



NOTES & TRENDS

ADMINISTRATIVE LAW

JUDICIAL LAW

■ **SUBPOENAS.** An employee allegedly discharged for misconduct requested a hearing on the denial of unemployment benefits by the Department of Economic Security. An unemployment law judge continued the hearing to allow the employee to subpoena two supervisors. The supervisors did not appear at the second hearing even though the employee stated she had asked DES to subpoena both. After allowing an offer of proof of the supervisors' testimony, the ULJ proceeded to adjudicate the matter, found misconduct, and the commissioner affirmed. *Thompson v. County of Hennepin*, C9-02-1544, 660 N.W. 2d 157 (Minn. App. 05/06/03). The Court of Appeals reversed and remanded because the record did not disclose why the witnesses did not appear and the court could not determine that Thompson had a full opportunity to present her defense.

<http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op021544-0506.htm>

■ **RIGHT TO A HEARING.** The Minnesota Pollution Control Agency issued a general permit covering the discharge of storm water by small municipalities. Each small city could then apply for coverage under the general permit by preparing a program document describing how it will comply with the Clean Water Act and filing a summary of the document with the MPCA. Although public notice and comment was allowed on the general permit, none was provided for each city's plan. The Court of Appeals found this violated the public hearing requirements of the Clean Water Act and held that the public was entitled to be heard on each city's program document, since it contained the substantive information on how the municipality would comply with the act. *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, C6-02-1243, 660 N.W. 2d 427 (Minn. App. 05/06/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op021243-0506.htm>

■ **DATA PRACTICES.** The city of St. Paul collected data from 41,249 traffic stops during the year 2000 in an effort to address racial profiling. The city released a summary report to the media but denied the *Star Tribune's* request for the names of individual officers who made the stops on the grounds that it was private personnel data. The district court determined that the vehicle driver was the subject of the data rather than the police officer, so that it was not private personnel data. The Court of Appeals reversed, finding that the purpose of the study was to assess the tendencies of officers in regard to racial profiling, thereby making it data on an individual collected because the individual was an employee. The court did affirm the district court's denial of attorneys fees and declined to adopt a new rule of law that a private citizen or news organization that prevails in district court would be entitled to attorney fees, unless the applicable law is clearly unsettled. *Star Tribune v. City of St. Paul*, C5-02-1931, 660 N.W.2d 821 (Minn. App. 05/13/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0305/op021931-0513.htm>

■ **IMPARTIAL DECISIONMAKER.** In *Chanhassen Chiropractic Center v. City of Chanhassen*, C0-02-1724, 663 N.W.2d 559 (Minn. App. 06/10/03) the city advised the center that its relocation benefits claim would be heard before the full City Council. The center sought a writ of mandamus arguing that the City Council could not be an impartial decisionmaker since it had a pecuniary interest. The Court of Appeals affirmed the denial of the writ because the record contained no evidence that the current City Council was involved in the city manager's denial of benefits. The court noted that whether a hearing officer is impartial is a fact-specific inquiry. It also observed that the center had an adequate legal remedy, namely appeal to the City Council.

<http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op021724-0610.htm>

■ **DUE PROCESS.** The Minnesota Court of Appeals held that paying a fixed salary to a person to solicit patients for a chiropractor does not constitute fee splitting, but does constitute unprofessional conduct. *Pietsch v. Minnesota Board of Chiropractic Examiners*, C6-02-2117, 662 N.W.2d 917 (Minn. App. 06/17/03). The court concluded that the board had discretion to make a case-by-case judgment as to what constitutes unprofessional conduct without further definition of the term

through legislation or rules. In dissent, Judge Forsberg found the prohibition on unprofessional conduct to be unconstitutionally vague as applied in this case because it did not provide the chiropractor with sufficient notice or warning that his actions were prohibited. Judge Forsberg encouraged the board to use its rulemaking authority to further define unprofessional conduct.
<http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op022117-0617.htm>

LEGISLATION

Perhaps taking their cue from the “just in time” inventory control of the manufacturing sector, the 2003 Legislature waited until the special session to pass the bulk of the administrative law modifications. No major developments, just incremental changes:

■ **RULEMAKING — SONAR ISSUES — Chapter 3 2003 Regular Session.** Effective July 1, 2003.

This act modifies the cost analysis that an agency must address in a SONAR, requiring greater specificity in identifying affected classes of parties as well as a new requirement to address “the probable costs” of *not* adopting the rule.

■ **LOCAL GOVERNMENTAL UNIT RULE PETITION — Chapter 1 2003 Special Session.** Effective July 1, 2003.

Article 2, Section 29 deletes the 2006 sunset date from M.S. 14.091 which allows cities and other local governmental units to petition for a rule amendment or repeal.

■ **GOOD CAUSE EXCEPTION — Chapter 6 2003 Special Session.** Effective May 31, 2003.

This bill provides a number of public notice and other procedural directions to agencies and the Office of Administrative Hearings for future agency use of the “good cause” exemption from rule-making. The bill also provides an appeal process to the Chief ALJ from an initial rule disapproval.

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Office of Administrative Hearings

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CIVIL LITIGATION

INSURANCE COVERAGE

■ **INTENTIONAL ACTS.** The Minnesota Supreme Court reversed the Court of Appeals, which had reversed the trial court’s refusal to grant summary judgment to the tortfeasor’s homeowner’s insurer, which had sought to avoid coverage by arguing that the tortfeasor’s criminal conviction could be used for collateral estoppel purposes in the pending civil action.

The case presents the issue of whether an insured’s criminal conviction can be used by an insurance company to collaterally estop the victim of the crime from litigating in a subsequent civil action the issue of the insured’s intent, to determine whether the insured’s homeowner’s insurance policy provides coverage for the incident.

The parents of a one-year-old child brought an action against the tortfeasor for serious injuries the child sustained while being cared for by the tortfeasor in the daycare center which the tortfeasor operated in her home. As a result of the incident, the tortfeasor was charged with assault in the first degree and malicious punishment of a child. The state alleged that the tortfeasor had shaken the baby, leading to severe, life-threatening injuries. The tortfeasor eventually waived the right to a jury trial and agreed to a bench trial. The judge found the tortfeasor guilty on both of the charged counts. The victim’s parents then filed a civil suit against the tortfeasor. The tortfeasor’s homeowner’s insurer brought an action for declaratory relief claiming that it had no obligation to defend, indemnify, or pay benefits to the victim for the injuries she suffered, pointing to the various provisions of the insurance policy excluding coverage for intentional acts. The district court denied the insurer’s motion for summary judgment, but the Court of Appeals held that collateral estoppel could be applied and that the tortfeasor’s conviction for assault in the first degree collaterally estopped relitigation of the intent issue with respect to the intentional acts exclusion.

In reaching its decision that an insured’s criminal conviction does not collaterally estop the victim from litigating in a civil action the issue of the insured’s intent, and whether the insured’s homeowner’s insurance policy provides coverage for the incident, the Supreme Court began with an analysis of *Travelers Insurance Company v. Thompson*, 281 Minn. 547, 163 N.W.2d 289 (1968), in which the Court held that the husband’s judgment of conviction in the criminal case was conclusive as to the result in the civil action to determine his rights to the life insurance proceeds of his deceased wife. There, the Court did grant a prior criminal conviction collateral estoppel effect, “where the

convicted defendant attempts by subsequent civil litigation to profit from his own crime, as where an arsonist seeks to recover insurance proceeds for damage caused by the fire which he was convicted of setting, or where a beneficiary convicted of homicide seeks to recover under the victim's life insurance policy."

In the present action, the victims of the tortfeasor argued that collateral estoppel should not be extended beyond the holding in *Thompson* where it was the convicted criminal who was prevented from profiting from his crime, given that here, the injured persons were simply victims seeking to be compensated, nor were they parties to the preceding criminal trial. The Supreme Court found those arguments, and two Massachusetts decisions to be compelling. Here, the victims had not had an opportunity to present their case to a jury. They were not parties to the criminal proceedings and had not had an opportunity to cross-examine the tortfeasor, nor to present their own evidence or experts. The Supreme Court concluded that, in order to give the victims a full and fair opportunity to be heard, the Court would not expand its ruling in *Thompson* to the facts of this case. *Illinois Farmers Insurance Company v. Reed*, 662 N.W.2d 529 (Minn. 2003).

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CRIMINAL LAW

■ **SENTENCE; APPRENDI, RETROACTIVE APPLICATION; COLLATERAL REVIEW.** The Court of Appeals holds that the *Apprendi* rule does not apply retroactively to proceedings seeking collateral review of a conviction. In this case, the appellant received a 20-year sentence for second-degree criminal sexual conduct, and received a 20-year sentence under the pattern sex offender law at a time when the maximum statutory sentence for the offense was 12 1/2 years. The court finds that the *Apprendi* rule is not a "watershed" rule of criminal procedure which alters bedrock procedural elements, and does not fall within the retroactivity rule of *Teague v. Lane*, 49 U.S. 288, 109 S. Ct. 1060 (1989). *James Joseph Meemken v. State*, C2-02-1689 (Minn. App. 06/03/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op021689-0603.htm>

■ **SENTENCE; MANDATORY MINIMUM; STAY OF IMPOSITION; JUDICIAL DISCRETION.** Appellant was convicted of second offense Fifth-Degree Controlled Substance under Minn. Stat. §152.025, subd. 3(b), which provides that such a defendant "shall be committed" to a period of confinement of not less than six months. The appellant had undertaken an exemplary course of rehabilitation which the judge recognized. However, the court noted that the six-month incarceration was "mandatory," and imposed a six-month term.

Held, sentence of the court was reversed. Although the mandatory period of incarceration for a second offense fifth-degree controlled substance offender is prescribed by the statute, Minn. Stat. §609.135, subd. 1 authorizes stays of imposition in all cases except where life imprisonment is required, or a minimum term is otherwise specified by Minn. Stat. §609.11. The instant offense does not require a life sentence, nor did the previous conviction involve use of a firearm. Minn. Stat. §152.025, subd. 3(b) does not specifically exclude discretion by the court. The Court of Appeals notes that when the Legislature wishes to restrict such judicial discretion, it selects language that leaves no doubt. Hence, Minn. Stat. §152.025, subd. 3(b) does not limit judicial discretion in fashioning a sentence, and the court may consider mitigating factors and impose a sentence of less than six months. *Amber Lynn Bluhm v. State*, C6-02-1775 (Minn. App. 06/17/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op021775-0617.htm>

■ **MIRANDA JUVENILE; PRINCIPAL'S OFFICE; NOTIFICATION OF PARENTS.** Appellant was pulled from his special education class, and escorted by his teacher to the principal's office. There, he was interviewed by the Mille Lacs Chief of Police regarding an incident of criminal sexual conduct. Also present was the school liaison police officer. The police chief made no attempt to contact the appellant's parents, nor did he give a *Miranda* warning. At trial, the appellant testified that he was "terrified" while being questioned by police. Appellant was told that he was not under arrest, and that when the interview was completed, he would be able to get up and walk out the door and go home on the school bus. It was repeated to the appellant that he would be free to go at any time.

