



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

ADMINISTRATIVE LAW

JUDICIAL LAW

■ **NOTICE.** The Department of Public Safety mailed a notice and order of revocation to appellant Plocher on May 15, 2003, that revoked his driver's license. The notice advised Plocher that he had the right to petition for judicial review within 30 days from receiving the notice. By statute, a mailed notice of revocation is deemed received three days after mailing, but the notice did not advise the licensee of this provision. Plocher received the notice on May 20, 2003, and filed his appeal on June 18, 2003. The district court determined that the appeal had to be filed by June 17, 2003, and dismissed for lack of jurisdiction. The Court of Appeals reversed, holding that the notice was actively misleading because it did not advise the licensee a petition had to be filed 33 days from mailing but rather stated that it had to be filed 30 days from receipt of the notice. The court found Plocher was denied due process of law since he relied on the commissioner's statement in the notice, even though he could have learned that the statement was erroneous by reading the statutes. *Plocher v. Commissioner of Public Safety*, A03-1572, 681 N.W.2d 698 (Minn. App. 07/29/04).

■ **ADMINISTRATIVE LAW 101.** AAA Striping Service Co. challenged the state's classification of certain of AAA's employees under Minnesota's prevailing wage law. After entering into a stipulation with the state (that required the payment of back wages), AAA initiated a declaratory judgment action in district court against the state seeking damages and injunctive relief. Because the Court of Appeals could not identify any quasijudicial action by the state (the classification was a policy decision), it determined that a *certiorari* appeal was not available and therefore the district court had jurisdiction to hear the declaratory judgment action. The court held that the doctrine of primary jurisdiction (under which the courts defer to agency expertise) did not apply because there was no agency process to defer to, and the parties had not raised the doctrine. Similarly, the court declined to apply the doctrine of exhaustion of administrative remedies because the state did not directly initiate a contested case action against AAA that would have allowed it to challenge the classification of its employees. AAA argued that the state was required to engage in some administrative process in classifying employees. The court agreed and held that as a matter of procedural due process the agency must engage in rulemaking (as contemplated by its own rule) or make a contested case proceeding available when requested by an aggrieved party. The court also found conflicting facts in the record that precluded summary judgment and returned the case to district court for fact-finding. Finally, the court held that AAA's equitable estoppel claim (based on a letter from an assistant attorney general) should not have been denied because of the existence of genuine issues as to material facts in the record. *AAA Striping Service Co. v. MDOT*, A03-622, 681 N.W.2d 706 (Minn. App. 06/29/04).

■ **UNPROFESSIONAL CONDUCT.** The Supreme Court in July decided that the use of "runners" or "cappers" by a chiropractor to obtain patients does not constitute unprofessional conduct "*per se*" where there is no evidence in the record of an industry standard in that regard. Nor did the record support a conclusion that the use of runners was unethical, deceptive or harmful to the public where no evidence was presented concerning the contacts between runners and patients. *Pietsch v. Minnesota Bd. of Chiropractic Examiners*, C6-02-2117, 683 N.W.2d 303 (Minn. 07/22/04)

■ **APPEAL DEADLINE.** The commissioner of human services disqualified a chemical-dependency counselor from providing direct contact services due to his criminal convictions. The counselor (Hickman) requested reconsideration of the decision which was denied by the commissioner in a letter that stated that it was a final decision that could be appealed to the Court of Appeals within 60 days. Rather than appeal, Hickman sent a second request for reconsideration to the commissioner, which was not authorized in statute or rule. The request was denied again and Hickman then filed a *certiorari* appeal. The Court of Appeals dismissed because the 60-day appeal period from the commissioner's first order denying reconsideration had expired. The court noted that the first denial was a final decision with immediate consequences and the filing of a second request (and the agency's second decision) did not extend the 60-day appeal period from the original decision. *Hickman v. Commissioner of Human Services*, A04-523, 682 N.W.2d 697 (Minn. App. 07/20/04).

■ **AGENCY AUTHORITY.** The Supreme Court held that the Metropolitan Council had statutory authority to require a city to modify its comprehensive plan when the plan contains a substantial departure from the Council's regional plans. The statute governing appellate review of the agency decision modified the traditional scope of review by providing that the court must not give preference to either the administrative law judge report or the Council's final decision. The statute also provides that the court's decision must be based on a preponderance of the evidence. In this case, the ALJ and the Council had found that the Council had the authority to approve comprehensive plans and that decision was affirmed by the Court of Appeals. The Supreme Court also found by a preponderance of the evidence that Lake Elmo's comprehensive plan, that called for less density, had a substantial impact on and was a substantial departure from Council system plans. *City of Lake Elmo v. Metropolitan Council*, A03-458, 685 N.W.2d 1 (Minn. 08/05/04)

■ **CASE-BY-CASE DECISION MAKING.** The Court of Appeals affirmed a decision by the commissioner of commerce that withdrew

approval of an insurer's credit insurance rates. The court held that the determination that the rates were "excessive in relation to benefits," as set out in statute, could properly be done on a case-by-case basis and did not constitute unpromulgated rulemaking. The court also noted that adoption of an ALJ's recommended decision without change by an agency was not improper where the commissioner also stated that his order was based upon all the files, records and proceedings. *In re Matter of Universal Underwriters Life Insurance Co.*, A04-184, 685 N.W.2d 44 (Minn. App. 08/10/04).

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CIVIL LITIGATION

JUDICIAL LAW

■ **PERSONAL JURISDICTION.** In separate cases during the past month, both the Court of Appeals and the Supreme Court have found insufficient contacts for Minnesota courts to assert personal jurisdiction.

In *Lorix v. Crompton Corporation*, 680 N.W. 2d 574 (Minn. App. 2004), the Court of Appeals reversed the district court's denial of defendants' motion to dismiss for lack of personal jurisdiction. The class action complaint alleged that several defendants had conspired to fix the prices of rubber-processing products. Suit was brought in Minnesota district court on behalf of a class of all persons who purchased tires in the state of Minnesota that were manufactured using the rubber-processing chemicals that defendants sold. The affiliated defendants were not licensed to do business in Minnesota, nor did they have any employees, sales agents, or business operations in Minnesota. The defendants moved to dismiss plaintiffs' claim on the ground that the Minnesota district court lacked personal jurisdiction over defendants. The district court denied defendants' motion and defendants appealed.

