



NOTES & TRENDS

ADMINISTRATIVE LAW

JUDICIAL LAW

■ **REPRESENTATION.** By statute a party in an unemployment administrative hearing may be represented by “any agent.” A nonattorney agent may also represent the party in an appeal from the decision of the unemployment judge to the commissioner of economic security. In *In Re Jesse H. Evjan*, CO-02-1240, ___ N.W. 2d ___ (Minn. App. 11/19/02), the applicant’s father and president of the incorporated employer filed a petition for a writ of certiorari with the Court of Appeals to contest a denial of benefits to his son. The court held that the father, a nonlawyer, could not file an appeal on behalf of either his son or the corporation and the appeal was therefore dismissed. <http://www.lawlibrary.state.mn.us/archive/ctappub/0211/c0021240.htm>

■ **SUBSTANTIAL EVIDENCE.** In *In Re Sharon O’Boyle*, C1-02-601, ___ N.W. 2d ___ (Minn. App. 12/24/02) the commissioner of human services determined that the appellant, as her mother’s caregiver, had committed maltreatment by failing to obtain medical services for her mother’s injuries. The Court of Appeals found evidence in the record to support a determination that the mother was a vulnerable adult and that she had been neglected. It found no factual findings to support a conclusion that appellant fell within the statutory definition of caregiver. Nor were there findings on the statutory exceptions to the maltreatment-by-neglect determination, namely, “therapeutic conduct” and “single mistake.” The court observed that where a party claims that exceptions apply, an agency is obligated to make findings and conclusions on the defenses presented. <http://www.lawlibrary.state.mn.us/archive/ctappub/0212/c102601.htm>

■ **STATUTORY INTERPRETATION.** HealthPartners challenged the amount of its assessment as a member of the Minnesota Comprehensive Health Association (MCHA) in *HealthPartners, Inc. v. Bernstein*, C6-02-870 655 N.W. 2d 357 (Minn. App. 01/14/03). HealthPartners argued that payments under Medicare cost contracts were not includable in its total accident and health insurance premiums for the purpose of determining an assessment. The commissioner of commerce adopted a recommendation for summary disposition by an administrative law judge in favor of MCHA. The Court of Appeals agreed with the commissioner that the Medicare cost contracts were payments received “for coverage” within the meaning of the statute and therefore includable in computing an assessment. <http://www.lawlibrary.state.mn.us/archive/ctappub/0301/c602870.htm>

LEGISLATION

With the Legislature now in full swing, a new batch of legislative amendments to the APA rule-making are being considered. Already under way are: S.F. 30 (Sen. Betzold), which proposes to add electronic notice requirements prior to an agency using the “good cause exception” to avoid formal rulemaking. S.F. 61 (Sen. Betzold), which would require the “statement of need and reasonableness” (SONAR) to attempt to estimate the costs of the rule implementation born by “identifiable categories of affected parties such as separate classes of governmental units, businesses, or individuals”. Watch this space for further legislative developments.

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CIVIL LITIGATION

COURT RULES

■ **AMENDMENTS TO RULES GOVERNING MINOR’S SETTLEMENTS.** On December 17, 2002, the Minnesota Supreme Court prescribed and promulgated amendments to Rules 145.05 and 145.06 of the General Rules of Practice, as they relate to actions on behalf of minors and incompetent persons.

The amendments became effective January 1, 2003, and apply to all actions pending on the effective date and to those actions filed thereafter.

Rule 145.05 Terms of the Order. The amendments to this section of the rule establish a new process for handling both the depositing of funds as well as the release of funds. They also create a form to be completed by the financial institution acknowledging receipt of the funds and a form to be submitted to the court for approval of the release of funds.

The changes which relate to depositing of funds include the elimination of references to outdated types of accounts and the approval of what are generally referred to as statement accounts. However, an additional requirement is imposed on the receiving financial institution to acknowledge to the court in writing that the financial institution has in fact received the funds.

The second change to this portion of Rule 145 eliminates the *automatic* release of funds when the minor reaches the age of majority. The rule, as amended, now requires a separate order of the court authorizing release of the funds.

Rule 145.06 Structured Settlements. Where the settlement of a minor's claim includes the purchase of an annuity or some other form of structured settlement, and if the company issuing the proposed annuity is related to the settling party, or its liability insurer, a second competitive structured settlement proposal from another qualified insurer must also be offered. The amendment further provides that, in order for there to be a meaningful comparison between the two competing proposals, the bids must contain comparable terms.

The amendment to require at least two competitive annuity bids is in response to the practice of some insurers to attempt to limit the annuity proposals to those coming from their "captive" insurers.

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **ARBITRATION DOES NOT BAR STATUTORY CLAIM.** The doctrine of collateral estoppel does not bar a former county jail administrator from suing for violation of the federal Civil Rights Act after his wrongful discharge claim was rejected in an arbitration proceeding under his labor union's collective bargaining agreement. In *Lafee v. Winona County*, 22003 WL 115360 (Minn. App. 2003), the Minnesota Court of Appeals held that the employee could pursue a claim for violation of his 1st Amendment right to the freedom of speech as well as an age discrimination claim under the Minnesota Human Rights Act, even though an arbitrator had ruled that there was "just cause" to terminate him under the collective bargaining agreement in light of the county's elimination of the position.

■ **WHISTLEBLOWERS.** Employers are not vicariously liable under the doctrine of *respondeat superior* for wrongful discharge decisions made by supervisors in violation of the whistleblower statute, Minn. Stat. §118.932. In *Anderson-Johanningmeier v. Mid-Minnesota, Inc.*, 2003 WL 42273 (Minn. App. 2003) (unpublished), the appellate court held that a jury verdict that the supervisor improperly fired two employees was not irreconcilable with a ruling in favor of the employer because the supervisor may have acted out of personal spite not attributable to the employer.

■ **WRONGFUL DISCHARGE.** The wrongful disclosure by the employee of his employer's business plan was considered a breach of an employment agreement and warranted the employee's termination in *Chalupsky v. Dobbs Temporary Services*, 2003 WL 105478 (Minn. App. 2003) (unpublished). The Court of Appeals held that the employee was properly terminated because the divulgence of the plan to his brother was not reasonably necessary and, therefore, violated the confidential provision of the employment agreement.

A caregiver who made a mandatory report of alleged maltreatment of vulnerable adults was wrongfully terminated in retaliation for his protected behavior in *Odoms v. My Brother's Keeper*, 2003 WL 115194 (Minn. App. 2003) (unpublished). The employee told his employer about his concerns regarding the maltreatment of a resident of a home for disabled adults by a coresident. When the employer failed to take action, the caregiver contacted two county social workers, which precipitated his discharge from employment. The court held that there was sufficient evidence of retaliation to warrant the trial court's determination of wrongful termination in violation of the mandatory reporting law under Minn. Stat. §626.557 subd. 3(a).

■ **UNEMPLOYMENT COMPENSATION.** In a rare reversal, the appellate court held in *Koschak v. RCM*

Technologies, USA, Inc., 2003 WL 42236 (Minn. App. 2003) (unpublished) that an employee was not properly terminated for “misconduct” and, therefore, was entitled to unemployment compensation benefits. The employee had distributed a note and card, soliciting money for an employee who, due to health problems in her family, had resigned her position rather than sign a form promising not to miss any more work in the next six months. Circulation of the note and card were “motivated by compassion,” did not constitute a breach of company policy or dissemination of confidential data.