Under these circumstances, the interview is held to be custodial. In the case of this juvenile, the interview was not "devoid of psychological intimidation and was strongly suggestive of the coercive influence associated with a formal arrest." The court notes that when a "uniformed officer summons

a child from the classroom, and actively participates in questioning him, the circumstances strongly suggest coercive influence associated with formal arrest.” The court also finds it significant that no attempt was made to contact the appellant’s parents. The court finds that the fact that the appellant was told he was free to leave and need not answer questions is only one factor and is not determinative of the custody question. “Given the facts of this case, appellant’s parents should have been notified prior to questioning and should have been allowed the opportunity to be present during the interview.”

Although the court concludes that the appellant’s statements should have been suppressed, the effect of the erroneous admission of the statement at trial was harmless beyond a reasonable doubt, given the overwhelming evidence of the appellant’s guilt, including an eyewitness to the sexual touching. **In re T.J.C.**, C3-02-1622, (Minn. App. 06/03/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op021622-0603.htm>

■ **TRIBAL JURISDICTION; FELONY JURISDICTION; PUBLIC LAW 280; RETROCESSION.** The appellant was lawfully arrested and convicted of felony assault on a tribal peace officer on tribal land. The Court of Appeals rejects the appellant’s contention that because Public Law 280 allows states to retrocede jurisdiction over a tribe to the federal government, that Minnesota *must* retrocede such jurisdiction in order for jurisdiction over the tribe to exist. Minnesota has not retroceded its authority over White Earth Reservation. Instead, the state has entered into a cooperative agreement with tribal authorities, pursuant to Minn. Stat. §626.93. Under these agreements, a tribe has concurrent jurisdiction with the local county sheriff to enforce state criminal law within the geographical boundaries of a tribe’s reservation. The court holds that Minnesota did not retrocede its jurisdiction in order to enter into cooperative agreements with Indian tribes. **State v. Kristen Rae Manypenny**, CX-02-855 (Minn. App. 06/03/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op020855-0603.htm>

■ **EVIDENCE; SPREIGL; IDENTITY; PRIOR ASSAULTS.** In a first-degree murder prosecution under Minn. Stat. §609.185 (domestic abuse first-degree murder), the trial court admitted evidence of two prior *Spreigl* incidents. The first was an assault of a 13-year-old boy with a beer bottle, and the second was the assault of a woman in her mid-forties. The trial court admitted these acts on the basis that they were relevant to the issue “identity,” and admitted the evidence as demonstrating the appellant’s “careless attitude toward vulnerable people.”

In response to the defense’s argument that the relevancy standard is heightened when *Spreigl* evidence is offered to prove identity, and that the court should look for resemblances between the methodologies of the crimes, the Minnesota Supreme Court holds that the trial court abused its discretion in admitting the *Spreigl* evidence. It was improper to admit this evidence to show a pattern of aggression toward vulnerable individuals for the reason that a 13-year-old boy and a middle-aged woman could not, under the circumstances, be held to be “vulnerable.” However, the admission of this evidence was harmless under the circumstances of this case. **State v. Michael Patrick Asfeld**, C3-02-633 (Minn. 06/12/03). <http://www.lawlibrary.state.mn.us/archive/supct/0306/OP020633-0612.htm>

■ **HOMICIDE; DOMESTIC ABUSE MURDER; PRIOR ABUSE OF OTHER “FAMILY OR HOUSEHOLD” MEMBERS; CONSTRUED.** In a prosecution for murder committed upon the appellant’s infant son, the state introduced evidence that the appellant had engaged in prior assaults against her mother, father, brother, and sister. Minn. Stat. §609.185 (6) states that a person is guilty of murder in the first degree if he causes death of a human being while committing domestic abuse and having engaged in a past pattern of domestic abuse upon the victim or “upon another family or household member” In this case, the defense argued that the statute requires a past pattern of domestic abuse upon the victim or upon another family or household member of the victim and the perpetrator. The Supreme Court rejects this interpretation, stating that the plain meaning of the statute contemplates a pattern of abuse on members of the perpetrator’s family or household, irrespective of the relationship to the victim. Therefore, the evidence of the pattern of abuse was properly admitted. **State v. Michael Patrick Asfeld, supra.**

■ **PLEA AGREEMENTS; AGREEMENT AS TO SENTENCE; STATE FAILURE TO HONOR; WITHDRAWAL OF PLEA.** The appellant, a juvenile, agreed to plead guilty to second-degree burglary in exchange for an agreement by the prosecutor that the state would recommend a stay of adjudication. At the time of the sentencing hearing, the prosecutor reviewed a presentence investigation from the probation department. The probation report included a social history outlining the appellant’s history of legal difficulties; the report also included indications that the appellant had continued to engage in risky

behavior between the date of the plea and the date of the sentence by not remaining law abiding, and by violating parental rules. At the dispositional hearing, the prosecutor backed off on the recommendation for a stay of adjudication, recognizing the issues brought up in the probation report, stating, "I don't think a stay of adjudication is appropriate any more." The appellant attempted to withdraw her plea of guilty, which was denied by the court, which also denied the stay of adjudication.

Held, this was an agreement as to sentence, within the meaning of *State v. DeZeler*, 427 N.W.2d 231 (Minn. 1988). As such, the state failed to keep its part of the agreement, and the juvenile was entitled to withdraw her plea. The appellant did not forfeit her right to withdraw a guilty plea, as to the changing circumstances, if the state changes its mind about a previous agreement. The court concludes that the state backed away from its commitment to make the agreed-upon sentence recommendation and by doing so violated the plea agreement, entitling the appellant to withdraw her plea. *In re S.L.*, C6-02-1467 (Minn. App. 06/17/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op021467-0617.htm>

■ **PROCEDURE; TRIAL BY STIPULATED FACTS; FINDINGS.** In a trial on stipulated facts, if the court omits a finding on any issue of fact essential to sustain the general verdict, the court shall be deemed to have made a finding consistent with the general finding, citing Minnesota Rule of Criminal Procedure 26.01, subd. 2. The Court of Appeals rejects the appellant's argument that appellate review of the facts is *de novo*. *State v. Aldo Acosta Dominguez*, C6-02-1159 (Minn. App. 06/24/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op021159-0624.htm>

■ **DWI/IMPLIED CONSENT; IMPLIED CONSENT HEARING; IMPLICIT FINDINGS; MISTAKEN ISSUES; APPELLATE REVIEW.** Following a hearing, the district court erroneously stated the issues, contrary to those put forth at the hearing. Nonetheless, the record substantiated the implicit findings of the district court, and those findings support a determination that the officer had probable cause to seize the appellant. The test is not whether the district court decision is clearly erroneous, but whether, as a matter of law, the basis for the stop was adequate. *Stephen M. Modaff v. Commissioner of Public Safety*, C5-02-2190 (Minn. App. 07/01/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0307/op022190-0701.htm>

■ **DWI/IMPLIED CONSENT; PRIOR IMPAIRED DRIVING CONVICTION; TEN YEAR LOOK-BACK PERIOD; PRE-1998.** Appellant was convicted of DWI in 1994, 1998, and 2000. In 2002, he was charged with a similar violation. The statute defines a qualified prior impaired driving incident as a prior conviction under Minn. Stat. §169A.20 or Minnesota Statutes 1998 §169.121. The reference to "1998" does not limit the ten-year look-back provision. Such a finding would frustrate the legislative intent. Therefore, the statute does not preclude looking back to the 1994 conviction as a prior offense for purposes of applying the new felony DWI law. *State v. Brian Adam Maas*, C3-02-2186 (Minn. App. 07/01/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0307/op022186-0701.htm>

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EMPLOYMENT & LABOR LAWS

JUDICIAL LAW

■ **SEX HARASSMENT.** An employer took prompt and appropriate action as a matter of law, warranting dismissal of a sex harassment claim in *Meriwether v. Caraustar Packing Co.*, 326 F.3d 990 (8th Cir. 2003). The claimant alleged a single instance of unwelcome physical touching by a coworker and other employees joking about the event the next day. The employer promptly investigated and suspended the other employee, and the incident did not recur. Under these circumstances, the employer took appropriate immediate action as a matter of law, which justified dismissal of the lawsuit. The court also upheld the trial court's award of attorney's fees to the employer for the appeal.

The Court of Appeals turned down claims of fault investigation in a pair of sex discrimination and harassment cases.

In *Schramm v. Village Chevrolet Co.*, 2003 WL 1874753 (Minn. App. 2003) (unpublished), the court held that a pregnant employee's memorandum to her boss asking to "clarify" rumors that she might be fired did not trigger a duty by the employer to investigate. The employer "responded appropriately" by dispelling the rumors, although the woman later was fired. The court also rejected a claim under the Parenting Leave Law, Minn. Stat. §181.941, since the employee was fired before she "requested or obtained" a leave of absence due to her pregnancy.

In *Soukop v. Graco, Inc.*, 2003 WL 21058572, (Minn. App. 2003) (unpublished), a male employ-

ee's claim that he was fired after the employer failed to investigate his complaints of harassment by a female coworker was rejected. The employer did investigate some of the incidents and tried to look into other claims, but the claimant "was not helpful in these efforts." There was no evidence of differential treatment based on gender other than the claimant's "own perception."

■ **ACADEMIC EMPLOYMENT.** Part-time early childhood instructors are not part of teacher's bargaining units. In *Education Minnesota — Chisholm v. Ind. Sch. Dist. No. 695, Chisholm*, 2003 WL 21295681, the Supreme Court, affirming the appellate court, held that they are not included in the teacher's union because their courses are given on a "noncredit basis."