In explaining Minnesota's use of the five-factor test to determine whether the exercise of personal jurisdiction is proper, the court noted a distinction between specific and general personal jurisdiction, but found that the district court did not indicate which type of jurisdiction it found applicable. Specific jurisdiction may exist when the cause of action arises out of or is actually related to the defendants' contacts with the forum and may be the result of a single contact. General jurisdiction exists when a defendant has "continuous and systematic" contacts with the forum. The Court of Appeals held that plaintiff did not show that defendants' out-of-state sales to tire manufacturers showed any intent or purpose to serve the Minnesota market. Finally, the Court of Appeals explained that there may be jurisdiction over a defendant even for causes of action unrelated to the defendants' contacts with the forum state if the contacts are so substantial and of such a nature as to justify suit against it. However, defendants' sales to companies in Minnesota were not substantial enough, nor were defendants' website contacts sufficient to find "continuous and systematic" contacts with Minnesota to form the basis for exercise of general jurisdiction.

In *Juelich v. Yamazaki Mazak Optonics Corporation*, 670 N.W. 2d 11 (Minn. App. 2003), the Supreme Court affirmed the Court of Appeals, which had affirmed the district court's granting of defendants' motion to dismiss for lack of personal jurisdiction.

Plaintiff was injured when he was maintaining a scissor-lift table manufactured by defendant Meikikou. Plaintiff sued Meikikou and other manufacturers and distributors that had incorporated the scissor-lift table into a laser-cutting machine, which was then sold. The facts established that Meikikou, a Japanese corporation, manufactured the table at its factory in Japan and sold the table to its distributor. The evidence further established that the laser-cutting machine was also manufactured in Japan, but was eventually sold to a distributor in Illinois, which eventually sold the system to a Minnesota supplier and eventually to plaintiff's employer. Finally, the evidence established that 122 of these laser-cutting machines had been delivered to the United States, with 17 of them ending up in Minnesota. The evidence was that defendant Meikikou knew that the systems would be marketed to the United States. Therefore, defendant Meikikou provided English warning labels, its operations manual was translated into English, and it maintained an English language website.

The Supreme Court analyzed the defendant's contacts by use of the five-factor test: 1) the quantity of contacts with the forum state; 2) the nature and quality of those contacts; 3) the connection of the cause of action with these contacts; 4) the interest of the state providing a forum; and 5) the convenience of the parties. With respect to each factor the Court found that the contacts did not weigh significantly in favor of exercising jurisdiction.

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EMPLOYMENT & LABOR LAW

JUDICIAL LAW

■ **LABOR UNIONS.** The 8th Circuit Court of Appeals upheld an arbitration award divesting a union of jurisdiction over most of the work bundling insertions for the Sunday editions of the *St. Paul Pioneer Press* newspaper. It affirmed the arbitrator's decision that, under an amendment to the collective bargaining agreement, the work could be assigned to home delivery carriers, who are independent contractors and not members of the union. It also reasoned that the union "waived" a provision in the bargaining agreement calling for interpretation of the contract to be subject initially to a joint management-labor committee. *Minneapolis-St. Paul Mailers*

Union Local #4 v. Northwest Publications, Inc., 379 F.3d 502 (8th Cir. 2004).

In another St. Paul union case, the Minnesota Court of Appeals in **St. Paul Police Officers Federation v. City of St. Paul**, 2004 WL 1381696 (Minn. App. 2004) (unpublished) held that a union could not set aside a mediated settlement agreement following an arbitration decision favorable to the union. After an arbitration award limited a disciplinary action against a police officer, the union and city entered into a settlement agreement in a mediation. The union later sought to rescind the agreement after the city required the officer to pass a fitness-for-duty examination to return to work. The appellate court, affirming the Ramsey County District Court, held that the union could not avoid the settlement agreement on grounds that it was too indefinite or vague. Because the mediated agreement did not address the fitness issues, it could not be raised as a basis for challenging the agreement.

The time period for filing a duty of unfair representation charge by public sector employees is 90 days. In **Allen v. Hennepin County**, 680 N.W.2d 560 (Minn. App. 2004), the appellate court ruled that a 90-day period applies to governmental employees under the Public Employees Labor Relations Act (PELRA), Minn. Stat. §179A.01, *et seq.*, rather than the 180-day time limit under federal law.

The National Labor Relations Act (NLRA) preempts state breach of contract and tort claims by an employer against a former employee, labor union, and union official agent arising out of a falsified employment application by the employee. In **Wright Electric, Inc. v. Oulette**, 2004 WL 2049794 (Minn. App. 2004), a union and business agent allegedly instructed a union member to obtain a job at a company, omit his union affiliation, and then seek to organize the employees there to join the union. When the falsification was discovered, the employee was fired and the company sued him, the union, and the union's business agent on breach of contract and tort claims. The appellate court held that various claims of the employer could not be pursued in state court because the employee's actions were "arguably covered" by the act and therefore preempted.

A determination that a union committed a breach of its duty of fair representation by not challenging the discharge of an employee formed a proper basis for upholding a \$27,800 damage award for a union member who was fired after he missed work due to inability to arrange daycare. In **Johnson v. McQuay International, Inc.**, 2004 WL 1774699 (Minn. App. 2004) (unpublished); the court affirmed a judgment of the Steele County District Court against the employee. Although the union was not held liable, it committed a breach of duty, which constituted an essential jurisdictional ground for the wrongful termination claim against the employer.

Two school employees were denied the opportunity to arbitrate their claims because they acted untimely. In **In Re The Matter of the Grievance Arbitration Between AFSCME Council 96 and Ind. Sch. Dist. No. 704**, 2004 WL 1834095 (Minn. App. 2004) (unpublished), a labor union challenged a school district's refusal to allow a school secretary to use her seniority to avert a seasonal lay-off. Because the union waited nearly a year to seek to compel arbitration, it was barred due to untimeliness. In **Ceolo v. Torah Academy**, 2004 WL 18284121 (Minn. App. 2004) (unpublished), a teacher at a religious school was disallowed an arbitration proceeding to contest the school's refusal to allow him to rescind his resignation because his grievance was filed two days too late. In both cases, the court held that the issue of timeliness could be decided by the trial courts as a matter of law, rather than by the arbitrators.

■ "AT WILL" EMPLOYMENT. A nonunion member could not avoid a compulsory arbitration agreement because of a clause alleviating one-half of the arbitrated expenses to the employee in **Faber v. Menard's, Inc.**, 367 F.3d 1048 (8th Cir. 2004). Reversing the trial court, the 8th Circuit held that the fee allocation provision was not *per se* unreasonable and remanded to determine whether it was "cost-prohibitive" for this particular employee, based on his own financial circumstances. It also directed the trial court to sever the clause if it was improper, require the employer to pay the arbitration expenses, and allow the arbitrator to proceed.