An employee who was late to work on ten occasions was disqualified from receiving benefits in *Marlott v. Haskells Inc.*, 2002 WL 31867758 (Minn. App. 2002) (unpublished). The claimant’s contention that he was late due to a second job was unsubstantiated. He also was not required to receive an explicit warning before being fired.

LEGISLATION

The Bush Administration is proposing major overhaul of the overtime laws under the Fair Labor Standards Act. Under a proposal of the Department of Labor, the salary level for exemption from certain overtime pay requirements would be lifted above \$8,060, which was the standard last set in 1975. The change, if implemented, would mainly affect blue-collar and white-collar workers and expand the number of them who would be subject to exemptions from the 1/2 times pay requirement for work in excess of 40 hours per week.

The administration states that low wage workers would realize a boost in income under the plan. But labor unions oppose the plan, arguing that it could impose excessive work on low-paid personnel.

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ENVIRONMENTAL LAW

ADMINISTRATIVE RULEMAKING

■ **CLEAN WATER ACT; STORM WATER PERMITS.** The EPA is considering comments on a draft construction general permit that will apply to both large (five acres or more) and small (one to five acres) construction sites. The current construction general permit applies only to large construction sites. Permittees will have to develop and implement a stormwater pollution prevention plan detailing how pollutants from construction activity are to be controlled. The new permit will replace the general permit that expires on February 17, 2003. For more details, see <http://cfpub.epa.gov/npdes/stormwater/cons.cfm#draft>.

■ **CLEAN AIR ACT; NEW SOURCE REVIEW.** EPA’s recent changes to the New Source Review provisions of the Clean Air Act have elicited a lawsuit by the States of New York, Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, Vermont and Maryland, and threats of litigation by environmental groups. The changes, which are scheduled to take effect on March 3, 2002, include (1) a rule authorizing companies to set a plant-wide emissions cap and to make changes within a plant without triggering new source review as long as the facilities do not exceed the cap; (2) establishment of a grace period exempting from additional new source review requirements for ten years emission units that have installed the best available control technology; (3) changes in the way emissions baselines and future emissions are calculated; and (4) an exemption for pollution control projects that would result in a net overall reduction in air pollutants. The challengers argue that the changes will allow companies to increase air pollution and are contrary to the Clean Air Act. For additional information, see <http://www.epa.gov/air/nsr-review/>.

JUDICIAL LAW

■ **NATIONAL ENVIRONMENTAL POLICY ACT; NATIVE AMERICAN TREATY RIGHTS.** In response to a challenge by citizens and animal advocacy groups, the 9th Circuit Court of Appeals recently reversed a district court’s grant of summary judgment in favor of the National Oceanic and Atmospheric Administration (“NOAA”) and National Marine and Fisheries Service (“NMFS”) on grounds that the agencies’ approval of the Makah Indian Tribe’s plan to resume whaling activities violated both the National Environmental Policy Act (“NEAP”) and the Marine Mammal Protection Act (“MMPA”).

In 1855, the United States entered into a treaty with the Makah Tribe, a traditional Northwest Indian whale hunting tribe, in which the tribe gave up most of the tribe’s land on the Olympic Peninsula in the state of Washington and was guaranteed the right to continue whaling in return. As part of an effort to revive tribal culture, the tribe developed a plan to resume the taking of gray

whales off the coast of Washington. NOAA and NMFS approved the tribe's plan. The 9th Circuit held that the agencies violated NEAP by not preparing an environmental impact statement ("EIS") to address the uncertainty and controversy over the local impact of the tribe's whaling plan. The court also held that the government violated the MMPA by failing to satisfy the permit or waiver requirements under MMPA's moratorium on the taking of marine mammals. According to the court, the tribe's treaty right did not supersede the statutory requirements because the application of the MMPA is necessary to achieve the statute's conservation purpose and the government provided no assurance that the MMPA's conservation purpose would be effectuated. The 9th Circuit concluded that the government must prepare an EIS and the tribe must obtain a permit or waiver under MMPA before the tribe's plan could be approved. *Anderson v. Evans*, 314 F.3d 1006 (9th Cir. 2002).

■ **ANIMAL FEEDLOTS; NUISANCE AND TRESPASS.** The United States District Court for the District of Minnesota recently denied a feedlot owner's motion to dismiss and allowed the adjacent owners' trespass, nuisance and negligence claims concerning alleged odors and pollution to go forward. Neighbors of a feedlot in Rock County, Minnesota filed an action against the owners of the feedlot, owners of the pigs being raised on the feedlot, and the Rock County Board of Commissioners in connection with odors, chemicals, and water pollution allegedly coming from the feedlot. The plaintiff's alleged trespass, nuisance and negligence, violations of the Minnesota Environmental Rights Act ("MERA"), and various violations of federal laws. The court dismissed plaintiffs' MERA claims on procedural grounds, but refused to dismiss plaintiffs' claims for nuisance, negligence, and trespass. *Overgaard v. Rock County Board of Commissioners*, 2002 WL 31924522 (D. Minn. 12/30/02).

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FAMILY LAW

JUDICIAL LAW

■ **DOMESTIC ABUSE — FINDINGS.** Following their separation in July 2001, the parties arranged a parenting schedule in which their children would spend alternate weeks with each parent. In March 2002, father petitioned for an *ex parte* order for protection on behalf of the children alleging that the mother had a history of committing domestic abuse against them. Following a hearing at which the parties testified, the district court, using a printed form, issued an order for protection which granted father sole legal and physical custody of the children, limited mother's contact with the children to supervised visitation, and ordered her to have no contact with father. As its findings regarding acts of domestic violence, the court wrote "SEE PETITION" and concluded that "the statements made by [mother the] weekend of March 1st [were] intended to inflict fear of harm toward the children and did in fact inflict the fear of harm in them." Mother appealed, arguing that the district court's findings of fact were insufficient to support an order for protection because the district court referred to the petition without stating the allegations that satisfy the elements of domestic abuse in finding that she caused fear of imminent harm in her children.

The Court of Appeals agreed, noting that, to enable meaningful appellate review, the basis for the district court's decision must be set forth with particularity. The court did not foreclose referring to the petition for factual findings when the facts are uncontested or adequately developed. Here, however, the petition alone did not permit meaningful review because it lacked detail regarding the alleged past abuse and it alleged current abuse without any particularity. At the hearing, the evidence was contraverted and the findings did not weigh the evidence or give any insight into the district court's credibility determination. As a result, the court could not review the district court's decision to determine whether there was a sound exercise of discretion and remanded to the district court for particularized findings based on the existing record.

The appellate court declined to rule on mother's other contention that the evidence was insufficient to support an order for protection since, given the current state of the record, the court could not review it for evidentiary sufficiency. The court also held that mother had waived her right to appeal the admission of the children's statements to father because she had not objected at the hearing. Remanded. *Gerads v. Gerads*, C5-02-777 (Minn. App. 01/28/03).

<http://www.lawlibrary.state.mn.us/archive/ctapun/0301/777.htm>

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FEDERAL PRACTICE

JUDICIAL LAW

■ **ATTORNEY'S FEES; DEFINITION OF "PREVAILING PARTY."** In *Buckhannon Board & Care Home, Inc. v. W. Va. Dept. of Health and Human Resources*, the Supreme Court rejected use of the so-called "catalyst theory" to support an award of attorney's fees, and held that a judgment on the merits or a consent decree is necessary to establish "prevailing party" status. However, even after *Buckhannon*, the definition of a "prevailing party" continues to be debated.