An arbitration decision upholding the discharge of a University of Minnesota employee under the university's grievance policy is subject to review under the Arbitration Act, but not as a quasijudicial decision for *certiorari*. *University of Minnesota v. Woolley*, 659 N.W.2d 300 (Minn. App. 2003). The Minnesota Court of Appeals held that an employee may seek *certiorari* review after the final administration decision of the University under Phase III of its policy only to proceed with binding arbitration. But, if arbitration is conducted, *certiorari* can no longer be pursued and any challenge must be brought under the limited grounds of the Arbitration Act.

■ **EMPLOYMENT WAGES.** An employer may validly refuse to pay sales commissions to employees, even after the work for the commission has been completed, if the sales personnel resigned before the funds were received by the employer. *Friedenfeld v. Winthrop Resources Corp.*, 2003 WL 1908112 (Minn. App. 2003) (unpublished). The appellate court held an employer may validly establish and enforce a policy that sales commissions are not paid to employees who resign, even though they have completed the sales for which a commission is to be paid before their resignation. Under the policy, the employer does not have to pay commissions if the employee is no longer working at the company, due to voluntary resignation, at the time the commission would otherwise be payable.

■ **UNEMPLOYMENT COMPENSATION.** A penalty for an employee fraudulently obtaining unemployment compensation was reversed in *Hovey v. Commissioner of Economic Security*, 2003 WL 1908005 (Minn. App. 2003) (unpublished). A determination by an unemployment law judge that the recipient had committed fraud by failure to disclose that the recipient had filed a claim for workers' compensation resulting in an \$800 penalty was erroneous because the employee did not begin receiving workers' compensation benefits until two months after his unemployment benefits ceased.

Another reversal of an unemployment compensation ruling in favor of an employee occurred in *Atkinson v. Qwest Corporation*, 2003 WL 1907951 (Minn. App. 2003) (unpublished). An employee, who had an "exemplary" record during 28 years of work, was fired after she lost her temper and cursed at an employee and touched both sides of his face after she had been the recipient of numerous incidents of harassing conduct, which management had failed to correct. While it did not "condone" the discharged employee's behavior, the court found that her action was not "violent or sufficiently forceful" and that she had not "intentionally" violated the company's policy against violence in the workplace. Therefore, she was entitled to receive unemployment compensation benefits.

An employee who quit after taking a 25 percent pay cut was denied unemployment compensation benefits in *Peirce v. Wright Utility Construction*, 2003 WL 1907954 (Minn. App. 2003) (unpublished). The employee may have been justified in quitting and would have received unemployment compensation benefits because of the decrease in pay. But he accepted a lower-paying position, and then quit his job because of an unsubstantiated claim that his employer told him that he would not be paid. Because he did not permissibly quit his job because of a reduction in pay, he was not entitled to receive unemployment compensation benefits.

LEGISLATION

Controversial legislation to require employees to use compensatory time for overtime work seems dead, at least for the time being. The measure, which was supported by business groups and opposed by labor unions, was defeated in a committee of the House of Representatives. As a result, it is unlikely to surface in Congress again in the immediate future.

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ENVIRONMENTAL LAW

JUDICIAL LAW

■ **CLEAN WATER ACT; FEDERAL JURISDICTION OVER WETLANDS.** The 4th Circuit Court of Appeals recently held that the Army Corps of Engineers' ("Corps") jurisdiction under the Clean

Water Act extends to wetlands adjacent to a roadside ditch that, through a system of nonnavigable tributaries, eventually drains into navigable waters.

James and Rebecca Deaton dug a ditch through wetlands on their property, depositing the excavated soils into the wetland area. The federal government brought a civil action against the Deatons, alleging that they violated the Clean Water Act by discharging pollutants into wetlands without a permit. The Deatons challenged the Corps' jurisdiction and lost. The Deatons filed a motion to reconsider after the Supreme Court ruled in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U. S. 159 (2001), that the Corps has no jurisdiction over certain isolated wetlands.

In their motion to reconsider, the Deatons argued, among other things, that Section 404(a) of the Clean Water Act regulates discharges into "navigable waters" only, and that rules promulgated by the Corps and purporting to regulate discharges into "tributaries of navigable waters" exceeded the scope of the Clean Water Act. Even if the Corps could regulate tributaries of navigable waters, the Deatons argued, the roadside ditch and adjacent wetlands on their property were not tributaries of navigable waters because they were remote from, and did not drain directly into, navigable waters. Both the district court and the 4th Circuit rejected these arguments.

On appeal from a denial of the Deatons' motion to reconsider, the 4th Circuit held that Congress may delegate to the Corps authority to regulate tributaries of navigable waters when such regulation is necessary to achieve the goal of protecting navigable waters. According to the court, any pollutant that degrades the water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves. The court further held that the Corps' view that "tributaries of navigable waters" cover roadside ditches and adjacent wetlands that do not directly flow into navigable waters is a permissible construction of the Clean Water Act. Thus, the court held, the Corps' jurisdiction extends to "any branch of a tributary system that eventually flows into a navigable body of water" *U.S. v. Deaton*, 2003 WL 21357305 (4th Cir. 06/12/03).

■ **CLEAN WATER ACT; TMDLS; JUDICIAL REVIEW.** The District of Columbia Circuit Court of Appeals recently ruled that federal appellate courts do not have original subject matter jurisdiction for review of the EPA's establishment or approval of total maximum daily loads (TMDLs) under the Clean Water Act.

Friends of the Earth sought appellate review of the EPA's approval/establishment of two TMDLs addressing water quality in the Anacostia River, in the District of Columbia. Friends of the Earth claimed that the TMDLs were inadequate to achieve the District of Columbia's water quality standards. The court dismissed the action for lack of subject matter jurisdiction, holding that Friends of the Earth must seek review of the EPA's actions in accordance with the judicial review provisions of the Administrative Procedure Act. EPA approval and establishment of TMDLs are not among the actions that are subject to direct appellate review, as listed in U.S.C. §1369(b)(1). This fact, together with the legislative history of the Clean Water Act, led the court to conclude that Congress did not intend for federal appellate courts to have original jurisdiction over these EPA actions. With this ruling, the D.C. Circuit joins several other circuits, including the 8th Circuit, in holding that original subject matter jurisdiction under the Clean Water Act extends only to those EPA actions that the Clean Water Act expressly makes directly reviewable by the appellate courts. *Friends of the Earth v. EPA*, 2003 WL 21414314 (D.C. Cir. 06/20/03).

■ **CLEAN AIR ACT; ADMINISTRATIVE COMPLIANCE ORDERS; JUDICIAL REVIEW.** The 11th Circuit Court of Appeals recently held the Clean Air Act is unconstitutional to the extent that it permits the EPA to impose severe civil and criminal penalties for failure to comply with an administrative compliance order ("ACO"). As a result, an ACO is "legally inconsequential" and is not a final agency action that is reviewable by federal appellate courts under the Administrative Procedure Act. Moreover, according to the court, the Tennessee Valley Authority ("TVA") may ignore an ACO without risking the imposition of penalties for noncompliance with the ACO until it has been proven in court that the TVA committed a violation of the Clean Air Act.

Beginning in the 1970s, the TVA undertook, without permits, a series of rehabilitation projects at several coal-fired electric power plants. In 1999, the EPA concluded that these actions violated the Clean Air Act because they did not constitute permissible "routine maintenance." The EPA subsequently issued an ACO requiring the TVA to identify all modifications made, apply for permits and enter into a compliance agreement with the EPA. The TVA challenged the validity of the ACO.

The 11th Circuit Court of Appeals held that it lacked jurisdiction to review the ACO because the

ACO is not a final agency order. Section 113(a)(1) of the Clean Air Act empowers the EPA to issue ACOS "on the basis of any information available," without any adjudication of liability by a neutral tribunal. The court reasoned that the statutory scheme is unconstitutional insofar as it permits the EPA to impose severe civil and criminal penalties without such an adjudication. According to the court, it is a violation of a defendant's constitutional right to due process for the EPA to issue and enforce a final order merely "on the basis of any information available." Thus, the court held that before the EPA can impose civil and criminal penalties, it must prove in district court that the TVA violated the Clean Air Act. *Tennessee Valley Authority v. Whitman*, 2003 WL 21452521 (11th Cir. 06/24/03).

LEGISLATION

■ **ARSENIC FERTILIZER RESTRICTIONS.** Effective August 1, 2003, fertilizers containing certain levels of arsenic will be illegal in Minnesota. As of August 1, the Commissioner of Agriculture for the State of Minnesota will be prohibited from licensing or registering for sale or use in Minnesota any fertilizer containing more than 500 parts per million by weight of arsenic. 2003 Minn. Sess. Law. Serv. c. 33, §1 (West).

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FAMILY LAW

JUDICIAL LAW

■ **CIVIL PROCEDURE; ATTORNEYS FEES.** Appellant-Wife entered into a stipulation on the record resolving a dissolution action. She immediately told her attorney that she had concerns and reservations about the stipulation but felt that she could not protest the terms of the stipulation in open court. Her attorney withdrew and the district court entered a judgment and decree prepared by Respondent's attorney over objection by Appellant's newly hired attorney. Appellant moved to reopen the judgment under Minn. Stat. §518.145, subd. 2(3) and later filed a supplemental motion with the court, supported by depositions and numerous affidavits attached to an affidavit by her attorney. The district court denied the initial motion on the merits and the supplemental motion because it was untimely. On appeal, this court concluded that the district court had applied the wrong standard in considering the original motion and remanded for reconsideration under the appropriate standard. The appellate court also remanded an issue regarding need-based attorney fees, but affirmed the denial of the supplemental motion as untimely. *Clark v. Clark*, 642 N.W.2d 459 (Minn. App. 2002).

At the hearing on remand, Appellant resubmitted the depositions and her attorney's affidavit and attachments. Respondent objected, asserting that, once again, the submission was untimely. The district court was unsure whether those documents could be considered on remand. Appellant argued that the documents could be properly considered. Respondent acknowledged the district court's authority to consider the documents, but argued that they should be rejected as untimely. The district court declined to rule on the issue at the time of the hearing and did not directly address the issue in its subsequent order. After hearing the argument of counsel, the court issued an order finding that appellant's "evidence, including affidavits, is not sufficient to raise the factual issue as to fraud," and that neither party has the ability to pay the other's attorney fees. The district court denied Appellant's motion for an evidentiary hearing on the issue of fraud, and denied each party's motion for need-based attorney fees. This appeal followed.