A veteran municipal city clerk/treasurer was deemed an "at will" employee who lacked any constitutional right to protect her job in **Peisch v. City of Pequot Lakes**, 2004 WL 1834152 (Minn.App. 2004) (unpublished). The "progressive discipline" provision of the City Code did not constitute a legally enforceable "expectation" of continued employment that could give the employee due process rights prior to termination. Moreover, the city did accord her a couple of hearings, which satisfied any due process requirements that could be applicable.

An employee of a county agriculture program also was deemed an "at will" employee by the 8th Circuit in **Massey v. United States**, 2004 WL 1885255 (8th Cir. 2004). Fired after irregularities were disclosed in an agricultural program, a technician sued for violation of due process rights. However, the 8th Circuit found that the employee, who worked at the "pleasure" of the county executive, had no enforceable constitutional "expectation" of continued employment and, therefore, was not entitled to any due process rights prior to termination.

■ UNEMPLOYMENT COMPENSATION. The new statutory definition of employment "misconduct" was addressed in the recent appellate court ruling. The date for determining which definition of employee "misconduct" applies in unemployment compensation proceedings is the date of discharge, rather than the date the wrongdoing occurred. In **Brown v. National American University**, 2004 WL 2049968 (Minn. App. 2004), the court held that the statutory amendment as of August 1, 2003, applies to all discharges after that date, regardless when the underlying conduct took place.

In **Grivna v. Riverside Family Dental, P.A.**, 2004 WL 2049946 (Minn. App. 2004) (unpublished), the court held that the insertion of the "single incident" exception to disqualification from benefits applied to an employee who questioned her employer's reaction over a pay dispute. The solitary event falls within the new provision of the law that allows benefits for an employee fired due to "a single incident that does not have a significant adverse impact on the employer."

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ENVIRONMENTAL LAW

RULEMAKING

■ **CERCLA; LANDOWNER DEFENSES; ALL APPROPRIATE INQUIRIES.** On August 26, 2004, the U.S. Environmental Protection Agency published its proposed rule concerning standards and practices for all appropriate inquiries under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§9601 *et seq.* ("CERCLA"). The proposed rule would establish regulatory requirements for the "all appropriate inquiries" element of the landowner liability protections available under CERCLA. The comment period ends on October 25, 2004. Standards and Practices for All Appropriate Inquiries, 69 *Fed. Reg.* 52541 (2004) (to be codified at 40 C.F.R. 312) (proposed August 26, 2004).

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FEDERAL PRACTICE

JUDICIAL LAW

■ **AMENDMENT OF COMPLAINT FOLLOWING VERDICT; FED. R. CIV. P. 15(B) AND 54(C).** Plaintiff sued her former employer in the Northern District of Iowa under Title VII, but did not allege parallel claims under Iowa law. The jury awarded the plaintiff more than \$850,000 in compensatory damages and back pay, and an additional \$650,000 in punitive damages. Because the amounts awarded were well in excess of Title VII's \$300,000 damage limit, the plaintiff moved to amend her complaint to include statutory claims under Iowa law, arguing that the legal standards for both sets of claims were identical. The district court initially denied the plaintiff's motion, but then granted the motion on reconsideration, allocating all of the compensatory damages to the Iowa claims (which had no damages cap), and allocating a reduced punitive damage award of \$300,000 to the Title VII claim. Not surprisingly, the defendant appealed.

The 8th Circuit panel (which included Judge Magnuson sitting by designation) held that a district court does not abuse its discretion in allowing a post-verdict amendment under Fed. R. Civ. P. 15(b) so long as "the amendment seeks to raise an issue not inconsistent with the position taken by the nonmoving party earlier in the proceedings." Because it was undisputed that the legal standards applicable to Title VII and the Iowa state law claims were the same, the panel found no abuse of discretion.

The panel also found no abuse of discretion in the district court's decision to permit the amendment under Fed. R. Civ. P. 54(c), which provides that "every final judgment shall grant the relief to which the party ... is entitled even if the party has not demanded such relief in its pleadings," absent any evidence that the defendant had been prejudiced by the plaintiff's failure to demand that relief at an earlier stage in the litigation. *Baker v. John Morrell & Co.*, 2004 WL 1948685 (8th Cir. 2004).

■ **PUNITIVE DAMAGES; DUE PROCESS.** The 8th Circuit continues to refine the rules governing punitive damages in the aftermath of *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003).

In the first of two recent cases, a employee sued his former employer under 42 U.S.C. §1981, and was awarded more than \$6 million in punitive damages on the wrongful termination claim, and an additional \$6 million in punitive damages on his hostile work environment claim. The district court remitted the punitive damages for wrongful termination to \$500,000, but left the hostile work environment award untouched. The 8th Circuit relied on a number of factors, including the disparity between the \$300,000 cap on punitive damages under Title VII and the award of more than \$6 million under §1981, as well as the fact that the plaintiff had been awarded more than \$600,000 in compensatory damages on his hostile work environment claim in finding that "due process requires that the punitive damages award ... be remitted to \$600,000." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004).

In a second case, the 8th Circuit reduced a jury award of \$18 million in punitive damages in a business-related tort case to \$7 million (twice the amount of compensatory damages awarded), finding that any larger amount would "violate notions of fundamental fairness." *Conseco Finance Servicing Corp. v. North American Mortgage Co.*, 2004 WL 1907796 (8th Cir. 2004).

■ **OTHER NOTEWORTHY DECISIONS.** An 8th Circuit panel granted a petition for rehearing and reversed its previous affirmance of an award of summary judgment to the defendant-employer by Judge Magnuson, finding that an "objective observer" could find that the plaintiff's work environment was "objectively hostile" in violation of Title VII. *Jackson v. Flint Ink North American Corp.*, 94 Fair Empl. Prac. Cases 549 (2004 WL 1908107).

Judge Montgomery denied a spoliation motion based on the plaintiff's destruction of evidence, finding that the defendant had not been prejudiced by the loss of the evidence, and that the plaintiff neither "knew or should have known" that litigation was foreseeable at the time it disposed of the disputed evidence. *Blandin Paper Co. v. J & J Industrial Sales, Inc.*, 2004 WL 1946388 (D. Minn. 09/02/04).

Judge Frank affirmed an order by Magistrate Judge Boylan imposing sanctions for plaintiff's failure to comply with the scheduling order, noting his "utter dismay" at plaintiffs' conduct. *Arnold v. Cargill, Inc.*, 2004 WL 1853149 (D. Minn. 08/12/04).

Judge Frank declined to apply collateral estoppel in an employment discrimination case to the findings made in the course of the plaintiff's request for unemployment benefits, finding that "public policy requires the courts to consider claims of racial discrimination when alleged rather than relying on determinations that were not entirely focused on the issue." *Santos Vargas v. Northwest Area Foundation*, 2004 WL 1834580 (D. Minn. 08/13/04).