Most recently, in *Christina A. v. Bloomberg*, juvenile inmates at the South Dakota State Training School brought a class action seeking to improve conditions at the facility. The parties eventually reached a settlement, which the district court approved following a Fed. R. Civ. P. 23(e) fairness hearing. While the district court retained jurisdiction to enforce the terms of the settlement agreement, the terms of the settlement agreement were not incorporated into a court order.

Following the settlement, the plaintiff class sought an award of attorney's fees and expenses. The district court found that the class was a prevailing party, and awarded it more than \$375,000. Defendants appealed, arguing that the class was not a prevailing party under *Buckhannon*.

The majority of the 8th Circuit panel held that the class could not be a prevailing party in the absence of either an enforceable judgment on the merits or a consent decree, and rejected the class's argument that the settlement agreement was the functional equivalent of a consent decree. Judge Melloy filed a dissenting opinion arguing that because the district court had retained jurisdiction to enforce the settlement agreements, the class was a prevailing party under *Buckhannon*. In support of this argument, Judge Melloy cited a recent 11th Circuit case which reached the same conclusion.

In light of *Christina A.*, litigants within the 8th Circuit are now on notice that a settlement agreement — no matter how favorable — will not be sufficient to confer prevailing party status.

Buckhannon Board & Care Home, Inc. v. W. Va. Dept. of Health and Human Resources, 532 U.S. 598, 121 S. Ct. 1835 (2001); *Christina A. v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003).

■ **OTHER NOTEWORTHY DECISIONS.** The 8th Circuit adhered to its long-established rule and refused to consider an appeal from the denial of summary judgment following a trial on the merits. The 8th Circuit indicated that in light of well-established authority, plaintiff's counsel had "come perilously close" to violating Fed. R. App. P. 38 in bringing an appeal "so obviously foreclosed by Circuit precedent." *Eaddy v. Yancey*, ___ F.3d ___ (8th Cir. 2003).

Judge Magnuson remanded an action to the Minnesota courts, but declined to award attorney's fees for improper removal under 28 U.S.C. §1447(c), finding that the defendant's motive for removal was a relevant factor to be considered, and that the defendant had not acted in bad faith. *Dakis v. Allstate Ins. Co.*, 2003 WL 118245 (D. Minn. 01/08/03).

The 8th Circuit affirmed a preliminary injunction entered by Judge Doty in a copyright case, finding no abuse of discretion. *Taylor Corp. v. Four Seasons Greetings, LLC*, ___ F.3d ___ (8th Cir. 2003).

The 8th Circuit affirmed Judge Frank's decision to affirm an award of attorney's fees by the Bankruptcy Court under Bankruptcy Rule 9011 prior to the filing of a reply brief and strongly suggested that a court's failure to wait for a reply brief before issuing a ruling might never constitute reversible error. *Floret v. Sendeky*, 315 F.3d 904 (8th Cir. 2003).

The 8th Circuit also affirmed the imposition of \$2,000 in Rule 11 sanctions against plaintiff's counsel for pursuing claims having "no legal merit." *Coomts v. Potts*, 316 F.3d 745 (8th Cir. 2003).

Judge Frank declined to certify plaintiff classes in a RESPA case, finding that one proposed class was "essentially indistinguishable" from a class that was decertified by the 8th Circuit in a similar case in 2002, and that the proposed class representative had not demonstrated that common questions of law or fact predominated among the second proposed class. *Andrews v. Temple Inland Mortgage Corp.*, 2002 WL 31844706 (D. Minn. 12/13/02).

Judge Magnuson granted a motion to transfer venue in a legal malpractice case against a Chicago law firm, finding that "the question of legal malpractice is inherently a local one," and that "the familiarity that the Northern District of Illinois has with the relevant standard of care" weighed in favor of transfer. *Tidemann v. Schiff, Hardin & Waite*, 2002 WL 31898165 (D. Minn. 12/18/02).

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INTELLECTUAL PROPERTY LAW

JUDICIAL LAW

■ **TRADEMARK INFRINGEMENT; CONSUMER CONFUSION; INJUNCTION.** The Court of Appeals for the 8th Circuit affirmed the issuance of a preliminary injunction in this trademark infringement case despite the lack of survey evidence establishing consumer confusion. Alleging trademark infringement, Bebe sought a preliminary injunction barring May from using the label “be” in connection with its advertising or sales of women’s clothing. Reviewing the district court’s finding of likelihood of confusion, a required element in trademark infringement suits, the court emphasized the similarity in the names, logos, clothes, and customer bases, as well as evidence of actual consumer confusion. The court concluded, “live testimony of Bebe’s employees and of a confused Bebe shopper were compelling enough to demonstrate the likelihood of actual confusion.” *Bebe Stores, Inc. v. May Department Stores International*, No. 02-3619 (8th Cir. 12/18/02) (per curiam).

■ **PATENTS; PRIOR PUBLIC USE; CORROBORATION OF TESTIMONY; FAILURE-TO-MARK.** The Court of Appeals for the Federal Circuit confirmed the continued vitality of its corroboration requirement and its adherence to the failure-to-mark rule announced in the Supreme Court case of *Wine Railway Appliance Co. v. Enterprise Railway Equipment Co.*, 297 U.S. 387 (1936). At trial, Telegenix offered oral testimony for the purpose of establishing prior public use of the patented invention by another, and thereby rendering invalid the patents in suit. The district court excluded the evidence finding the uncorroborated testimony unreliable and potentially confusing to the jury. Addressing Telegenix’s challenge that only an interested witness’s testimony requires corroboration, the Federal Circuit reemphasized that “[c]orroboration is required of any witness whose testimony alone is asserted to invalidate a patent, regardless of his or her level of interest.” Noting the absence of contemporaneous physical or documentary evidence corroborating the offered testimony, the Federal Circuit held the district court rightfully excluded it.

Telegenix also challenged the district court’s holding allowing the assessment of damages for infringing acts that occurred before the date on which Telegenix received notice of infringement. Generally, when the product covered by the patent in suit is not marked with the patent number, 35 U.S.C. §287(a) limits patent infringement damages to acts occurring after the infringer receives notice of the infringement. Therefore, Telegenix argued, because TDS did not manufacture a product to mark, damages should have been limited to those acts that occurred after Telegenix received notice of infringement. The Supreme Court in the *Wine Railway* case, however, held the notice requirement of §287(a) does not apply where there is no product to mark because without a product to mark there could be no *failure* to mark. Over Telegenix’s arguments to the contrary, the Federal Circuit affirmed the district court’s ruling and confirmed its continued adherence to the rule announced in *Wine Railway*; specifically, that limiting damages to acts taken after receiving notice, as defined in 35 U.S.C. §287(a), is only appropriate when there has been a *failure* to mark, and that a failure to mark presupposes the existence of a product to mark. Watch for cases where the issue is whether an “offer for sale” triggers the notice requirement even though the product offered does not exist, *i.e.*, cannot be marked, at the time of the offer. *Texas Digital Systems, Inc. v. Telegenix, Inc.*, 2002 U.S. App. LEXIS 21567 (Fed. Cir. 10/16/02).