The Court of Appeals noted that a district court's decision whether to vacate a judgment will be upheld absent an abuse of discretion, and the findings as to whether the judgment was prompted by mistake or fraud will not be set aside unless clearly erroneous. *Hestekin v. Hestekin*, 587 N.W.2d 308, 310 (Minn. App. 1998). For purposes of reopening a dissolution judgment for fraud under Minn. Stat. §518.145, subd. 2(3), fraud includes a party's failure to make full disclosure. Citing *Doering v. Doering*, 629 N.W.2d 124, 129-30 (Minn. App. 2001), *rev. denied* (Minn. 09/11/01), the court held that the appropriate legal standard in this case is ordinary fraud. Because parties to a dissolution have the duty to disclose all assets and liabilities completely and accurately, fraud in the dissolution context does not require an intentional concealment or an affirmative misrepresentation. *Sanborn v. Sanborn*, 503 N.W.2d 499, 503-04 (Minn. App. 1993), *rev. denied* (Minn. 09/21/93). A district court may summarily dispose of a fraud claim (*i.e.*, grant summary judgment) "only where there is no genuine issue of material fact in dispute and where a determination of the applicable law will resolve the

controversy.” *Doering*, 629 N.W.2d at 130 (Minn. App. 2001). When presented with a motion for summary judgment, the district court may not weigh the evidence but must view the evidence in the light most favorable to the nonmoving party. *Id.*

In this case, the basis of Appellant’s fraud claim was Respondent’s failure to fully and accurately disclose income from scheduling soccer referees and refereeing soccer games. Appellant argued that, in addition to the duty to disclose inherent in the proceeding, she had requested information and documentation about income from soccer activities in discovery, and that Respondent was ordered to provide specific income and expense information. Respondent argued that although he technically failed to formally comply with discovery requests and the court’s order compelling discovery, he fully disclosed all documents in his possession and had, despite some minor discrepancies, been truthful about his income from providing soccer referee services. Respondent had continuously asserted that much of the information about his soccer activities was on the computer that has always been in Appellant’s possession.

Noting that Respondent had provided little or no information in a number of areas and discrepancies in information that had been provided, the court concluded that Appellant had made a prima facie showing of nondisclosure sufficient to warrant an evidentiary hearing and that the district court’s finding to the contrary was clearly erroneous. Much of the dispute depended on a credibility determination that could only be made by the district court in an evidentiary hearing.

The court also affirmed the district court’s determination that Appellant does not have the ability to pay Respondent’s need-based claim of attorney fees. Because a determination of Respondent’s ability to pay need-based fees depends on his actual income, the amount of which is in dispute, the court reversed the district court’s denial of Appellant’s claim for need-based fees and directed the district court to redetermine this claim based on the outcome of the evidentiary hearing. On remand, the district court may also consider claims for attorney fees by either party based on conduct because such fees are not controlled by ability to pay. Reversed and remanded. *Clark v. Clark*, C0-02-2016 (Minn. App. 05/20/03) (unpublished).

<http://www.lawlibrary.state.mn.us/archive/ctapun/0305/op022016-0520.htm>

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FEDERAL PRACTICE

JUDICIAL LAW

■ **PUTATIVE CLASS ACTIONS; SETTLEMENT OR OFFER OF JUDGMENT; MOOTNESS.** Plaintiffs brought a putative class action against Norwest Mortgage alleging RESPA violations. After their motion for class certification was denied, and some claims were dismissed on summary judgment, the parties entered into a settlement agreement which dismissed plaintiffs’ claims, but also purported to preserve plaintiffs’ right to appeal the class certification order and also waived Norwest Mortgage’s right to argue that the appeal was moot. Nevertheless, at oral argument the 8th Circuit panel asked counsel whether the settlement had mooted the class certification issue, and the panel eventually ordered supplemental briefing on the mootness issue.

After surveying opinions from a number of circuits, the 8th Circuit adopted the rule previously established in the 4th Circuit, which allows a plaintiff to appeal an adverse class certification ruling after settlement only if he or she “retains an interest in the litigation,” either because some claims remain or because the plaintiff seeks to shift his or her attorney’s fees and costs to the members of the putative class. Because the parties had failed to submit their settlement agreement to the district court, it was unclear what interest (if any) plaintiffs had retained. Having failed to establish that they had any remaining interest, plaintiffs’ appeal was dismissed as moot. *Potter v. Norwest Mortgage, Inc.*, 329 F.3d 608 (8th Cir. 2003).

Two weeks later, Judge Doty found that another putative class action was moot, this time as the result of the defendant’s Fed. R. Civ. P. 68 offer of judgment.

Jones filed a purported class action against CBE, alleging FDCPA violations. CBE answered the complaint, and two days later served an offer of judgment on Jones, which offered \$1,000 plus attorney’s fees and costs, the maximum Jones could recover under the FDCPA.

CBE subsequently filed a motion to dismiss, arguing that the case had been mooted by the offer of judgment. Opposing the motion, Jones argued that the offer of judgment did not provide all of the relief he sought because his complaint included a request for declaratory relief. However, Judge Doty held that declaratory relief was not available under the FDCPA, and also rejected the argument that

the claims were not moot because they were “capable of repetition yet avoiding review.” Finally, Judge Doty cited *Potter* to support his conclusion that Rule 68 offers of judgment could be used to dispose of purported class actions prior to class certification.

Finding that the Rule 68 offer mooted Jones’ claim, the court dismissed the action for lack of subject matter jurisdiction. **Jones v. The CBE Group, Inc.**, 215 F.R.D. 558 (D. Minn. 2003).

■ **OTHER NOTEWORTHY DECISIONS.** The Supreme Court resolved a split in the circuits and unanimously held that FLSA actions are subject to removal under 28 U.S.C. §1441(a), rejecting the plaintiff’s argument that the FLSA itself precluded removal. **Breuer v. Jim’s Concrete of Brevard, Inc.**, 123 S. Ct. 1882 (2003).

The 8th Circuit affirmed an award of \$300,000 in punitive damages to a plaintiff in an employment discrimination case, finding that the award was “not grossly excessive” in light of the defendant’s “reprehensible conduct.” Curiously, the 8th Circuit’s “excessiveness” discussion made no mention of the Supreme Court’s recent decision in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). **Walsh v. National Computer Systems, Inc.**, 332 F.3d 1150 (8th Cir. 2003).

Judge Tunheim recently awarded the plaintiff more than \$29,000 in attorney’s fees and costs under 28 U.S.C. §1447(c) following a remand for lack of subject matter jurisdiction. **NEO Corp. v. Fortistar Methane, LLC**, 2003 WL 21402748 (D. Minn. 06/16/03).

Judge Ericksen granted in part and denied in part defendants’ motion to exclude the testimony of plaintiff’s damages expert under Fed. R. Evid. 702. **Hexamedics, S.A.R.L. v. Guidant Corp.**, 2003 WL 21012179 (D. Minn. 04/30/03).

Magistrate Judge Boylan denied a motion for sanctions premised on the defendant’s communications with members of a putative plaintiff class, finding that the defendant’s 1st Amendment rights were paramount in the absence of an order certifying a plaintiff class. **Rothe v. Wayzata Nissan LLC**, 2003 WL 21181343 (D. Minn. 05/14/03).

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INTELLECTUAL PROPERTY LAW

JUDICIAL LAW

■ **PATENTS; VALIDITY; “BACKWARDS RES JUDICATA”.** In this infringement action, Judge Frank held that plaintiff Bruckelmyer could not turn *res judicata* on its head to prevent his former licensee and its competitor from jointly challenging the validity of Bruckelmyer’s patents. Bruckelmyer had exclusively licensed his patents to Ground Heaters Inc. (GHI). GHI sued T.H.E. Machine Co. (T.H.E.) for infringement of those patents. But when Bruckelmyer wouldn’t agree to the royalty-bearing settlement GHI proposed, GHI switched sides and signed a joint settlement agreement with T.H.E. agreeing that Bruckelmyer’s patents are invalid. Take that! Well, Bruckelmyer didn’t. He sued both GHI and T.H.E. for infringement and argued the defendants’ joint statement about the invalidity of the patents prevented defendants from challenging the validity of the patents under *res judicata*. One problem: the defendants’ settlement agreement stated the patents were *invalid*, which was consistent with their current argument. This problem did not escape the court’s attention. In rejecting the backwards *res judicata* argument, the court said “Bruckelmyer ... wants to employ the doctrine of *res judicata* to prevent Defendants from asserting the patents’ invalidity The result is absurd” **Bruckelmyer v. Ground Heater’s, Inc., T.H.E. Machine Co.**, 02-CV-1761 (D.Minn. 06/16/03).

■ **TRADEMARK; “REVERSE PASSING OFF”; COPYRIGHT DISTINGUISHED.** In a recent case where copyright and trademark law stretched dangerously close to overlapping, the U.S. Supreme Court formally recognized the doctrine of “reverse passing off” — copying the work of another and representing it as your own — but determined that appellant’s conduct did not constitute “reverse passing off.” Appellant Dastar copied and edited a Fox TV series now in the public domain (Fox failed to renew the copyright registration) and sold the product as its own without acknowledging Fox. With no claim for copyright infringement, Fox alleged this constituted “reverse passing off,” copying Fox’s work and representing it as Dastar’s. The Supreme Court disagreed. Ensuring no end-run around the Copyright Act, the Supreme Court found that the Lanham Act protects the producer of tangible goods offered for sale, and not “the author of any idea, concept, or communication embodied in those goods.” Trademark law does not recognize the origination of the creative work or reward innovation in creation. Those protections are found in the Copyright Act, protections Fox had failed to renew. **Dastar Corp. v. Twentieth Century Fox Film Corp. et al.**, 123 S.Ct. 2041 (2003)

■ **PATENT; DISCLOSURE; MATERIALITY OF “SUBSTANTIALLY SIMILAR” CLAIM.** The Court of Appeals for the Federal Circuit held recently that a contrary decision by another patent examiner reviewing a substantially similar claim is material and must be disclosed in a later patent examination. Under the patent rules, an applicant must disclose all material information known to her and her agent(s). Nondisclosure could result in a loss of rights if inequitable conduct is proven. The court — after remarking on the decade-old uncertainty of this issue — passed on deciding whether the standard for “materiality” in inequitable conduct cases changed following amendment to the disclosure rule in 1992. The court did decide that under both the standards “an adverse decision by another examiner ... meets the materiality standard” Someone please explain what a “substantially similar claim” is! **Dayco Products, Inc. v. Total Containment, Inc.**, 329 F.3d 1358 (Fed. Cir. 2003)

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JUVENILE LAW

TRENDS

■ **FOSTER CARE AND CHILD WELFARE.** The Wilder Research Center estimates that this year in the state of Minnesota, 30,000 children under the age of 18 will spend one night in foster care, group homes, detention centers, youth shelters, or on their own. Wilder conducted the research as part of a year-long project called “Our Children Our Future: A Community Forum on Creating Healthy Homes for Every Child in Minnesota,” which evolved out of a community debate in 2002 over Mary Jo Copeland’s proposed children’s home. Although Minnesota’s crisis care for children has consistently ranked near the top in the nation, Wilder’s review of published research and interviews with experts across the state revealed overburdened court systems, low community awareness and involvement, lack of funding, incomplete compliance with federal and state laws, scarcity of culturally appropriate services, and limited access to children’s mental health services. See “State and Regional News,” *PR Newswire*, June 18, 2003 at www.prnewswire.com.