Judge Doty *sua sponte* remitted a jury award of \$75,000 to \$1 in an excessive force case, based on the jury's determination that the use of excessive force "was not a direct cause of injury to the plaintiff." *Corpus v. Bennett*, 2004 WL 1908249 (D. Minn. 05/25/04).

Judge Tunheim remanded an action brought by a class of European plaintiffs to the Minnesota state courts, rejecting the defendant's

argument that the “federal common law of foreign relations” provided federal question jurisdiction. However, plaintiffs’ request for costs pursuant to 28 U.S.C. §1447(c) was denied on the basis that the law on which the defendant relied in seeking removal had “not been conclusively decided.” *O’Neill v. St. Jude Medical, Inc.*, 2004 WL 1765335 (D. Minn. 08/05/04).

Judge Magnuson struck one defendant’s summary judgment reply memorandum as sanction for failure to comply with the motion deadlines in the court’s scheduling order. *C.H. Robinson Co. v. Zurich American Ins. Co.*, 2004 WL 1765320 (D. Minn. 08/05/04).

The 8th Circuit affirmed Judge Doty’s grant on judgment as a matter of law for an employer in a Title VII case. *Wilson v. Brinker Int’l, Inc.*, 94 Fair Empl. Prac. Cases 549 (2004 WL 1933345)

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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **LICENSED TRADEMARKS; ROYALTY; INFRINGEMENT PRINCIPLES.** In a recent contract case, Judge Magnuson used infringement-damage principles in determining a reasonable royalty A&L Labs, Inc. owed Bou-Matic for its use of licensed trademarks. A&L obtained a license from Bou-Matic to use certain trademarks, subject to a reasonable royalty. The amount of the reasonable royalty was not specified, however, in the license. The court used the *Georgia Pacific* factors — a well-established measure of royalties in patent and trademark infringement cases — as a guide to determine the reasonable royalty due under the license in this case.

Guided by these factors, the court determined a 3 percent royalty was reasonable despite commission rates of 8.5 percent and 5 percent contained in the license. The court reasoned that the parties would have valued the whole Bou-Matic brand at 3.5 percent — the difference between the two commission rates. The court then concluded that Bou-Matic’s trademarks are worth less than the brand as a whole and set the royalty at 3 percent. *A&L Labs., Inc. v. Bou-Matic, LLC*, 2004 U.S. Dist. LEXIS 15062 (D. Minn. 08/02/04).

■ **PATENT INFRINGEMENT; STANDING TO SUE; JURISDICTION.** The U.S. District Court for the District of Minnesota recently highlighted an important distinction between subject-matter jurisdiction and personal jurisdiction. The court dismissed DB Industries as an improper plaintiff because DB Industries did not have standing to sue for patent infringement because it neither owns the patent nor is a licensee of the patent. Readers are reminded that only the holder of legal title to a patent at the time of infringement has standing to sue for damages. In some circumstances, an exclusive licensee may also have standing to sue. DB Industries, the only Minnesota party, was neither an owner nor a licensee.

Despite dismissing the only Minnesota party, the Court upheld personal jurisdiction and venue over B&O. In determining whether exercising personal jurisdiction over B&O is reasonable and fair, the court considers, among other things, Minnesota’s interest in providing a forum for its residents. Despite neither remaining party being from Minnesota, the court found this factor favored jurisdiction. Minnesota has an interest in discouraging injuries that occur within the state, reasoned the court. Minnesota’s interest in commerce and scientific development are also impacted when a party infringes on a patent and as such stifles creative development and diverts instate sales. Finally, the court found that DB Industries, while no longer in the case, is a Minnesota resident that has an interest in the outcome of the litigation as it owns Sinco, the owner of the patent allegedly infringed. *DB Indus., Inc. v. B&O Mfg., Inc.*, 2004 U.S. Dist. LEXIS 15208 (D. Minn. 08/04/04),

■ **PATENTS; STRUCTURE AND FUNCTION; CLASS OF STRUCTURES.** The Court of Appeals for the Federal Circuit held that “corresponding structure” to a claimed function can include a class of structures. The patent statute allows a patentee to claim a means for performing a function as long as the patent document discloses structure that performs the claimed function and links it to that function. The appellate court found that in construing a means-plus-function claim limitation, “corresponding structure” might include a class of structures that perform the claimed function. “That the disputed term is not limited to a single structure does not disqualify it as a corresponding structure, as long as the class of structures is identifiable by a person of ordinary skill in the art,” said the appellate court. The district court erred in excluding a class of circuits from the corresponding structure to the claimed function because persons skilled in circuit design would recognize that the class of circuits perform the claimed function. *Linear Tech. Corp v. Impala Linear Corp.*, 2004 U.S. App. LEXIS 17108 (Fed. Cir. 08/17/04).

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JUVENILE LAW

JUDICIAL LAW

■ **APPELLATE PROCEDURE; JUVENILE PROTECTION PROCEEDINGS V. FAMILY COURT CUSTODY PROCEEDINGS; GUARDIANS AD LITEM.** In a special term opinion, the Minnesota Court of Appeals discussed the respective roles of guardian ad litem and custody evaluator and made important distinctions in appellate procedures in juvenile protection proceedings and family court custody proceedings. The district court, in a divorce and custody dispute, appointed a Ph.D. psychologist as a custody evaluator for the minor children of the parties, and ordered that this expert be made a party to the proceeding. Following the court’s award of joint legal custody, one of the parties filed an appeal.

The husband moved to dismiss the appeal on the ground that the wife failed to timely serve the notice of appeal on the court-

appointed expert who had been made a party. The Court of Appeals denied the motion to dismiss, distinguishing the appointment of a guardian ad litem in a family court child custody proceeding, which is in most cases permissive, and noting that the guardian ad litem in such a proceeding is not automatically a party but may be designated as such in the order of appointment.

In response to the husband's argument that it was a fatal jurisdictional defect for the guardian ad litem not to be served with a notice of appeal, the Court of Appeals held that a court-appointed custody evaluator who is not designated as a guardian ad litem cannot be a *de facto* guardian ad litem. To hold otherwise would undermine the General Rules of Practice. Because of the guardian ad litem's role as the advocate for the child, the guardian may be an "adverse" party to an appeal from a family court custody determination. A custody evaluator, by contrast, does not have the same role as an advocate for the child.