■ **COPYRIGHT; 1998 COPYRIGHT EXTENSION ACT.** The United States Supreme Court confirmed the constitutionality of Congress’s 1998 Copyright Term Extension Act. Previously, the law protected copyright holders’ rights for 50 years following the author’s death. The 1998 act extended protection for *existing* and future copyrights to 70 years after death of the author. *Eldred v. Ashcroft*, No. 01-618 __ U.S. __ (01/15/03).

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JUVENILE LAW

JUDICIAL LAW

APPELLATE JURISDICTION; UNTIMELY NOTICE OF APPEAL. The Minnesota Rules of Juvenile Procedure control over statute regarding time limits set for appeal. Noting that the Supreme Court has the primary responsibility under the separation of powers doctrine to regulate matters of trial and appellate procedure, the Minnesota Supreme Court upheld the appellate court’s dismissal of a mother’s appeal of her termination of parental rights for failure to timely serve the guardian ad litem (GAL) with a notice of appeal.

The district court terminated the mother's parental rights and the mother appealed. The Court of Appeals dismissed the appeal for lack of jurisdiction and the mother appealed the appellate court's dismissal to Minnesota Supreme Court.

In dismissing mother's appeal, the Court of Appeals relied upon Minn. Stat. §260C .415 which provides that an appeal must be taken within 30 days of the filing of an appealable order and that the appeal is taken to the Court of Appeals as in civil cases. The Court of Appeals then relied upon Minnesota Rule of Civil Procedure 103.01 which requires a timely notice of appeal be served on all adverse parties. The Court of Appeals dismissed the appeal because the GAL, which apparently the court considered an adverse party, was not timely served.

The Supreme Court upheld the Court of Appeals dismissal, although for slightly different reasons. The Court held that the Rules of Juvenile Procedure control over the statute, and because the GAL was not timely served under the rules, dismissal is required.

The Court refused to use its inherent authority to hear the appeal in the interest of justice solely because it was a termination of parental rights action. The Court observed that such exceptions are made only in exceptional cases and never have they made a wholesale exception for a class of cases or on the basis of "simple attorney negligence, inadvertence or oversight." Furthermore, the Court was not persuaded by mother's argument that the failure to timely serve GAL was a mere technical violation of the rules.

Justice Anderson, and Justice Page, concurring in part and dissenting in part, did not agree that the two-week delay in serving the GAL automatically required dismissal of the appeal. However, the justices determined that based on the record and after review on the merits, they would have affirmed the termination of parental rights. *Welfare of J.R., Jr. and A.I.R.*, 651 N.W.2d 1 (Minn. 2003).

■ **ADULT TRAFFIC OFFENSES; SENTENCING.** Defendant who was a juvenile at the time of her arrest for driving while intoxicated and an adult at the time of her conviction could be sentenced to jail, ruled the Minnesota Court of Appeals.

The case was submitted to the trial court on stipulated facts and the defendant was found guilty and sentenced to 90 days in jail and a \$700 fine. The court executed 21 days of the jail sentence and \$350 of the fine. Defendant appealed, among other issues, whether the court could sentence the defendant to jail.

Citing Minn. Stat. §260B.225, Subd. 8(b), defendant argued that she should be considered a juvenile for sentencing purposes and it was impermissible to sentence her to jail. The state argued that since defendant was an adult at the time of sentencing 260B.225, Subd. 8(b) did not apply and there was no prohibition against jail time. The statute states in relevant part "that a juvenile convicted of an adult traffic offense in district court shall be treated as an adult for sentencing purposes, except that the court may order the juvenile placed out of home only at a residential treatment facility or a juvenile correctional facility." Minn. Stat. §260B.225, Subd. 8(b). The court held that the plain meaning of the statute is unambiguous and applies only to persons who are juveniles at the time of conviction. Since defendant was an adult at the time of her conviction, she was properly sentenced to jail. *State v. Collins*, 2003 WL 113176 (Minn. App. 2003)

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TAX LAW

JUDICIAL LAW

■ **LLC OWNED FARMLAND; GREEN ACRES TREATMENT.** The Minnesota Tax Court held that property owned by an LLC qualified for special valuation and tax deferment for certain agricultural land under Minn. Stat. §273.111 ("green acres treatment"). The court held that the statute is to be interpreted broadly so that its equitable features could be applied. The court further held that the change in the form of ownership from Individual to partnership to LLC should not change the tax treatment. An LLC is not a corporate entity and qualifies under the statute. Finally, the court disagreed with the government's position that the noncorporate requirement of the statute required a natural persons requirement. *Dale Properties, LLC v. County of Hennepin*, No. 28918 (Minn. T.Ct. 12/20/02).

■ **PROPERTY TAX ASSESSMENT; RELATED CORPORATIONS; REQUIREMENT FOR INFORMATION PRODUCTION.** The Minnesota Tax Court held that a corporation's challenge to a property tax assessment must comply with the Minn. Stat. §278.05.6(a) requirement for information production. The petitioner claimed that it did not need to produce a lease or related information because the

other party to the lease was a related corporation. The entities had a combined reporting system that had offsetting entries for each payment of "rent." The court held that the corporations were separate legal entities and that the land was, therefore, income producing. *SPX Corp. v. County of Steele*, No. CX-01-342 (Minn. T.Ct. 12/26/02)

■ **FRAUD IN TAX COURT PROCEEDING; IRS COUNSEL.** The 9th Circuit Court of Appeals vacated a decision of the Tax Court because of prejudice caused by testimony offered during trial. A large number of taxpayers (approximately 1,800) sought a redetermination of deficiencies for a transaction that the IRS had characterized as a sham transaction. A majority of the taxpayers agreed to be bound by the results of a test case trial. IRS counsel entered into secret settlement agreements with three of the taxpayers in exchange for their testimony at trial. IRS counsel did not reveal the existence of the settlement agreements, and permitted the taxpayers to testify at trial, even though some of the testimony was false. The 9th Circuit found that the actions of the IRS counsel caused fraud and harmed the integrity of the judicial process. *Dixon v. Commissioner*, No. 00-70858 (9th Cir. 01/23/03).

■ **OFFSET FOR RENTAL REAL ESTATE; EQUAL PROTECTION CHALLENGE.** The 8th Circuit Court of Appeals held that the \$25,000 offset for rental real estate activities authorized under §469, does not unconstitutionally favor persons who rent real estate as opposed to persons who rent cars. The 8th Circuit found that the statute was rationally related to a legitimate purpose and did not interfere with fundamental rights or employ a suspect classification. *Schetzler v. Commissioner*, No. 02-2286 (8th Cir. 12/23/02).

■ **INTERNATIONAL TAX — JOHNSTON ISLAND INCOME.** The Tax Court held that income earned by an individual earned while residing on Johnston Island is U.S. sourced income. Because Johnston Island is a U.S. possession and not a foreign country, the court concluded that income earned there is not foreign-earned income. *Jones v. Commissioner*, T.C. Memo. 2003-14 (01/15/03).

■ **BURDEN OF PROOF; TAX COURT; OFFERING CREDIBLE EVIDENCE.** The 8th Circuit interpreted the Section 7491(a) rule that if a taxpayer produces credible evidence on an issue then the burden of proof shifts to the IRS. The court held that credible evidence is the quality of evidence, which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted. Because the IRS did not submit any evidence on the matter at issue, the 8th Circuit remanded for the Tax Court to consider the impact of the shift in burden of proof. *Griffin v. Commissioner*, No. 02-2030 (8th Cir. 01/14/03).