On a national level, state welfare officials, the Bush administration, and child care advocates agree that the nation’s state-run foster care system, which is temporary home to 542,000 abused and neglected children, needs to be overhauled. Unfortunately, there is no consensus on how much the federal government should pay states to run their programs. Regardless of how a revamped state-run foster care system is paid for, nationwide statistics showcase the magnitude of the problems affecting the foster care system:

- State agencies field approximately 3 million reports each year of child abuse and neglect cases affecting foster children.
- Foster children spend an average of almost three years in a foster care program.
- Foster-care-related programs account for more than half of what the federal government spends on child welfare programs and receive double the amount of money spent on children’s services programs under welfare and Medicaid combined.

Foster care programs in seven states and cities including such places as New York, Milwaukee and Washington, D.C. are operating under the court’s watchful eyes after lawsuits brought by Children’s Rights, Inc., a New York-based advocacy group claimed widespread abuse of children in foster homes. A suit brought by the group in New Jersey has resulted in a settlement between the state and Children’s Rights, Inc. in which New Jersey must immediately spend an extra \$22.3 million to bolster its child welfare agency and allow an independent panel to oversee major reforms. The agreement with the advocacy group came after the group issued reports stating that chronic problems at the Division of Youth and Family Services (DYFS) led to the physical and sexual abuse of children in the agency’s care. Most recently, in January 2003, a seven-year-old Newark boy died after his case was closed by DYFS and reports on the home were never investigated. See *Gannett News Service*, June 17, 2003, at www.lancastereaglegazette.com/news.

In a related case from the U.S. Court of Appeals for the 11th Circuit, a panel from the court held that a federal district court properly dismissed a suit brought by children in Florida’s foster care system against the state for violation of rights they asserted they were guaranteed pursuant to federal law and the U.S. Constitution. The children alleged that the state had failed to provide for their needs and safety, to maintain educational and medical records, and to place siblings together or to facilitate visitation between them, in violation of their constitutional rights as well as their rights

under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §1983, under which they claimed the right to prompt placement with permanent families and the right to have records furnished to their caregivers. After addressing standing issues that disposed of the constitutional claims, the court found that the provisions of the Adoption Act on which the children based their claims do not confer privately enforceable rights and were barred by the 11th Amendment. **31 Foster Children v. Bush**, 329 F.3d 1255 (11th Cir. 2003). <http://pub.bna.com/fl/0210180.pdf>.

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PROBATE & TRUST LAW

JUDICIAL LAW

■ **FIDUCIARY DUTY OF TRUSTEE TO SUCCESSOR BENEFICIARY; DUTY TO INFORM DONEE.** A trust instrument gave the settlor's wife a special power to appoint trust property to settlor's descendants. It also provided a gift of \$125,000 to the settlor's son-in-law. After the son-in-law was divorced from the settlor's daughter, a trust officer advised settlor's wife that she could eliminate the gift to the former son-in-law by exercising her power to appoint all of the trust assets to others. At her request the trust officer called the wife's attorney and told him that she wished to exercise the power. The attorney drafted the document exercising the power and independently advised the wife of the effect of its exercise.

The Court of Appeals held that the trustee had a duty to inform the wife of her rights under the special power of appointment and that it did not violate any fiduciary duty to a successor beneficiary in so informing her particularly where it referred her to independent counsel and did not materially affect her decision to exercise the power. **Norwest Bank Minnesota North v. Beckler**, C7-02-2109 (Minn. App.06/24/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op022109-0624.htm>

■ **CLASS GIFT; BENEFICIARY ADOPTED AS ADULT INCLUDED DESPITE NATURAL MOTHER'S EXCLUSION FROM TRUST.** George Lane (Lane), who did not have any natural children, had adopted his wife's brother, Lewis. In the 1930s Lane created several trusts for the benefit of Lewis and Lewis's two sons, Henry and George. These trusts included a class gift to the issue of Henry and George. Lane explicitly provided that he made no provision in these trusts for Lewis's daughter, Gwenyth, because he believed that her father, Lewis, would provide for her.

Henry had two natural children and adopted his adult stepson. George had no children of his own but adopted Gwenyth's only son, Charles. The Court of Appeals affirmed the district court's holding that Charles would be included in Lane's gift to the issue of George despite the fact that Gwenyth had been specifically excluded as a beneficiary of the trust. It relied on Minnesota's presumption that adopted persons are treated the same as natural children in class gifts, the fact that Lane's will and trusts stated that adopted children were to be eligible beneficiaries and the fact that Lane adopted Lewis as an adult.

The court noted that it was not unsympathetic with the concern that Henry's three children will each receive far less than Charles under its decision. This is presumably because the distribution among Lewis's issue was to be *per stirpes*. In such case Henry's three children would share one half of the estate and Charles, as George's only child, would take the other half. (This disparity would not occur if the distribution scheme had called for division of shares at the generation in which there is a living member at the time of distribution — the method commonly referred to as *per capita* with representation.) **In the Matter of the Trust Created Under Agreement with George B. Lane**, C6-02-1789 (Minn. App. 04/29/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0304/op021789-0429.htm>

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REAL PROPERTY

JUDICIAL LAW

■ **EMINENT DOMAIN.** The St. Paul HRA condemned property in downtown St. Paul in which Shannon Kelly's was a tenant operating a restaurant/brewery. Shannon Kelly's asserted a claim of loss of going-concern damages. The district court granted the HRA's motion for partial summary

judgment, concluding *inter alia* that Shannon Kelly's could not establish a claim for loss of going-concern damages as a matter of law; and in any event, the claim was precluded by certain lease language and the acceptance of relocation benefits by Shannon Kelly's. The Court of Appeals reversed, finding that issues of genuine fact remain as to whether a claim for loss of going-concern existed and observing that neither the lease language nor the acceptance of relocation benefits precluded recovery. The Supreme Court granted review on the limited issue of whether the district court erred in holding that Shannon Kelly's was not entitled to recover for loss of going-concern value. On review, the Supreme Court held that the condemnation provision in the lease agreement terminated Shannon Kelly's interest in the property at the time of condemnation and therefore it did not have an interest in the condemned property. Also, the court, not the jury, has the power to determine whether a compensable interest or loss of going-concern damages exist. Because Shannon Kelly's failed to establish that its business could not be relocated, the Supreme Court affirmed the district court's grant of summary judgment for the HRA. Reversed and remanded. **Housing and Redevelopment Authority of the City of St Paul v. Lambrecht**, C7-01-1919 (Minn. 06/26/03). <http://www.lawlibrary.state.mn.us/archive/supt/0306/op011919-0626.htm>

■ **ZONING.** Wendinger owns land located near a confined-animal feeding operation operated by Forst. In 1994, Forst entered into an agreement with Wakefield Pork whereby Forst agreed to construct and operate a confined-animal feeding operation which included *inter alia*, a new operation for storing liquid animal waste which was pumped and spread on area fields each autumn. After complaining about the odor, Wendinger sued Forst and Wakefield for negligence, nuisance, and trespass seeking injunctive and compensatory relief. On cross-motions for summary judgment, the district court dismissed the trespass claim for failure to state a claim and dismissed the negligence and nuisance claims. The appellate court dismissed the trespass claim on the basis that odors do not interfere with the exclusive possession of land. Because invasive odors may support a claim of nuisance if they rise to the level of nuisance harm and are caused by a condition intentionally maintained by defendant, the district court erred in dismissing the nuisance claims. Finally, the agricultural operation's compliance with generally accepted agricultural practices does not preclude the finding of negligence. Affirmed in part, reversed in part, and remanded. **Wendinger, et al v. Forst Farms, Inc. et al.**, C1-01-440 (Minn. App. 06/10/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op021603-0610.htm>

■ **MORTGAGE FORECLOSURE.** Simonson Lumber foreclosed a mortgage and bought the property at the foreclosure sale. First Construction later redeemed the property after paying Simonson Lumber under protest \$14,000 for its interest in a purchase agreement that it asserted created an additional security interest. The district court determined that the purchase agreement did not constitute a second lien or mortgage and awarded First Construction a judgment against Simonson Lumber for \$14,000. On appeal, the appellate court held that a recorded real estate purchase agreement that contains a nonmerger clause is not sufficient to create a security interest in the property unless it also contains an express intention to do so. Affirmed. **First Construction Credit, Inc. v. Simonson Lumber of Waite Park, Inc.** CX-01-781 (Minn. App. 06/10/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op022002-0610.htm>

■ **RELOCATION BENEFITS.** Chanhassen Chiropractic Center (Center), a tenant of office space in a building acquired by the city of Chanhassen (city) asserted a claim for relocation expenses against the city. When its claim was not resolved, Center requested an administrative hearing. The city administrator denied the claim for benefits and gave the Center notice that it could appeal the decision to the Chanhassen City Council. The Center filed a petition for writ of mandamus in district court to compel the city to select a fair and impartial hearing officer. After a hearing, the district court denied the petition for writ of mandamus and this appeal followed. The appellate court concluded that where there is no showing of the city council's partiality on a specific issue, a city does not violate a clear duty by designating the city council as the hearing officer on a relocation benefits appeal under the Minnesota Uniform Relocation Act. Affirmed. **Chanhassen Chiropractic Center, P.A. v. The City of Chanhassen**, C8-02-1447 (Minn. App. 06/10/03). <http://www.lawlibrary.state.mn.us/archive/ctappub/0306/op021724-0610.htm>

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TAX
JUDICIAL LAW

■ **TAXPAYER TORT CLAIM AGAINST COLLECTION AGENCY MAY PROCEED TO TRIAL.** The United States Supreme Court held that a Nevada court was not obligated to extend full faith and credit to a California statute that provided absolute immunity to a California collection agency. Taxpayer, who was a former California resident and current Nevada resident, alleged negligent misrepresentation, invasion of privacy, fraud and other torts against a California agency's assessments and penalties for a tax year for which taxpayer filed as part-year California resident. The court found that Nevada's policy of protecting its citizens from injurious intentional torts committed by other states' government employees was based on Nevada's sovereignty and was not intended to counter California's law. California collection agency acts partly occurred in Nevada and therefore Nevada law may apply. **Franchise Tax Bd. of California v. Hyatt**, 123 S.Ct. 1683 (May 2003).