Comparing family court and juvenile court proceedings, the appellate court observed that in juvenile protection proceedings, timely service of the notice of appeal on all parties is a jurisdictional requirement, regardless of whether the party is "adverse" to the appeal. Under the Rules of Civil Appellate Procedure, which applied in this appeal because it arose from a family court custody matter, service of the notice of appeal on a party within the appeal period is only required if the party is an adverse party. Even if designated as a party, a custody evaluator, lacking the guardian ad litem's role as an advocate for the child, cannot be a "adverse" party. The appellant's failure to serve the notice of appeal on the custody evaluator in this case is not a jurisdictional defect warranting dismissal. Because neither of the parties challenged the district court's decision to make this custody evaluator a party, the court did not reach the issue of whether the district court was authorized to make a custody evaluator a party to the proceeding. **Ceppek v. Ceppek**, A04-197 (Minn. App. 08/03/04).

■ **CHILD PROTECTION; INDIAN CHILD WELFARE ACT; PERMANENCY.** In an unpublished decision, the Court of Appeals addressed a rather complicated child protection matter which involved the interplay of the Indian Child Welfare Act ("ICWA") and Minnesota's permanency statute. The case involved a 13-year-old Native American child and an enrolled member of the Grand Portage Band of Chippewa (hereinafter "the Band"). There had been significant allegations of abuse and neglect of this child by his mother, who was a Band member. The county became involved on several occasions, with case plans being put in place and several CHIPS petitions being filed. On numerous occasions, the child was returned home, only for problems to arise once again.

The district court, ruling on the county's petition for the child to be placed in long-term foster care as a child in need of protection or services (CHIPS), denied the petition for long-term foster care and adjudicated the child as in need of protection or services under the statute. The court reaffirmed an interim order providing for the placement of the child in a foster home pending disposition and ordered that a case plan be prepared.

The Court of Appeals denied the mother's motion that the court erred in entering a CHIPS adjudication when the county had not requested a CHIPS adjudication. The court found the mother had expressly consented to the inclusion of the CHIPS issue in the litigation and could not now claim to be prejudiced. The court also rejected the mother's argument that the county's failure to provide her with a written out-of-home placement plan warranted reversal of the adjudication. Held, although a placement plan is required in every case, the absence of a placement plan does not warrant reversal when case-planning efforts have been an ongoing concern of the county, the parent's lack of cooperation is responsible for the county's failure to construct the plan, and the evidence clearly showed that the parent would not be aided by a written placement plan.

The court did agree with the mother that the county's failure to meet the child's educational needs, through no fault of her own, did not provide a basis for a CHIPS determination in a case involving removal of the child from the home. The statute for a CHIPS determination requires a showing that neglect was attributable to the parent's conduct. However, there was more than ample clear and convincing evidence that this child lacked the special care his condition required because the mother was unwilling or unable to provide that care. Thus, the CHIPS adjudication was affirmed.

The appellate court further declined to reverse the CHIPS adjudication on grounds that the county and the Band failed to provide needed remedial services and rehabilitative programs required under the ICWA. Finding that the county and the Band worked together over two years to develop two case plans and to provide the mother numerous and varied services, the Court of Appeals focused on the efforts made throughout the course of the proceedings and determined that the failure to provide services between March and June of 2003 was insignificant in light of the efforts otherwise made.

The Band itself, a Respondent by virtue of its support of the county's petition, challenged the denial of the petition for long-term foster care, arguing that because the child was 13 and had been in foster care for more than 12 months, the trial court lacked the discretion to order nonpermanent out-of-home placement. The Court of Appeals agreed with that analysis. It found that the court's placement options were limited to either returning the child home or ordering one of the permanent placement options provided in the statute.

Although the district court therefore erred by failing to make a permanency determination, it did not err in denying the petition for long-term foster care since there were no efforts made to locate an adoptive family, as would be prerequisite to an order for long-term foster care. The Court of Appeals therefore reversed the order placing the child in foster care for an indeterminate period of time pending a disposition hearing, and remanded the matter for a permanency determination consistent with Minnesota's permanency statute. **In the Matter of the Child of: E.M.D., Parent**, A04-157 (Minn. App. 08/03/04).

■ **DELINQUENCY; CRIMINAL SEXUAL CONDUCT; EVIDENCE; "REASONABLE JUVENILE."** Where the appellant juvenile argued that there was not sufficient evidence to prove that the complainant did not consent to the sexual contact he was alleged to have committed, the Court of Appeals declined to accept that a reasonable juvenile standard should apply to the element of consent in a criminal

sexual conduct case. Observing that courts have used a reasonable juvenile standard when determining whether a juvenile's conduct was criminally reckless or negligent, the court found no caselaw or statutory authority in Minnesota to support the appellant's position that a reasonable juvenile standard should apply to the element of consent in a criminal sexual conduct case. ***In the Matter of the Welfare of: A.A.M., Child***, A03-1793 (Minn. App. 08/17/04).

■ **TERMINATION OF RIGHTS; DUE PROCESS.** Where the appellant father challenged the district court's order terminating his parental rights to his two children, he argued that his due process rights were violated when he was not made a party to the proceeding as to one of the children until the day of trial.

The Court of Appeals found that the Minnesota Rules of Juvenile Procedure expressly provide that a child's presumed father is a party to a TPR proceeding regarding the child. Service is not necessary to make that person a party to a TPR proceeding. Here, the appellant was this child's presumed father because the child resided with him from the time she was born until they moved to Minnesota in 2001. Therefore, the appellant father was a party to the proceeding as it related to that petition and had standing to exercise his rights as a party.

The fact that he was not served with a summons and the TPR petition was of no consequence; under the Minnesota Rules of Juvenile Procedure, service is waived by voluntary appearance in court. By appearing at the admit/deny hearing and entering a denial to the petition regarding this particular child, the appellant father voluntarily appeared in court with regard to the petition, thereby waiving service of process. ***In the Matter of the Children of: M.T. and H.V. and In the Matter of the Children of M.T. and D.H.H.***, A04-64 (Minn. App. 08/24/04).

■ **ASSISTED REPRODUCTIVE TECHNOLOGY; SURROGACY; CUSTODY; TENNESSEE.** Where the biological father brought an action claiming primary custody of triplets born to a woman via donor eggs, the Tennessee Supreme Court held that the children should remain with the mother because she is their legal mother, despite the lack of a genetic link with the children. Following the majority trend across the country, the Court looked to the parties' intentions, as were made clear in documents they signed with the *in vitro* fertilization facility. ***In re C.K.G.***, M2003-01320-COA-R3-JV (Tenn. 06/22/04).