■ **UNREPORTED INCOME FROM TAX PREPARATION; DEFICIENCY CALCULATION.** The Tax Court found a return preparer liable for unreported income. The petitioner prepared and filed hundreds of returns over several tax years and claimed refunds for 99 percent of them. He arranged for refund anticipation loans or RALs for returns filed electronically. He received \$30 per RAL in addition to preparation fees. The IRS assessed a deficiency based on the number of returns filed and from survey information gathered from the individuals on whose behalf the returns were filed. The court found the IRS actions as a reasonable method to reconstruct his income. *Joseph v. Commissioner*, T.C. Memo. 2003-19 (01/21/03).

■ **CROSS-CHAIN SALES; DISTRIBUTIONS IN EXCHANGE FOR STOCK.** The Tax Court held that payments by one brother-sister corporation to another brother-sister corporation in the same ownership chain (cross-chain sale) were payments in exchange for stock, rather than dividends. The parties agreed that cross-chain sales are treated as redemptions, but disputed whether the redemptions are distributions in exchange for stock or distributions of property under Section 301. The court noted that such a distinction is a factual determination that focuses on the actions of the redeemed shareholder and the redeeming corporation. The court found that a formal presentation of the plan to the parent's board of directors only days after the cross-chain sale of the subsidiary was compelling evidence that the sales were part of a plan. *Merrill Lynch & Co., Inc. v. Commissioner*, 120 T.C. 3 (01/15/03).

■ **REASONABLE COMPENSATION; CORPORATE FOUNDER; PREVIOUS UNDERCOMPENSATION.** The Tax Court found a payment of approximately \$200,000 to be reasonable compensation and fully deductible. The taxpayer established that he was undercompensated in prior years in order to meet specified bonding requirements, a business necessity. The court concluded that under certain circumstances, prior services may be compensated in a later year. *Devine Brothers, Inc. v. Commissioner*, T.C. Memo. 2003-15 (01/16/03).

■ **DISABILITY BENEFITS INCLUDIBLE IN GROSS INCOME.** The Tax Court held that an airline pilot who, after ending his employment because of carpal tunnel syndrome, collected disability benefits based on his age, years of service, and salary, not on his medical condition, should report any payments received as gross income. The pilot was eligible for benefits under a plan obtained in collective bargaining negotia-

tions and the plan was funded by the airlines. The court rejected the pilot's argument that the pilots paid the contributions to the plan through wage concessions during negotiations. The court held that such a position requires too broad a reading on the relevant code section and would essentially qualify any negotiated disability package for exclusion since any such package could be construed as a substitute for wages that employees might otherwise receive. **Tuka v. Commissioner**, 120 T.C. No. 1 (01/06/03).

■ **SUSPENSION OF STATUTE OF LIMITATIONS; "FINANCIAL DISABILITY."** The Tax Court held that it did not have jurisdiction to decide whether a taxpayer was entitled to a refund of overpaid taxes. The taxpayer failed to file his claim within the statute of limitations but claimed that it was suspended due to his "financial disability" during this period. The taxpayer alleged that his financial disability resulted from his care-giving responsibilities to his mother and from work. In denying his claim, the court held that the relief contemplated by Section 6511 is for the taxpayer's own impairment, and that the impairment must be substantial. **Brosi v. Commissioner**, 120 T.C. 2 (01/13/03).

■ **TAX SHELTER; NON-TAX BUSINESS PURPOSES REQUIRED FOR RECOGNITION.** Where taxpayers used an "elaborate partnership" with entities created solely for the purpose of a possible tax shelter transaction, "the absence of a non-tax business purpose" is fatal to the recognition of the entity for the tax purposes. The court concluded that the only "logical explanation" for the formation of the partnership was the exploitation of a temporary Treasury regulation and the gain of a paper loss to absorb capital gains. Under a prior decision the IRS is required only to recognize partnerships formed for non-tax purposes; case remanded for such a finding. **Boca Investering Partnership, et al. v. United States**, No. 01-5429, (DC Cir. 01/10/03).

■ **CASUALTY LOSS DEDUCTION; FORCED SALE OF HOME; HOSTILITY AND RACISM.** The 9th Circuit affirmed a Tax Court holding that a taxpayer was not entitled to a casualty or theft loss deduction and was not able to exclude dividend income. The court affirmed the rejection of the taxpayer's claim that hostility and racism from police and neighbors forced him to sell his home. The court held that harassment doesn't qualify as a sudden or cataclysmic event under Section 165(c)(3), nor could the taxpayer show serious physical damage or destruction to his property, as required by Section 165(h), or that the property was the target of theft. The taxpayer also argued that he didn't have to report his long-term capital gain distributions because the fund from which the distributions came had an asset allocation of 60 percent bonds. He claimed that Schedule B instructs individuals to include gross dividends and other distributions on stocks but not on bonds. The court rejected this argument, noting the broad definition of gross income in the code. **Torre v. Commissioner**, No. 02-70133, (12/11/02).

■ **DEDUCTION FOR EXPENSES INCURRED AS TEMPORARY COMMUTER.** The Tax Court held that a car salesman, temporarily assigned to a dealership further away from his home than his current dealership, was entitled to deduct expenses for miles traveled. The court held that while individuals are not normally allowed to deduct expenses for commuting, if an individual is temporarily assigned elsewhere, those expenses are deductible for tax purposes. **Brockman v. Commissioner**, T.C. Memo. 2003-3 (01/07/03).

■ **APPLICATION OF OVERPAYMENT TO LIABILITY; REVIEWABLE COLLECTION ACTION.** The Tax Court held that it did not have authority to review the application of taxpayer's overpayment for one taxable year to offset the taxpayer's liability for another taxable year. Additionally, any collection actions initiated before the Internal Revenue Service Restructuring and Reform Act of 1998 are not reviewable by a court. **Bullock v. Commissioner**, T.C. Memo. 2003-5 (01/07/03).

■ **NONCUSTODIAL PARENT; DEPENDENCY EXEMPTIONS; FAILURE TO INCLUDE PROPER DOCUMENTATION.** The Tax Court held that a noncustodial parent was not entitled to dependency exemptions for two of his children because the final page of his divorce decree attached to his return didn't provide information sufficiently similar to that on a Form 8332. The Court rejected his claim that he relied on an IRS publication indicating that a copy of the divorce decree was sufficient. **William R. Cramer, et ux., et al. v. Commissioner**, T.C. Summary Opinion 2003-2 (01/09/03).

■ **DISABILITY BENEFITS PROPERLY EXCLUDED FROM INCOME.** Taxpayer appealed an assessment that his disability payments were includible as income. The taxpayer claimed that he sustained a permanent disability as a result of mental injury during the course of his employment as a judge. The Tax Court held that disability payments were properly excluded from gross income under section 104(a)(1), which excludes compensation for personal injuries or sickness paid by workers' compensation acts. It held that the act contained a specific provision that awards benefits solely for a work-related disability. Therefore, it is a dual-purpose statute and benefits are properly excludable. **Byrne v. Commissioner**, T.C. Memo. 2002-319 (12/30/02).