■ **LEASING CHARACTERIZED AS PASSIVE ACTIVITY LIMITING DEDUCTIONS.** The U.S. Tax Court held that services performed by taxpayers as corporate officers were distinct from their responsibilities as owners of their equipment. Taxpayers formalized a lease agreement that would provide leasing services to their own subchapter C corporation. Court held that taxpayers were not obligated as owners to provide any such services to their corporation. Services provided by taxpayers that are unrelated to their responsibility as owners of equipment do not qualify for extraordinary personal services exception. Petitioners' argument that they materially participated in this activity was rejected. The court emphasized that regardless of whether the taxpayer materially participates in the activity, rental activities are presumptively passive activities. **Kessler v. Commissioner**, T.C. Memo.2003-185, U.S. Tax Ct., (06/26/03).

■ **BUSY WORK SCHEDULE NO EXCUSE FOR NOT FILING RETURN.** U.S. Tax Court held that busy workload which included "a lot of traveling" is not reasonable cause that would restrict the timely filing of tax return. Petitioner's second argument that he overpaid his taxes and expected a refund was rejected. Court held that taxpayer is liable for additions to tax under §6651 (a) (1). **Crittenden v. Commissioner**, T.C. Memo.2003-186, U.S. Tax Ct., 06/26/03.

■ **DISABILITY PAYMENTS NOT EXCLUDED FROM INCOME.** U.S. Tax Court held that disability payments are income when made for the purpose of replacing lost income due to injury, rather than to compensate for the injury itself. The court stated that petitioners met the four conditions for §105(a) to apply: (1) the amounts received must be provided from accident or health insurance, (2) for personal injuries, (3) from contributions paid by employer, and (4) that the contribution was not includable in employee's gross income. **Hayden v. Commissioner**, T.C. Memo.2003-184, U.S. Tax Ct., 06/24/03.

■ **COURT EMPOWERED TO AUTHORIZE FORCED SALE OF JOINTLY OWNED PROPERTY.** The 8th Circuit affirmed a decision to sell property jointly owned by a husband and wife for the taxes assessed only against the husband. The court found that §7403 authorized a forced sale of the entire property in which the delinquent taxpayer has an interest even though property is homestead to a nondelinquent spouse. **U.S. v. Downing**, 91 AFTR2d 2003-2134 (8th Cir. 05/07/03).

■ **AMOUNTS RECEIVED FOR RIGHTS OF FUTURE LOTTERY PAYMENTS NOT CAPITAL ASSETS.** The U.S. Tax Court held that the transfer of future annual lottery payments to a corporation for a bulk payment is ordinary income. In 1996, taxpayer transferred his rights to three payments of \$470,000 each to Singer Asset Finance Co., L.L.C., for a bulk payment of \$1,113,500. The court disagreed with the taxpayer's contention that the gain on the sale from a lottery ticket is a capital asset under §1221. **Johns v. Commissioner**, T.C. Memo.2003-140, U.S. Tax Ct., 05/19/03.

■ **LIMITED MARKET VALUE AND EQUALIZATION RELIEF APPLIED FOR PROPERTY TAX.** The Minnesota Tax Court held that taxpayer is allowed both limited value relief (Minn. Stat. §273.11) and then equalization value relief (Minn. Stat. §278.05) to determine taxable value of property. First, application of the limited market value statute is applied, followed secondly by the equalization value relief. **Harris v. County of Hennepin**, 2003 WL 21458762, Minn. Tax Ct., 06/18/03.

■ **INSURANCE POLICIES NOT SUBJECT TO PREMIUM TAX.** The Minnesota Supreme Court held that premiums received by insurer on stop-loss insurance policies issued to employers are not subject to a premium tax. Employers involved in this decision self-fund health care coverage for their employees. The Court reasoned that since these payments were not from "direct business," then the premium tax should not apply. Blue Cross of Minnesota receipts were not subject to the premium tax. **BCBSM, Inc. v. Commissioner of Revenue**, 2003 WL 21355912, (Minn. 06/12/03).

■ **CHURCH PROPERTY; TAX-EXEMPT STATUS.** Minnesota Tax Court held church property used for church purposes as tax exempt. The court applied Minn. Const. Art X, §1 and Minn. Stat. §272.02,

subdivision 6 to render the decision. Country Bible Church used the Destiny Center to fulfill the church's purpose and mission, to "win souls for Christ." The Center was used for religious activities and events. **Country Bible Church v. County of Grant**, Minn. Tax Ct., 06/09/03.

■ **TAX INCREMENT FINANCING DISTRICT; CONTIGUOUS PROPERTY.** The Court of Appeals for the state of Minnesota affirmed a district court ruling that the city of Eagan properly included property in a redevelopment tax increment financing (TIF) district. Appellants argued that Highway 55 divides the district. However, the court upheld the district court's determination that Highway 55 did not "disrupt the contiguity" of the district. **Reiling v. City of Eagan**, 2003 WL 21500314, (Minn. App. 07/01/03).

■ **LITIGATION COSTS AND FEES; MARRIED TAXPAYERS.** The U.S. Tax Court held that taxpayers who had made qualified offer to IRS to settle water rights adjustment were entitled to award of litigation costs. The court reasoned that since issues integral to the adjustment were litigated and decided on behalf of the taxpayers, their liability was not determined exclusively by settlement. Therefore, the settlement limitation set forth in §7430(c)(4)(E)(ii)(I) is inapplicable and litigation costs and fees may be awarded. **Gladden v. Commissioner**, 120 T.C. No. 16, U.S. Tax Ct., (06/27/03).

ADMINISTRATIVE DEVELOPMENTS

■ **AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE.** The U.S. Tax Court has adopted extensive amendments to its Rules of Practice and Procedure. This includes five new titles, 29 new rules, and amendments to 38 existing rules. Due to the magnitude of the amendments, the court has republished the Rules in their entirety. The majority of the changes were embodied in interim rules issued by the court on September 16, 1997, and January 26, 1999.

Many of the amendments were made to effectuate legislative changes made by Congress since the Rules were last published, including the Taxpayer Relief Act of 1997 (P.L. 105-34), the IRS Restructuring and Reform Act of 1998 (P.L. 105-206), and the Community Renewal Tax Relief Act of 2000 (P.L. 106-554). Those changes include expansion of the court's declaratory judgment jurisdiction and new authority to hear actions for: (1) redetermination of employment status; (2) determination of relief from joint and several liability on a joint return; and (3) lien and levy enforcement. In addition, the court has adopted a new Form 2, which provides a check-the-box small tax case form for taxpayers wishing to elect small-tax-case procedures. Lastly, technical, conforming, and stylistic changes have also been made.

The amendments are generally effective on June 30, 2003. However, certain amendments apply retroactively to the effective date specified in the relevant legislation. CCH Federal Tax Day (07/01/03).

■ **IRS SERVES SUMMONS FOR CLIENT NAMES.** On June 19, the IRS received approval from the U.S. District Court for the Northern District of Illinois to serve a summons on Jenkins & Gilchrist asking the law firm to identify taxpayers in a technical tax shelter that the IRS has determined is abusive. Tax Notes Today (06/20/03).

■ **IRS REVIEWS SUSPENDS ISSUANCE OF LETTER RULING CONCERNING IRC §29 CREDITS.** IRC §29 provides a tax credit for the production and sale of solid synthetic fuels produced from coal. Taxpayers seeking a letter ruling that a solid fuel, other than coke, produced from coal is a qualified fuel under IRC §29(c)(1)(C) are required to present evidence that all, or substantially all, of the coal used undergoes a significant chemical change. However, the IRS has recently questioned the scientific validity of test procedures and results that have been presented by taxpayers as evidence of a significant chemical change, and is currently reviewing information regarding those procedures and results. Until this review is complete, rulings on the question of a significant chemical change will be suspended if a request relies on the procedures and results under review.

In the interim, taxpayers may request a letter ruling presubmission conference to determine if a ruling request relies on the test procedures and results in question. Taxpayers that have previously received rulings and want certainty regarding the test procedures and results may request a Prefiling Agreement by following procedures set forth in Rev. Proc. 2001-22, 2001-1 C.B. 745. Ann. 2003-46.

■ **FINAL REGULATIONS ISSUED FOR SUBSTANTIATION OF INCIDENTAL BUSINESS EXPENSES WHILE TRAVELING AWAY FROM HOME.** Newly finalized regulations authorize the IRS to establish a method under which a taxpayer may use a specified amount for incidental expenses paid or incurred while traveling away from home in lieu of substantiating their actual cost. However, the taxpayer will not be relieved of the requirement to substantiate the actual cost of other travel expenses as well as the time, place, and business purpose of the travel. The regulations are effective July 2, 2003, and apply to expenses paid or incurred after September 30, 2002. T.D. 9064; Reg. §1.62-2; Reg. §1.274-5.

■ **GUIDANCE ON INFORMATION REPORTING REQUIREMENTS FOR PAYMENT OF SERVICES.** The IRS has provided guidance to federal agencies regarding information reporting requirements under IRC §6041A and §6050M for the payment of services. This guidance clarifies that the two provisions impose separate reporting requirements and have different underlying purposes. Furthermore, in some instances, the required information may overlap. As a result, in some instances, a federal agency may be required to make an information return only under IRC §6041A, only under IRC §6050, under both provisions, or under neither provision. Rev. Rul. 2003-66.