■ **SECOND PARENT STATUS; LESBIAN COUPLE; CALIFORNIA.** In a dispute between a lesbian couple as to a claim to second parent status, the California Court of Appeals held that a gender neutral application of the Uniform Parentage Act's ("UPA") presumption of paternity would support a woman's claim to second parent status with respect to the child born to her former same-sex partner during their relationship. That appellate court held that this second parent must rely on the paternity provision because she is neither the mother nor the adoptive parent of the child, had received the child into her home, and she held it out as her own during the parties' relationship.

In considering the validity of a prebirth judgment in this case, the court determined, as a matter of first impression, that the family court had fundamental subject matter jurisdiction to determine whether the partner was the child's legal parent. However, it lacked authority under the UPA to enter a judgment of parentage based on nothing more than the parties' stipulation. In other words, it was improper for the court to make this determination prior to the child actually being born and simply relying on the parties' executed agreements for a prebirth paternity/maternity determination. Rather, the parties had to proceed under the parentage presumptions of the UPA with a "paternity action" after the child was born.

While Minnesota has enacted parts of the Uniform Parentage Act, this case may have some applicability to assisted reproductive technology cases involving gestational carriers where prebirth maternity and paternity determinations are sought. ***Kristine Reneh v. Lisa Ann R.***, No. B167799 (Cal. Ct. App. 06/30/04).

— GARY A. DEBELE
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REAL PROPERTY

JUDICIAL LAW

■ **COMPREHENSIVE PLANS.** The Supreme Court has resolved a long-standing dispute between the city of Lake Elmo (city) and the Metropolitan Council (Council) over planned population densities in the city. The Council adopted a resolution directing the city to modify its comprehensive plan to allow for greater population densities. An administrative law judge (ALJ) concluded that the Council's resolution was proper and the Court of Appeals upheld the Council's decision in all material respects. The Supreme Court affirmed. The Court clarified that in reviewing a contested appeal of a Council decision, neither the ALJ nor the Council's decision should be entitled to deference. Additionally, the Court held that given the broad statutory authority of the Council to create a regional plan for growth, the Council has the authority to compel that the city's comprehensive plan conform to the Council's predictions and plans for metropolitan population growth, despite the city's protests that the Council was usurping its role as development planner within its boundaries. In the end, the Court concluded that a preponderance of the evidence supported the Council's conclusion that the city's comprehensive plan may substantially impact or substantially depart from the Council's regional plan. More specifically, the Court agreed that the city's land use planning would impact the Council's sewer and transportation planning as well as overly burden neighboring communities. ***City of Lake Elmo v. Metropolitan Council***, A03-458 (Minn. 08/05/04)

■ **EMINENT DOMAIN.** Xcel Energy has an electrical substation in downtown Minneapolis, which was located near the planned light rail transit line (LRT). Xcel negotiated for some time with the Minnesota Department of Transportation (MNDOT) and the Metropolitan Council (Council) for an agreement to allow access to the substation for maintenance, which never resulted in either an agreement or

an express refusal to allow access. Contending that it would be deprived of access to its substation, Xcel petitioned for mandamus relief directing MNDOT and the Council to commence eminent domain proceedings for the taking of Xcel's access and the diminution of the property's market value. The district court dismissed the complaint. The Court of Appeals reversed, holding that fact issues existed as to whether Xcel's access was obstructed. The Supreme Court reversed the Court of Appeals. The Court held that there was insufficient evidence in the record to rebut MNDOT and the Council's evidence that it was physically possible to access the substation for repairs. Accordingly, a claim for deprivation of access was premature and speculative, preventing the sought-after mandamus relief. Xcel's claim for regulatory taking based on the absence of an agreement for future access was likewise premature because there was no refusal to allow access and, in fact, Xcel had not even required access by that point. **Northern States Power Co. v. Minnesota Metropolitan Council**, C4-03-67 (Minn. 08/05/04).

LEGISLATION

On August 1, 2004, a number of statutory amendments relating to real property and land use took effect, including:

■ **NONCONFORMING USES:** The Legislature altered its prior statutory prohibition on the repair or replacement of a nonconforming use that is destroyed by fire or other peril to the extent of greater than 50 percent of its market value. Under the amendment, such a nonconforming use may be continued and may be replaced or restored if a building permit is applied for within 180 days of the date damage occurred. Minn. Stat. §462.357, subd. 1e.

■ **SELLER'S DISCLOSURE:** A seller of residential real property must before signing a purchase agreement disclose all material facts of which the seller is aware that could adversely and significantly affect an ordinary buyer's use and enjoyment of the property or a known intended use of the property. Previously, the statute required only disclosures related to the physical condition of the property. Minn. Stat. §513.55.

■ **MORTGAGE LENDING:** A new statute makes a mortgage lender liable for causing unreasonable delay in the processing of a loan application beyond the expiration of an interest rate or discount point agreement. The lender is liable for the borrower's out-of-pocket damages, which includes the present value of increased interest costs over the life of the loan, or specific performance. In addition, the lender is liable for a penalty of \$500 per instance of unreasonable delay. Minn. Stat. §325F.691.

■ **COMMON INTEREST COMMUNITY.** The right to rescission of a buyer of a unit in a common interest community has been reduced from ten days after receiving required disclosures to five days. Minn. Stat. §515B.4-106.

■ **STATUTORY CANCELLATION.** The Legislature also created a new procedure for cancellation of purchase agreements for residential real property. The statute provides for a 15-day cancellation period, as opposed to the previously-available 30-day period, and now permits the buyer to cancel by statute. Additionally, the statute provides a procedure for a declaratory cancellation of the purchase agreement under certain circumstances, which does not include a right to cure by the buyer. Minn. Stat. §559.217; see also Larry M. Wertheim, "Canceling Residential Purchase Agreements," *Bench & Bar* (May/June 2004).

— C.J. DEIKE
Edina Realty Home Services

TAX

JUDICIAL LAW

■ **CONSTITUTIONAL LAW; MINN. STAT. §297F.24; TOBACCO SALES.** The Council of Independent Tobacco Manufacturers of America, Carolina Tobacco Company, and Winner Tobacco Wholesale, Inc. recently brought an action against the state of Minnesota to prevent enforcement of Minn. Stat. §297F.24, alleging that the statute violates the 1st Amendment, equal protection and state uniformity clauses. The appellants also contended that the statute is a bill of attainder and unconstitutional special legislation. The functions of Minn. Stat. §297F.24 are to make cigarette manufacturers that were not party to the "Minnesota Settlement" agreement of 1997 pay fees comparable to the costs attributable to the use of their cigarettes via a tax levied on distributors of the cigarettes. The statute was also meant to prevent non-settlement manufacturers from undermining the state's policy of discouraging young smokers by supplying cheaper cigarettes. In affirming the lower court's decision, the Court of Appeals held that the statute in question is neither a bill of attainder nor special legislation in violation of the Minnesota Constitution and that it does not abridge the appellants' 1st Amendment rights or violate the equal protection and state uniformity clauses. In its reasoning the court held that the statute has a legitimate purpose that is not a direct attempt to stifle speech and is thus subject to a rational basis review. **Council of Indep. Tobacco Mfrs. of Am. v. State of Minnesota**, 2004 Minn. App. LEXIS 983.

