declaratory judgment action seeking a declaration that the driver was not on duty when the accident occurred. Two days later, the state, as creditor, filed a garnishment action in another county, naming the excess insurer as garnishee. The declaratory action was dismissed pursuant to Minn. Stat. § 541.05, subd. 1 because the matter was not litigated within six years of the date of the accident or notice thereof. The carrier did not appeal that decision. After the trooper intervened in the garnishment action, the court held that the insurer was prohibited from denying coverage based on the dismissal of the declaratory judgement action. The insurer appealed from that ruling.

In reversing the trial court, the Court of Appeals held that the statute of limitations does not apply to declaratory judgment actions and collateral estoppel does not apply after an improper dismissal based on procedural rules instead of merits.

In this opinion, the Supreme Court did not address whether a statute of limitations applies to declaratory judgment actions. The Court held that while the decision in the initial action was procedural in nature, judgment had been entered “on the complaint.” The Court construed that judgment to be on the merits and subject to *res judicata*. *State v. Church Mutual*, C2-00-1364, 636 N.W.2d 322 (Minn. 12/6/01).

<http://www.lawlibrary.state.mn.us/archive/supct/0112/c2001364.htm>



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■ **LANDOWNER'S DUTY OF CARE — POOLS.** Plaintiff slid head-first into the shallow end of his brother's above-ground swimming pool, fracturing a vertebra. The landowner believed it was dangerous to dive into the pool, but did not think that there was any danger in going down the slide. The pool owner had posted "no diving" signs but had not posted similar signs regarding the slide.

The Supreme Court held that because the plaintiff's negligence claim against his brother was based on a theory of premises liability, the landowner had a continuing duty to use reasonable care for the safety of plaintiff, as an entrant on his premises. This duty does not depend on the existence of a special relationship. The Court reasoned that the landowner would not have owed a duty, and hence would not have been liable for any physical harm caused to plaintiff, if the danger associated with doing a head-first belly slide was either known or obvious, unless the landowner should have anticipated the harm despite its known or obvious nature. Since the district court failed to consider whether the danger associated with the condition and the risk involved such an "obvious" danger, the Court remanded the case for further proceedings. *Louis v. Louis*, C3-00-1325, 636 N.W.2d 314 (Minn. 12/6/01).

<http://www.lawlibrary.state.mn.us/archive/supct/0112/c3001325.htm>

■ **NO-FAULT ARBITRATION:** Plaintiff injured her knee while getting out of her truck and ultimately filed a no-fault petition for arbitration in which she sought \$9,999 in wage-loss and replacement-services benefits. Five days before the arbitration hearing, the claimant attempted to withdraw the petition because a subrogation claim caused the entire claim to exceed the \$10,000 jurisdictional limit. The insurer objected to the request to withdraw the petition because the arbitration rules require ten days notice. The arbitrator awarded the claimant more than \$24,000 in no-fault benefits.

In affirming the district court's confirmation of the award, the Court of Appeals relied on Minnesota Rule of No-Fault Arbitration 34, which states: "Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection thereto in writing shall be deemed to have waived the right to object." Since the insurer's objection to the arbitrator considering a claim in excess of the jurisdictional limit was *never stated in writing*, the court held that the insurer waived that objection. *Regenscheid v. Farm Bureau Mut. Ins. Co.*, CX-01-862, 636 N.W.2d 349 (Minn. App. 12/4/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0112/cx01862.htm>

■ **MALICIOUS PROSECUTION,** A city council member brought a malicious prosecution claim against several individuals and the city after they alleged that plaintiff had overcharged the city when submitting expense reimbursements. The county's sheriff conducted a criminal investigation which found no factual support for the allegations and closed the investigation.

In affirming the trial court's dismissal of the claim, the Court of Appeals held that formal legal action must be instituted in order to trigger a malicious prosecution claim. The initiation of a criminal investigation alone, without further proceedings (such as a criminal charge or indictment), is not sufficient. *Stead-Bowers v. Langley*, C6-01-423, 636 N.W.2d 334 (Minn. App. 12/4/01).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0112/c601423.htm>

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