■ **AGGREGATE ENTRY AGE NORMAL FUNDING METHOD NOT REASONABLE METHOD FOR MINIMUM FUNDING STANDARDS.** The IRS has determined that two versions of the aggregate entry age normal funding method do not constitute reasonable funding methods for purposes of the minimum funding standards because both can create experience gains or losses even if all actuarial assumptions are exactly realized. Under one version, the method determines the normal cost per plan participant by dividing the sum of the present values (determined as of each participant's entry age) of each participant's projected benefits by the sum of the present values of an annuity for each participant equal to one per year payable from the participant's entry age until the participant's retirement age. Under the second version, the method determines the normal cost accrual rate by dividing the sum of the present values (determined as of each participant's entry age) of each participant's projected benefits by the sum of the present values of future compensation from the participant's entry age until the participant's retirement age.

This determination is effective for valuations performed for plan years beginning after December 31, 2003. CCH Federal Tax Day (06/30/03); Rev. Rul. 2003-83.

■ **FREEZING OF ACCRUALS UNDER QUALIFIED, DEFINED BENEFIT PLAN A PARTIAL TERMINATION OF PLAN.** The IRS has ruled that an employer's freezing of accruals under a qualified, defined benefit plan constituted a partial termination of the plan, not a plan termination, for purposes of determining whether service for the plan sponsor after the plan was established may be disregarded for vesting purposes if accruals resume under the plan. Rev. Rul. 2003-65.

■ **AUTOMATIC EXTENSION TO FILE CERTAIN INFORMATION RETURNS AND EXEMPT ORGANIZATION RETURNS.** The IRS and Treasury Department have released temporary regulations providing an automatic extension of time to file certain information returns and exempt organization returns. The temporary rules eliminate the requirement for a signature and an explanation to obtain an automatic extension of time to file these returns. The temporary regulations affect taxpayers who are required to file certain information returns and/or exempt organization returns and need an extension of time to file. The text of the temporary regulations also serves as a portion of the text of proposed regulations. The temporary rules are effective as of June 11, 2003. T.D. 9061; NPRM-REG-107618-02; CCH Federal Tax Day (06/11/03).

■ **CCH FEDERAL WITHHOLDING CALCULATOR UPDATED.** The CCH Federal Withholding Calculator has been updated to reflect the new tax provisions enacted in the Jobs and Growth Tax Relief Reconciliation Act of 2003. Tax practitioners can use this withholding calculator to assist taxpayers in revising their withholding allowances and extra withholding amounts for 2003 income taxes. While the payroll withholding tables recently revised by the IRS do not adjust for excess withholding from the first six months of 2003, this calculator will permit taxpayers to adjust their withholding for the rest of 2003 to minimize their refund in 2004. The withholding calculator is found in CCH Internet Tax Research Network, in Tax Preparation Calculators under the Practice Aids blue bar on the Federal and Perform Plus II tabs. CCH Federal Tax Day (06/12/03).

■ **COST-SHARE PAYMENTS UNDER CONSERVATION RESERVE PROGRAM EXCLUDABLE FROM GROSS INCOME.** The IRS has determined that all or a portion of cost-share payments received under the Conservation Reserve Program are eligible for exclusion from gross income to the extent permitted by IRC §126. However, rental payments and incentive payments made to participants do not qualify as cost-share payments and are includible in gross income. Rev. Rul. 2003-59.

■ **QUALIFIED FAMILY OWNED BUSINESS INTEREST ELIGIBILITY UNAFFECTED BY DISTRIBUTION IN REDEMPTION OF STOCK.** A distribution in redemption of stock does not affect an estate's eligibility to make a qualified family-owned business interest election. A distribution in redemption of stock that is part of such an election and that qualifies under IRC §303 does not affect the initial determination of whether an estate is eligible to make the election. In addition, the distribution in redemption of stock does not constitute a disposition under IRC § 2057(f)(1)(B) and, therefore, no additional estate tax is imposed pursuant to IRC § 2057 as a result of the distribution. Rev. Rul. 2003-61.

■ **GUIDANCE ON FAIR MARKET VALUE DETERMINATIONS.** The IRS has issued guidelines for mak-

ing fair market determinations for inventory items that are acquired when a taxpayer purchases the assets of a business for a lump sum or a corporation acquires the stock of another corporation and makes a §338 election. The guidance discusses three basic methods used to determine the fair market value of the inventory: (1) the replacement cost method; (2) the comparative sales method; and (3) the income method. Rev. Proc. 2003-51; CCH Federal Tax Day (06/26/03).

■ **QUALIFIED RETIREMENT PLAN DISTRIBUTIONS; ITEMS INCLUDIBLE IN INCOME.** Amounts that are distributed from a qualified retirement plan that are applied, at the distributee's election to pay health insurance premiums under an employer's cafeteria plan are includible in the distributee's gross income. Similarly, such distributions that are applied directly to reimburse the plan participant's medical care expenses are also includible in gross income of the distributee. Rev. Rul. 2003-62.

■ **COMPLIANCE INITIATIVE FOR NONRESIDENT ALIENS AND FOREIGN CORPORATIONS.** The IRS has announced a compliance initiative for nonresident aliens and foreign corporations that have not filed federal income tax returns. Under this initiative, the IRS will waive the filing deadlines if a taxpayer files on or before September 15, 2003 all required federal income tax returns for every year that a waiver is requested. In addition, the taxpayer must pay the reported income tax liability along with any statutory interest and penalty amounts. Notice 2003-38.

■ **LOWER ESTIMATED TAX PAYMENTS.** Self-employed persons, investors, and others who make estimated tax payments can start benefiting from the lower tax rates and other recent tax changes enacted in the Jobs and Growth Tax Relief Reconciliation Act of 2003 when they make their next quarterly tax payment. By reconfiguring their projected 2003 income tax, some taxpayers will be able to reduce their payments for the rest of the year. New tax rate schedules and worksheets may be found at <http://www.irs.gov/newsroom/article/0,,id=109951,00.html>. IR-2003-76.

■ **IRS ISSUES TEMPORARY AND PROPOSED REGULATIONS TO CURB USE OF "SON OF BOSS"**

PARTNERSHIP SHELTERS. The IRS has issued temporary and proposed regulations on a partnership's assumption of a partner's liabilities that are designed to prevent avoidance of IRC §358(h) corporate liability and basis reduction rules through use of what has been called the "Son of Boss" partnership shelter. An example of this shelter is when a taxpayer purchases and writes economically offsetting options and then purports to create substantial positive basis by transferring those option positions to a partnership. Upon disposition of the partnership interest, the liquidation of the partnership, or the sale or depreciation of distributed partnership assets, the taxpayer claims a tax loss, even though the taxpayer has incurred no corresponding economic loss. The regulations are part of the IRS continuing effort to shut down abusive tax shelters and are designed to make clear that such transactions do not produce the claimed tax results. T.D. 9062; REG-106736-00; Federal Taxes Weekly Alert (06/26/03).

■ **BUSINESS PURPOSE FOR CORPORATE DIVISIONS NOT DEFEATED BY COMMON DIRECTORS OR TRANSITIONAL AGREEMENTS.** In Revenue Rulings 2003-74 & 75, the IRS has found that corporate divisions satisfied the business purpose test. As a result, the parent can distribute stock and securities in a subsidiary to its shareholders without causing either the parent or the distributees to recognize gain or loss. Rev. Rul. 2003-74&75; CCH Federal Tax Day (06/26/03).

■ **STATISTICS OF INCOME BULLETIN ISSUED.** The Bulletin includes articles on selected income and other tax return information for the 400 individual income tax returns reporting the highest adjusted gross incomes for tax years 1992-2000, individual returns for 2000 with income of \$200,000 or more, S corporation returns, split-interest trust information returns, and "unrelated business income" reported by tax-exempt organizations.

Highlights from the Bulletin include:

■ For 2000, approximately 2.8 million individual income tax returns reporting income of \$200,000 or more were filed. These returns are slightly more than two percent of all returns filed for 2000.

■ Between 1999 and 2000, total individual tax returns filed increased by 1.8 percent. However, the number of tax returns reporting income of over \$200,000 increased by 14.1 percent.

■ S corporation returns increased by 4.9 percent from tax year 1999 and represent 56.7 percent of all corporate entities. Total assets for S corporations increased 10.0 percent to nearly \$1.8 trillion in tax year 2000. ir-2003-80 (06/26/03).

- **NEW SCAM ALERT.** The IRS is warning about a new scam targeting potential recipients of the Advance Child Tax Credit. As a part of this scam, the taxpayer is promised that the caller can speed up payment of the credit for a fee. However, the IRS reminds taxpayers that no person or organization can speed up the payment of the Advance Child Tax Credit. IR-2003-79 (06/18/03).
- **ADVANCE CHILD TAX CREDIT.** The Treasury Department and IRS announced that eligible taxpayers who claimed the Child Tax Credit on their 2002 tax returns will automatically receive an advance payment of the 2003 increase in this credit. The Jobs and Growth Tax Relief Reconciliation Act of 2003 increased the maximum child tax credit from \$600 to \$1,000. The law also instructed the Treasury Department to provide the difference (up to \$400 per child) as an advance payment to each eligible taxpayer this summer. Taxpayers do not need to take any action to receive this advance payment. The Treasury Department and IRS will perform all eligibility calculations and automatically mail a notice and a check to each eligible taxpayer. Checks will be mailed beginning with three principal mailings on July 25, August 1, and August 8. IR-2003-68 (05/28/03).
- **EARNED INCOME TAX CREDIT (EITC) ADMINISTRATION.** The IRS announced an initiative designed to improve service, fairness, and compliance with the eitc law. The EITC provides low-income taxpayers with a refundable tax credit. Approximately 19 million taxpayers claimed over \$32 billion of such credits on 2002 returns. However a recent study indicated that, in 1999, between \$8.5 billion and \$9.9 billion of EITC claims were erroneously paid. The objective of the IRS initiative is to reduce overpayments while improving eligible taxpayers' ability to participate in the EITC program. IR-2003-78 (06/13/03).
- **IDENTIFICATION NUMBERS FOR BUSINESSES ON THE WEB.** Businesses may now obtain identification numbers directly from the IRS website. After the taxpayer completes an online application form, the website issues the employer identification number that may be used immediately. The website is available at <http://www.irs.gov/businesses/small/article/0,,id=102767,00.html>. ir-2003-77 (06/13/03).
- **INTEREST RATES UNCHANGED FOR THE THIRD QUARTER.** The IRS announced that there will be no change in interest rates for the quarter beginning July 1, 2003. IR-2003-75 (06/09/03).
- **"FAST TRACK" GUIDANCE TO HELP TAXPAYERS.** The IRS issued guidance to make permanent the Fast Track Mediation and Fast Track Settlement programs. These programs allow taxpayers and the IRS to reach agreement on tax disputes more quickly. In addition, the IRS announced a pilot Fast Track Mediation program for tax-exempt bonds. IR-2003-73 (06/03/03).