■ **FISHING CREW COMPENSATION; "PROCEEDS"; SELF-EMPLOYMENT.** The Tax Court held that a member of a fishing boat crew was self-employed because he was compensated solely from the proceeds of the sale of the boat's catch even though operating expenses were subtracted from the proceeds before the crew's compensation was determined. Based upon the traditional methods of compensating crew members, the history of the fishing industry, the preamble and example within Reg. §31.3121(b)(20)-1(a) and a practical interpretation of the statute, the court determined that "proceeds" refers to net proceeds after the subtraction of operating expenses rather than gross proceeds from the sale. Thus the court rejected the taxpayer's argument that because he subtracted owner's expenses prior to compensating himself, he was classified as an "employee" due to the requirement in Reg. §31.3121(b)(20)-1(a) that a self-employed crew member's compensation must depend "solely" on the sales proceeds. **Anderson v. Comm'r**, 123 T.C. No. 12

■ **DRIVER-LEASING COMPANY; PERCENTAGE LIMITATION ON MEAL EXPENSES.** The deduction of the per diem amounts covering food

and beverage expenses paid to over-the-road truck drivers who were leased by the taxpayers, a driver-leasing company, to independent trucking companies, was subject to the Code §274(n)(1) limitation of 80 percent for two years and 50 percent for the remaining years. The taxpayer argued that the common-law employer of the truckers was the trucking companies. However, the Tax Court disagreed and held that the taxpayer was the common-law employer and was thus subject to the percentage. In reaching its conclusion, the Tax Court placed emphasis on a determination of who had control over the truck drivers. *Transport Labor Contract/Leasing, Inc. & Subsidiaries v. Comm'r*, 123 T.C. No. 9.

■ **ABATEMENT OF INTEREST; APPEAL; COSTS TO TAXPAYER.** A taxpayer entered into a settlement agreement with the IRS in 1985 regarding his investment in a partnership. This settlement agreement served as the basis for the taxpayer's request for an abatement of interest on taxes assessed in 1999 for his 1983 tax year. The taxpayer's request was denied by the appeals officer with no apparent consideration of the settlement agreement. The taxpayer subsequently filed suit for abatement and was granted a full abatement in a settlement with the IRS. The taxpayer then sought litigation costs under Code §7430. The Tax Court held for the taxpayer and noted that the government's position was not substantially justified. Further, the court noted that the taxpayer had made a reasonable and good-faith effort to disclose to the appeals officer all relevant information. The court held that the taxpayer was not entitled to enhanced attorney's fees because the issue was not sufficiently difficult to qualify for enhanced fees. *Corson v. Comm'r*, 123 T.C. No. 10

■ **NO RELIEF FROM JOINT AND SEVERAL LIABILITY.** The IRS denied a wife Code §6015(f) relief from joint and several liability. The IRS's decision was not an abuse of discretion because she knew when the joint return was filed that she had an obligation to pay the joint liability and that some of her assets would be used to pay it. *O'Neill v. Comm'r*, T.C. Memo. 2004-183.

■ **SECURITIES LOSSES NOT DUE TO THEFT.** A taxpayer attempted to deduct losses incurred while investing in speculative securities over a period of three years as theft losses. The taxpayer engaged in investments while being entertained and supplied with alcoholic drinks by his stockbroker. The theft deduction was denied because the taxpayer did not sufficiently establish that the events constituted a theft and could not prove the date of discovery of the alleged theft. In addition, his attempt to carry over the capital losses to subsequent tax years as a net operating loss was rejected because he did not show the specific amounts that would have been carried back three years and forward 15 years. *Yoakum v. Comm'r*, Respondent T.C. Memo 2004-191

■ **SOLE PROPRIETOR; INCOME TAX, SELF-EMPLOYMENT TAX LIABILITY.** A sole proprietor was liable for federal income taxes, including self-employment taxes on the income he received from his telephone services and on interest and dividend income. The taxpayer did not offer any evidence to contradict the IRS's position that he personally managed and controlled his business and that he was directly compensated by his clients for the goods and services that he sold during the tax years in question. Furthermore, the IRS properly reconstructed his income from invoices issued by the business and from bank deposits made by the taxpayer. *Coomes v. Comm'r*, T.C. Memo. 2004-182.

■ **DEPENDENCY EXEMPTIONS; GRANDNIECES AND NEPHEWS.** The Tax Court held that a taxpayer wasn't entitled to dependency exemption deductions and child tax credits. In general, a grandnephew, a grandniece, or an otherwise unrelated child may qualify as a dependent only if, for the taxable year of the taxpayer, that individual has as his or her principal place of abode the home of the taxpayer and is a member of the taxpayer's household. Petitioner admits that none of the children in question lived with her for the entire taxable year in 1999 or 2000, the tax years in question. Accordingly, they do not qualify as petitioner's dependents under Code §152(a), and petitioner is not entitled to dependency exemption deductions or the related child tax credits. *McNair v. Comm'r*, T.C. Summ. Op. 2004-115

■ **UNCLAIMED, UNREIMBURSED BUSINESS EXPENSES; INNOCENT SPOUSE RELIEF.** A corporate officer was entitled to reimbursement of expenses that he incurred on his employer's behalf. Though the taxpayer failed to claim his reimbursement, his failure to do so did not convert the costs to deductible ordinary and necessary business expenses. Thus he was not entitled to a deduction. Furthermore, the taxpayer's spouse was not entitled to Code §6015 relief from joint and several liability. Her involvement with the couple's financial matters, her knowledge of the deductions, and her lack of financial hardship prevented her from receiving §6015 relief. *Applegate v. Comm'r*, T.C. Summary Opinion 2004-113

■ **MOTOR HOMES; SECTION 179 PROPERTY.** Motor homes sold and rented by taxpayers as part of their trade or business qualified as Section 179 property. Thus, the taxpayers were able to deduct part of the cost to purchase the homes during the tax year in question, rather than add the cost to their capital account and depreciate it over a number of years. The court rejected both the taxpayer's and the IRS's arguments that the motor homes are used either predominantly for transportation or that their use should be determined by the time they are used for either purpose. Rather, the court examined whether property substituted for the motor homes would be considered predominantly used for lodging. The court found that substitute transportation is not used for lodging and would clearly qualify as Section 179 property. Furthermore, any substitute lodging would also qualify as Section 179 property under the transient exception. Thus, the motor homes owned and used by the taxpayer were not predominantly used for lodging and qualified as Section 179 property. *Shirley v. Comm'r*, T.C. Memo. 2004-188