■ **INTEREST FROM DIVORCE SETTLEMENT TAXABLE AS INCOME.** The 3rd Circuit rejected taxpayer's argument that payments described as interest in a divorce decree represented post-divorce appre-

ciation in value of her exspouse's law practice and were not taxable as income. The court found that any portion of a judgment that compensates a taxpayer for the delay in receipt, or lost use of the taxpayer's money, constitutes interest and is taxable as such. The court also sustained the accuracy-related negligence penalty in light of the taxpayer's education and employment experience. **Cipriano v. Commissioner**, No. 02-1055 (01/06/03).

■ **UNREPORTED INCOME; TRANSFER OF REAL ESTATE; TAX LIABILITY.** The 11th Circuit upheld a Tax Court decision that a taxpayer realized income when he transferred real estate to a partnership. The court rejected the argument that the sale should be recognized under the installment method, noting that transferor entity was a dealer and that the transfer was to a partnership and not an individual. **Tietig v. Commissioner**, No. 02-11754 (01/03/03)

ADMINISTRATIVE LAW

■ **MINNESOTA SALES TAX; MAINTENANCE OF SWIMMING POOLS AND HOT TUBS.** The commissioner issued a Revenue Notice indicating that Minnesota sales tax applies to the cleaning, maintenance, and disinfecting of spas, hot tubs, and swimming pools. The commissioner also takes the position that seasonal opening and closing services are subject to the sales tax. Revenue Notice No. 02-22 (12/30/02).

■ **MINNESOTA SALES AND USE TAXES; EXEMPTION CERTIFICATES.** The commissioner issued a Revenue Notice explaining the department's position on what constitutes a valid exemption certificate. A purchaser may provide his or her own certificate as long as it contains the required information listed in Minnesota Statutes §297A.72. Minnesota will also accept the Uniform Sales and Use Tax Certificate developed by the Multistate Tax Commission. Revenue Notice No. 02-23 (12/30/02).

■ **NO GAIN RECOGNITION; SUCCESSIVE SHORT SALES OF STOCK.** The commissioner has ruled that if a taxpayer owns stock and enters into successive short sales of that stock, and if all of the short sales are closed before the 30th day of the taxpayer's tax year and the appreciated financial position was unhedged for 60 days then there is no gain recognition under Section 1259(a)(1). Viewing the short sales as a whole, the commissioner determined that the subsequent sales should be treated as reestablished positions with respect to the previous short sales. Consequently, the commissioner treats the first short sale as a closed transaction under section 1259(c)(3)(A). The same reasoning applies to all short sales within the period meaning that they are all closed transactions. Rev. Rul. 2003-1 (01/06/03).

■ **ESOPs THAT HOLD EMPLOYER SECURITIES IN S CORPORATIONS; ALLOCATION DELAYS.** The commissioner maintains that certain employee stock ownership plans that comply with §409(p) requirements upon initial organization but are subsequently extended to include ineligible individuals will not be entitled to allocation delays. ESOPs must be organized to provide substantial benefits, or substantial participation in the ownerships of the S corporations to the participants in the plan. Disqualified persons are treated as receiving deemed distributions to the extent of any allocation to their account. Rev. Rul. 2003-6 (12/18/02).

■ **RECEIPT OF CASH FOR PLEDGE TO DELIVER SHARES ON FUTURE DATE NOT A SALE.** The IRS has ruled that a shareholder has neither sold stock currently nor caused a constructive sale of stock if the shareholder receives a fixed amount of cash, simultaneously enters into an agreement to deliver on a future date a number of shares of common stock that varies significantly depending on the value of the shares on the delivery date, pledges the maximum number of shares for which delivery could be required under the agreement, retains an unrestricted legal right to substitute cash or other shares for the pledged shares, and is not economically compelled to deliver the pledged shares. Rev. Rul. 2003-7 (01/16/03).

■ **ROLLOVER PERIOD WAIVER FOR PENSIONS, IRAs.** The commissioner has issued guidance about obtaining waiver of the rule that requires rollover distributions to be transferred within 60 days of the distribution. Currently, the IRS can waive the 60-day rollover requirement for taxpayers based on disasters, financial institution error, death and disability, combat zone service, and terrorist actions. The IRS will issue a waiver in cases where failure to waive would be against equity or good conscience, including casualty, disaster, or other events beyond the taxpayer's reasonable control. Relevant facts and circumstances considered include: financial institution error, inability to complete a rollover due to death, disability, hospitalization, incarceration, restrictions imposed by a foreign country, or postal error. Rev. Proc. 2003-16 (01/08/03).

■ **RETIREMENT PLAN AMENDMENTS; ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001; NONDISCRIMINATION RULES.** The commissioner has issued a ruling that amend-

ments to retirement plans that reflect the increase in the allowable compensation limit contained in the Economic Growth and Tax Relief Reconciliation Act of 2001 will satisfy the nondiscrimination rules and minimum coverage requirements contained in I.R.C. §401. Rev. Rul. 2003-11 (12/23/02)

■ **DISASTER RELIEF PAYMENTS; EXCLUSIONS FROM GROSS INCOME.** The commissioner issued a Revenue Ruling modifying a previous ruling in which certain disaster relief payments by an employer to an employee were not gross income under §61. Disaster relief payments by employers are now excluded from gross income under §139 as qualified disaster relief payments. Payments by state governments are excluded under the same provision. Payments by charitable organizations are excluded from gross income of the recipients as gifts under §102. Rev. Rul. 2003-12 (12/20/02).

■ **DISCLOSURE OF PARTICIPATION IN POTENTIALLY ABUSIVE TAX AVOIDANCE TRANSACTIONS; EFFECTIVE DATE.** The IRS promulgated temporary regulations in October 2002 that revamped the rules for the disclosure of participation in potentially abusive tax avoidance transactions under section 6011 by expanding the categories of transactions that must be disclosed on returns, and by including “material advisors” as individuals subject to the investor list maintenance requirements under section 6112. The effective date will not occur until the regulations are finalized, which is expected to be in February 2003. Notice 2003-11 (01/17/03).

■ **VOLUNTARY COMPLIANCE INITIATIVE FOR OFFSHORE ACCOUNTS.** To improve investigation into offshore credit card schemes, the IRS announced a new initiative that offers partial amnesty to taxpayers that disclose participation in offshore income sheltering. The IRS estimates that over 1 million taxpayers may be involved in schemes that utilize credit or debit cards issued by offshore banks to access funds in countries where income can be hidden. Those taxpayers who voluntarily disclose a scheme by April 15, 2003, will avoid criminal prosecution and civil fraud penalties. Promoters of such offshore credit card schemes are not eligible to participate in the amnesty initiative. Rev. Proc 2003-11 (01/15/03).

■ **IRS CREATES OFFICE OF PROFESSIONAL RESPONSIBILITY.** The IRS has established the Office of Professional Responsibility and has appointed Brien Downing as director; the office of Director of Practice will be eliminated. The newly created office will be charged with enhancing the oversight of tax professionals as part of its ongoing modernization effort. IR-2003-3 (01/09/03).