LEGISLATION

■ **HOUSE MOVES TAX BILLS; SENATE ACTION UNCERTAIN.** On June 18, the House approved the Death Tax Repeal Permanency Act of 2003 (HR 8) by a vote of 264 to 163. Under the Economic Growth and Tax Relief Reconciliation Act of 2001, the federal estate tax is repealed for one year, 2010, after a gradual reduction in the estate tax rate between 2001 and 2009. HR 8 would make this measure permanent. However, passage of HR 8 in the Senate is far from certain as leading Republican senators have indicated their opposition to a permanent repeal of the estate tax.

One June 19, the House approved the Taxpayer Protection and IRS Accountability Act of 2003 (HR 1528) by a vote of 252 to 170. Among other things, HR 1528 would: grant a first-time penalty waiver for minor negligence cases; equalize the interest rate on overpayments and underpayments; allow taxpayers to enter into partial installment agreements; extend the individual filing deadline to April 30 for e-filers; and permit taxpayers to consult with the Taxpayer Advocate Service confidentially. CCH Federal Tax Weekly (06/26/03).

■ **HEALTH SAVINGS ACCOUNTS BILL; MEDICARE PRESCRIPTION DRUG BILL.** The Health Savings and Affordability Bill of 2003 (HR 2596) would create a Health Savings Account (HAS) and Health Savings Security Account (HSSA) that would be portable and allow taxpayers to deposit and accumulate money tax-free for medical expenses. Distributions would also be tax-free if made for qualified medical expenses. HSA's would be available only for people with health insurance and with a high deductible; whereas HAS's could be used by the insured or uninsured. After passing the House by a vote of 237 to 191, HR 2596 was then merged with HR 1, the Medicare prescription drug measure.

A House-Senate conference committee will now attempt to reconcile HR 1 with the Senate's Medicare drug bill, the Prescription Drug and Medicare Improvement Bill of 2003 (Sen. 1), which was passed on June 27 by a vote of 76 to 21.

President Bush indicated his support for the legislation and urged Congress to reconcile any differences and send him a bill to sign "as quickly as possible." CCH Federal Tax Day (06/27/03); CCH Federal Tax Day (06/30/03).

■ **U.S. - JAPAN INCOME TAX TREATY.** The United States and Japan have reached an agreement in principle on the text of a new income tax treaty that is a complete modernization of the existing 30-year-old treaty between the two countries. Key provisions include a substantial reduction in withholding taxes imposed on cross-border dividends, interest, royalties, and other income and the complete elimination of source country withholding taxes on royalties, certain interest, and certain inter-company dividends. After signature, the proposed treaty is subject to each country's ratification procedures. CCH Federal Tax Day (06/11/03).

■ **MINNESOTA TAX OMNIBUS BILL SIGNED.** The annual Minnesota tax omnibus bill was signed on June 8, 2003. The bill updates references to the Internal Revenue Code, authorizes the creation of enterprise zones, and requires certain accelerated tax payments. Specific provisions of the bill include:

■ The establishment of up to ten job opportunity building zones for a maximum period of 12 years. Effective for tax years beginning after 2003, corporate income tax exemptions are allowed up to 20 percent of the sum of the corporation's payroll in the zone and the adjusted basis of property at the time that the property is first used in the zone by the corporation. In addition, a refundable corporate income tax credit is allowed for jobs created in the zones. Finally, there are repayment provisions equal to the tax benefits received in the prior two years for businesses that no longer meet the requirements of the zone.

■ A research and development credit is allowed for corporations that increase research activities in a biotechnology and health sciences zone. The credit is equal to 5 percent of the first \$2 million of qualified research expenses and 2.5 percent of the amount in excess of \$2 million.

■ A personal income tax exemption is enacted for income earned in a zone.

■ Purchases of tangible property, taxable services, and construction materials used in the zones are exempt from Minnesota state and local sales and use taxes.

■ Personal property and improvements to real property located in either type of zone are exempt from property tax.

■ Electricity produced by wind energy conversion systems located in job opportunity building zones is exempt from the wind energy production tax.

■ For payments made after 2003, vendors with annual sales and use tax liabilities of \$120,000 or more during a fiscal year ending June 30 are required to remit 85 percent (formerly 75%) of their estimated June liabilities two business days before June 30, with the additional amount of tax not remitted in June due on or before August 20.

■ Cigarette and tobacco products distributors are required to make accelerated cigarette tax payments, effective January 1, 2004.

■ Effective for sales made on or after June 30, 2003, alcoholic beverage tax is imposed on low-alcohol dairy cocktails equal to eight cents per gallon or two cents per liter. In addition, taxpayers with annual alcoholic beverage tax liabilities of \$120,000 or more are required to make accelerated payments for June liabilities. CCH State Tax Day (06/11/03).

LOOKING AHEAD

■ **FEDERAL TAX COLLECTION SERVICES.** House Congressional Resolution 213 was referred to the Ways and Means Committee on June 6, 2003. The resolution with the short title "Taxpayer Abuse Prevention Resolution of 2003" deals with the concern that private collection agencies may abuse taxpayers' privacy rights in obtaining their information from the IRS. Concern has also been expressed regarding possible abusive measures by these agencies in the collection process.

Background: The IRS has proposed paying private debt collectors a 25 percent commission to collect unpaid tax debt.

Argument Against IRS Proposal: Section 1204 of the IRS Reform and Restructuring Act of 1998, prevents IRS employees from being evaluated on the basis of the amount of taxes they collect in order to eliminate incentives to use overly aggressive tax-collection techniques.

Support for Resolution: The following organizations oppose the IRS proposal and support the resolution: Citizens for Tax Justice, Consumer Federation of America, Consumers Union, National Consumer Law Center, National Consumers League.

— KATHRYN SEDO

— HECTOR RIVERA

— BRIAN UREVIG

University of Minnesota Law School

TORTS & INSURANCE

JUDICIAL LAW

■ **OFFSET IN CONTRACT CLAIM.** Leamington Company leased a building to PSP from 1983 through May 1996 as a homeless shelter. The property was vandalized and Leamington sued PSP for damages. The parties settled for \$340,000 and agreed Leamington could pursue any insurance claims. The insurer, NIA, claimed any judgment should be offset by the \$340,000. The district court agreed, but the Minnesota Supreme Court reversed and remanded. The district court then ruled the \$340,000 settlement would be credited to any final settlement by Leamington against NIA.

The parties stipulated that maximum damages should be \$340,000 and NIA could assert other defenses. The trial court held that the comparative fault act mandated the damages must be offset. The Minnesota Court of Appeals affirmed on other grounds, finding the comparative fault statute did not apply in contract actions. However, it found that Restatement (Second) of Torts §920A(1) 1979 and a recent case, *VanLandschoot v. Walsh*, ___ N.W.2d ___ (Minn. 2003) applied because the source of the collateral funds was not a third party. Logic suggests funds received from the tortfeasor should be applied against any recovery from the tortfeasor's insurer. ***Leamington Co. v. Nonprofits Insurance Association***, C6-02-1212 (Minn. App. 05/27/03).

■ **SCHMIDT-CLOTHIER REVISITED.** The district court certified as an important and doubtful question whether the principles of *Schmidt-Clothier* apply in a first-party property-insurance dispute outside the personal injury context. The Minnesota Court of Appeals found it should apply. However, a one-day notice prior to trial was found insufficient under a Rule 68 offer of a judgment to meet the 30-day requirement of *Schmidt* for an insurer to substitute its draft and preserve subrogation rights against a tortfeasor.

The trial court also held property owners were not entitled to attorney's fees or prejudgment interest on a Rule 68 offer of judgment where a prior offer included specific amounts of attorney's fees and prejudgment interest. The Minnesota Court of Appeals affirmed, refusing to allow fees where no statute permitted attorney's fees, and the settlement offer was silent as to fees. The same logic applied to the prejudgment interest claim. ***Schwicker, Inc. v. Winnebago Seniors, Ltd., et. al***, C8-02-1972, C4-02-2083 (Minn. App. 05/27/03).

■ **CONTINGENCY FEE CONFLICT — TWO FIRMS FOR THE PRICE OF ONE?** Two firms were contracted by different relatives to represent different trustees in a wrongful death action. Decedent's maternal grandfather, Hanson, requested court approval for a \$30,000 settlement when Madsen, on behalf of the paternal relatives, objected to a one-third settlement. The two firms then worked together on a UIM suit and obtained a verdict of \$223,308.84. A district court judge determined the law firms were entitled to 20 percent of the proceeds, with each firm receiving 10 percent. Hanson appealed (with attorneys Mack & Daby) contending the one-third contingent agreement controlled.

The Minnesota Court of Appeals reversed and remanded. It found when Mack and Daby agreed to split equally a contingent fee, each was entitled to one-sixth of the UIM award. The trial court erred when it determined Hanson's fee agreement did not apply when he signed the fee agreement before being appointed trustee. ***Hanson v. State Farm Insurance Company, et al.***, CX-02-1620 (Minn. App. 05/27/03).

■ **CRIMINAL CONVICTION DOES NOT ESTOP LITIGATING "INTENT" IN CIVIL ACTION.** An insured's criminal conviction for assault and malicious punishment of a child does not collaterally estop parent/victim of the crime from litigating the issue of the insured's intent in a subsequent civil action to determine whether the insured's homeowner's policy provides coverage. (See discussion under "Civil Litigation," *supra*, Ed.). ***Illinois Farmers Insurance Company v. Reed***, 662 N.W.2d 529 (Minn. 2003).

— TOM BAUDLER

— LEE BJORNDALE

Baudler Baudler Maus & Blahnik, PA