■ **TAXPAYER ADVOCATE’S ANNUAL REPORT RELEASED.** The Taxpayer Advocate’s Annual Report to Congress listed navigating the IRS as the number one problem by both individual and business owners in their dealings with the IRS. The number two problem is the prompt processing of offer-in-compromise cases. The report includes information on other problems encountered by taxpayers, legislative recommendations, and the most-litigated tax issues. The Taxpayer Advocate also asked Congress for legislative authorization for the advocate to intervene as amicus curiae in any federal litigation — excluding cases before the U.S. Supreme Court — to raise taxpayer rights issues. For the text of the report visit the IRS website at: http://www.irs.gov/pub/irs-utl/mta_2002_annual_rpt.pdf.

■ **E-SUBSCRIPTION FOR IRS NEWSWIRE.** The IRS has announced the creation of an e-subscription service for instant delivery of news releases. Subscribers will get specialized information sent as an email. IRS news releases and fact sheets will now be available to the public as soon as the IRS issues them. Visit the IRS website for subscription information: www.irs.gov. IR-2003-09. (01/23/03).

■ **IRS INCOME TAX MODIFICATIONS FOR 2002.** The IRS has announced new website features, reduced tax rates, and fewer forms to file.

■ **Free Electronic Filing:** For the first time, more than 60 percent of all taxpayers will be able to prepare and electronically file tax returns for free on the Internet. The IRS “free file” program is offered through private-sector partners and is available through www.irs.gov to those who qualify. Taxpayers can also monitor the progress of their tax refund through the IRS website.

■ **Reduced Tax Rates:** Most tax rates have decreased by one-half percent, and a new 10 percent rates applies to certain filers.

■ **Increased Credits:** The requirements for the Earned Income Tax Credit have been modified to exclude nontaxable income such as supplemental military pay for housing or combat. In addition, taxpayers who meet certain income guidelines may be able to take the retirement savings credit for qualified retirement savings contributions.

■ **Increased Deductions:** Taxpayers may be able to deduct up to \$3,000 for qualified tuition and fees paid for higher education. IR-2003-01 (01/03/03).

■ **MINNESOTA INCOME TAX MODIFICATIONS FOR 2002.** The Minnesota Department of Revenue has changed the following for the 2002 tax year:

■ **K-12 Education Credit:** Beginning in 2002 the K-12 Education Credit is limited to 75 percent

percent of allowable expenses.

■ **Federal Bonus Depreciation:** Minnesota law requires taxpayers to add back 80 percent of the Federal Bonus Depreciation authorized under the Job Creation and Worker Assistance Act of 2002 to their Minnesota return for years ending after September 10, 2001.

■ **Reduced Phone Service:** Citing budget cuts, the Department of Revenue has discontinued its toll-free tax help lines and reduced the hours that representatives are available to answer questions.

■ **Electronic Filing Required for Certain Return Preparers:** Any preparer who filed more than 100 Minnesota returns last year is required to electronically file all 2002 Minnesota returns. MN Dept. of Revenue News Release (01/07/03).

■ **DIVORCE DECREE CAN ALLOCATE TAX ON STOCK REDEMPTIONS.** Spouses can agree in the divorce or separation instrument that the redemption of stock in a corporation will be taxable to the transferor spouse, notwithstanding that the redemption might otherwise result in a constructive distribution to the nontransferor spouse under applicable tax laws. This is consistent with the policy of providing flexibility to spouses and former spouses on the structuring of their property transfers. Under the regulations, spouses can elect the special rule by expressly providing in a divorce or separation instrument their mutual intent concerning whether the redemption should be treated as a redemption distribution to the transferor spouse or to the nontransferor spouse. Treasury Decision 9035 (01/13/03).

■ **QUALIFIED NEUTRALS FOR ARBITRATION UNDER REV. PROC. 2002-67.** The IRS has selected 30 individuals (e.g., Paul Gutterman of the University of Minnesota) to serve as qualified neutrals available to taxpayers for arbitration under the provisions of Rev. Proc. 2002-67. This procedure gives individuals the chance to settle their cases through the fast-track dispute-resolution procedure, which requires binding arbitration for any issues not resolved during accelerated settlement negotiations. Announcement 2003-3 (Jan. 13, 2003).

LEGISLATION

■ **U.S.-SWISS INFORMATION EXCHANGE TREATY.** The U.S. and Swiss competent authorities on January 23 entered into a mutual agreement under the current Switzerland-United States income tax treaty. According to Treasury, the agreement seeks to facilitate “more effective tax information exchange” between the two countries. The Acting Treasury Secretary said the agreement is a “significant step” by the United States in ensuring that “no safe haven exists anywhere in the world for the funds associated with illicit activities, including tax evasion.” He said he anticipates “continuing progress” with Switzerland and other financial centers in combating illicit activities. See 2003 TNT 17-5 (01/27/03).

LOOKING AHEAD

■ **BUSH ECONOMIC PLAN.** The Treasury Department has issued a fact sheet outlining President Bush’s economic stimulus package. The President’s plan includes:

- Tax rate bracket changes to the following: 10 percent, 15 percent, 25 percent, 28 percent, 33 percent, and 35 percent.
- Implement a planned reduction in the “marriage penalty” during 2004 rather than in 2009.
- Increase the child tax credit from \$600 to \$1,000 per child.
- Increase the write-off expense limit from \$25,000 to \$75,000 for small business owners.
- Exclude dividends from gross income, and permit corporations that reinvest their taxed earnings to make an adjustment to the shareholders’ stock basis reflecting the taxed income the corporation retains. Pre-2002 earnings would not be eligible for the dividend exclusion. 2003 TNT 5-25 (01/07/03).

■ **RULES WOULD LIMIT DEFENSES TO IMPOSITION OF ACCURACY RELATED PENALTIES.** The IRS has proposed regulations that would limit the defenses available to the imposition of the accuracy-related penalty. The proposed regulations would prevent a taxpayer from relying on the opinion or advice of a tax advisor to satisfy the reasonable cause and good faith exception with respect to any underpayment if the position was not disclosed on a return. Further, the proposed regulations would not permit a taxpayer who engages in a reportable transaction to rely on the realistic possibility standard to avoid accuracy related penalty for negligence or disregard of rules or regulations if the position regarding the reportable transaction is contrary to a revenue ruling or notice. NPRM Reg-126016-01 (12/31/02).

■ **PROPOSED DECREASE IN CAPITAL GAINS TAX.** H.R. Bill 42, titled Capital Gains Tax Rate Reduction Act of 2003, was introduced in the House of Representative. It proposes to decrease the

10 percent capital gains rate to 5 percent and the 20 percent capital gains rate to 10 percent. H.R. 42 (01/21/03).

■ **EXPIRING TAX PROVISIONS.** The Joint Committee on Taxation has issued a listing of tax provisions that expired in 2002, or that will expire in 2003-2010. Joint Committee on Taxation, JCX-1-03 (01/07/03).

— MARK ASTLING

— KATHRYN SEDO

University of Minnesota Tax Clinic

TORTS & INSURANCE

JUDICIAL LAW

■ **CORPORATE DISSOLUTION; BAR TO TORT, CONTRACT CLAIMS.** Claims for negligence, products liability and breach of warranty were filed against corporations Jamar II and Walker Jamar. The companies moved to dismiss the lawsuits for insufficiency of process, claiming that as dissolved corporations, they can no longer be served. A trial judge appointed by the Minnesota Supreme Court to hear asbestos-related cases denied the motions to dismiss pursuant to the language of Minn. Stat. §302A.729 and 781 (1984).

Plaintiffs asserted that because their claims constitute “liabilities incurred during the dissolution proceedings,” the statute did not bar the assertion of the claims. The companies maintained that the claims did not fall within the requisite statutory definition.

The Minnesota Court of Appeals held the definition of “liabilities incurred” under Minn. Stat. §302A.781, subd. 3, (1984) encompassed only debts or claims that a corporation was legally obligated to pay at the time of the dissolution process, rather than unmatured tort and contract claims. The Minnesota Court of Appeals reversed the order of the district court denying the companies’ motion to dismiss for insufficiency of process. *Podvin v. Jamar Company, et al.*, C0-02-1075, C1-02-1182, C3-02-1183, C5-02-1184, C7-02-1185 (Minn. App. 01/14/03).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0301/c0021075.htm>

District court granted Hertz’s summary judgment motion, because Gunther was using the rental vehicle for personal reasons at the time of the accident, thus the personal insurance coverage provided through American Family was primary to Hertz’s commercial insurance policy.

The Minnesota Court of Appeals affirmed. According to Minn. Stat. §65B.47, subd. 1 (2002), American Family bore primary responsibility for the payment of no-fault benefits and the district court properly granted Hertz’s summary judgment motion. *American Family Insurance Company vs. The Hertz Corporation*, C2-02-901 (Minn. App. 01/14/03) (unpublished). <http://www.lawlibrary.state.mn.us/archive/ctapun/0301/901.htm>

■ **DOG BITES CANINE JUDGE: JUDGE SUES.** Appellant Joe “Kim” Clingan was in Minnesota to serve as chief judge during United States Police Canine Association regional certification trials held at Glencoe High School. Appellant was helping an Anoka County sheriff’s deputy with his dog. Clingan was bitten, lost a tooth and suffered a great deal of pain.

Clingan sued Anoka County, the Sheriff’s Department, and the police officer, alleging negligence and strict liability under Minnesota’s dog-bite statute. The district court granted summary judgment for the county, holding that the officer was exercising his professional judgment and discretion; therefore the actions were protected by the doctrine of official immunity. The Minnesota Court of Appeals affirmed. The facts showed that the officer exercised discretion such that immunity was appropriate. Moreover, because the officer was immune from liability, the county was protected by vicarious immunity protection as well. *Clingan v. Anoka County, et al.*, CX-02-1049 (Minn. App. 01/21/03) (unpublished). <http://www.lawlibrary.state.mn.us/archive/ctapun/0301/1049.htm>

■ **DRAM-SHOP NOTICE.** The Court of Appeals held that the notice requirement for dram-shop claims is satisfied by service of a complaint that contains the information required in dram-shop notices, as long as the complaint is served within the statutorily provided time period.

The dram-shop statute requires that a notice be served within 240 days after entering into an attorney-client relationship, and further that any complaint be commenced within two years after the injury.

The Court of Appeals refused to consider the liquor establishment’s argument that the 240-day requirement should commence from the time that the plaintiff retained a bankruptcy attorney for the purpose of filing bankruptcy, because this issue was raised only in the bar’s reply brief. Since the reply brief, pursuant to the rules, must be confined to a new matter raised in the brief of the respondent, it is beyond the scope of respondent’s brief, and not properly before the court.

A complaint which contains all the required information of the notice, served within the applicable limitations period, satisfies the notice requirement. *Wood v. Diamonds Sports Bar & Grill, Inc.*, C7-02-845 (Minn. App. 12/24/02).

<http://www.lawlibrary.state.mn.us/archive/ctappub/0212/c702845.htm>

■ **FRAUDULENTLY OBTAINED POLICY; PAYMENT RESPONSIBILITY.** Gangestad purchased residential property for \$25,000, and resold it to Mattice for \$60,000, which included a \$54,000 mortgage and \$6,000 in cash.

Immediately after the closing, Mattice quit-claimed the property back to Gangestad, paid Mattice \$6,000 cash, and assumed the mortgage payments. The transaction enabled Gangestad to use Mattice's credit to get a loan, in the form of a mortgage, from HomeComings.

Gangestad intentionally failed to record the deed so he wouldn't trigger the mortgage's Due on Sale clause. Gangestad's insurance agent submitted an application to Minnesota Property. The agent completed the application in Mattice's name, naming him as the owner and HomeComings as mortgagee. The agent forged Mattice's signature to falsely certify that Mattice was fee owner of the property. Minnesota Property issued a fire insurance policy naming Mattice as the insured and HomeComings as mortgagee.

One month after the policy was issued, the property was destroyed by arson. Mattice filed a claim and submitted a sworn statement that he was the fee owner of the property. HomeComings, as mortgagee, filed a claim under the policy's standard mortgage clause, which states that denial of a claim as to the policy's insurer would not apply to a valid claim by the policy's named mortgagee.

Mattice's claim was denied. Although Mattice had no knowledge that the insurance policy had been issued in his name, until after the fire, he fraudulently submitted a claim representing that he was fee owner of the property, when in fact he had quit-claimed the property back to Gangestad earlier. Thus, the policy was null and void as to Mattice.

HomeComings, however, argued that it was entitled to receive the insurance proceeds as an innocent mortgagee.

Minn. Stat. §65a.01, subd. 3, states that fire insurance policies must provide that: "no act or default of any person other than the mortgagee, before or during the term of the policy, shall render the policy void as to the mortgagee."

Relying on this statute, and in part on a 1926 case, the Court of Appeals found coverage in favor of the mortgagee. Even though the policy was obtained through the fraud of a person other than HomeComings before the term of the policy, it was not void as to HomeComings. The case of *Allen v. St. Paul Fire & Marine Ins. Co.*, 176 Minn. 146, 280 NW 816 (1926), stands for the proposition that a contract between the mortgagee and the insurer "begins and proceeds" when the contract between the insured and the insurer "fails, or if it never attaches." (emphasis in original).

Judge Randall issued a lengthy dissent. It was his opinion that the mortgagee's insurable interests are derivative through Mattice, and Mattice had absolutely no recognizable interest in any fire insurance policy, having no knowledge of the application until after the fact, and since his signature was forged on the application.

While it was true that both HomeComings, the mortgagee, and Minnesota Property, the insurer, were defrauded by Gangestad and his insurance agent, as between the two innocent parties, the law should fall on HomeComings, the mortgagee, because there was no fire insurance contract.

Judge Randall dismissed the argument that denying coverage would chill the interest of lenders to lend people money to buy homes and businesses. In the usual case, fraud is committed by the mortgagor, which does not, under Minnesota Statute, eliminate an innocent mortgagee from coverage. Secondly, lenders are able to protect themselves from this unique set of facts by asking the insured one question: "Do you have a fire insurance policy in place on this property on which you wish to borrow money from us, using the property as collateral?" If the insured answers yes, the lender simply gets verification and then the benefit of the standard mortgage clause. If Mattice had been an actual insured here and participated in the fraud to obtain the policy, then the mortgagee would have full protection under Minnesota Statute as an innocent mortgagee. On the other hand, if Mattice had answered, "no, I don't", the lender would require the fire insurance to be in place before a loan could be made. *Mattice, Respondent, HomeComings Financial Network, Inc., Respondent vs. Minnesota Property Insurance Placement, et al.*, C8-02-854 (Minn. App. 12/24/02). <http://www.lawlibrary.state.mn.us/archive/ctappub/0212/c802854.htm>

— TOM BAUDLER

— LEE BJORNDALE

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