■ **RECONSTRUCTION OF INCOME.** The IRS's increase of the amount of gross income reported by an attorney in connection with her law practice was not credible because it was based on its improper use of the bank deposits method. The IRS failed to analyze all of the taxpayer's bank accounts and reportable taxable income. Further, the IRS failed to adjust for nontaxable items. The IRS also acted unreasonably and arbitrarily when it denied all of the taxpayer's claimed business deductions without examining the expense records that she had produced for the revenue agent's inspection. The taxpayer was subject to a penalty for failure to timely file her returns but she was not subject to a negligence penalty. *Westby v. Comm'r*, T.C. Memo 2004-179

■ **SOCIAL SECURITY DISABILITY BENEFITS; AGENT ORANGE; NO EXCLUSION FROM INCOME.** A taxpayer who was exposed to Agent Orange and subsequently developed cancer as a result of his exposure while serving in the armed forces during the Vietnam War was not permitted to exclude the disability benefits that he received from the Social Security Administration as amounts paid for personal injuries or sickness resulting from active service in the armed forces described in Code §104(a)(4). The taxpayer's lung cancer developed as a result of exposure to Agent Orange, however it developed following a separation from the service and a career in the public sector. In holding that the taxpayer must include the benefits in his gross income, the Tax Court noted that social security disability benefits do not take into consideration the nature or cause of the disability and are computed based on the taxpayer's earnings, not the nature or extent of the disability. Thus, for the purposes of Code §1049(a)(4), they do not qualify as paid for personal injuries or sickness resulting from military service. *Reimels v. Comm'r*, 123 T.C. No. 13.

ADMINISTRATIVE MATTERS

■ **OFFERS IN COMPROMISE; BANKRUPTCY; IN RE MACHER.** The IRS has announced that it will adhere to the procedures of Rev. Proc. 2003-71 and will continue to return offers in compromise submitted by taxpayers who are currently in bankruptcy. The nonacquiescence announcement is in response to *In re Macher* (DC Va. 2004-1 USTC ¶50,114). In *Macher* a federal district court upheld a bankruptcy court's order compelling the IRS to consider an individual debtor's offer in compromise. The court found that the IRS's policy of mechanically rejecting a debtor's offer in compromise did not allow the "fresh start" promoted by the bankruptcy laws. The IRS disagreed that a bankruptcy court can order it to process a debtor's plan of reorganization according to offer in compromise processing procedures applied to taxpayers not in bankruptcy. Thus the IRS will adhere to its current procedures regarding offers from taxpayers in bankruptcy.

■ **GST EXEMPTION; EXTENSION OF TIME TO ALLOCATE.** The IRS has provided guidance for obtaining an extension of time for allocating the generation-skipping transfer (GST) tax exemption using a simplified alternative method. The extension may be requesting using a Form 709 for the year of the transfer of the trust, regardless of whether a Form 709 has previously been filed for that year. The Form 709 and its attached statement entitled "Notice of Allocation" must be filed no later than the date prescribed for filing the transferor's federal estate tax return. The new procedure applies only to taxpayers who meet the following conditions: 1) the transfer must be made or deemed to have been made by a gift to a trust from which a GST may be made on or before December 31, 2000; 2) no taxable distributions have been made and no taxable terminations have occurred at the time the request for relief is filed; 3) the transfer qualified for the annual exclusion and the amount of the transfer does not exceed the amount of the annual exclusion for the year of the transfer; 4) no GST exemption was allocated to the transfer; 5) at the time the request for relief is filed, unused GST exemption is available to allocate to the transfer. Rev. Proc. 2004-46

■ **FILING EMPLOYER FORMS AFTER MERGER, ACQUISITION.** The IRS has issued guidance explaining both the standard and alternate procedures for preparing and filing employment tax returns after a statutory merger, acquisition or consolidation. The Rev. Proc. also explains the new schedule D (Form 941), Report of Discrepancies Caused by Acquisition, Statutory Mergers or Consolidations. In the event that an acquisition, statutory merger or consolidation creates a discrepancy between what was reported on Form W-2, Wage and Tax Statement, and what was reported on Form 941, Employer's Quarterly Federal Tax Return, the employer can use the new schedule D (Form 941) to explain the discrepancy, even if the employer e-filed its employment tax returns. IR-2004-109; Rev. Proc. 2004-53

■ **REPORTING, DISCLOSURE REQUIREMENTS FOR POLITICAL ORGANIZATIONS; ENFORCEMENT.** Political organizations covered by Code Section 527 are required to report their contributions and disbursements in order to place their support and operations within the public domain before elections. The IRS has announced that it will be taking steps to improve the disclosure and reporting of such political groups. In the beginning stage of this program, the IRS will contact a cross-section of covered groups and request that they correct and explain any discrepancies in their files before the upcoming filing deadlines. IR-2004-110.

■ **ALTERNATIVE DEFICIT REDUCTION CONTRIBUTION ELECTION EXCEPTION.** Code Section 412(l)(12) allows certain employers who are required to make additional pension plan contributions under Code Section 412(l) to make reduced contributions for certain plan years. Normally, benefit improvements are prohibited under a plan that makes this alternative deficit reduction contribution election. However, the IRS has provided guidance on the special funding rules in Notice 2004-59. The Notice provides rules for an exception in cases where the plan's enrolled actuary certifies that the amendment provides for an increase in annual contributions that will exceed the increase in annual minimum funding required for the plan. In addition, the notice provides guidance on related issues which include the following: what plan amendments are subject to the Code Section 412(l)(12)(B) requirements and what plan terms a restricted amendment must include, how the amount is determined, how the amount affects the application of a minimum funding requirement, how a credit balance generated as a result of contributions made with respect to the §412(l)(12)(B) amount for the prior plan year affects the computation of the amount for the present plan year, and the certification requirements and consequences of failure to comply. Notice 2004-59, TDNR JS-1862

■ **CALCULATING ALTERNATE METHOD OF ALLOCATION FOR MN INCOME TAXES.** The commissioner of revenue has issued Form ALT, Application for Alternative Methods of Allocation, for taxpayers that choose to petition for another method to allocate income under the provisions of Minn. Stat. Sec. 290.20(1a). This form is for Minnesota corporate franchise income tax and personal income tax purposes. Revenue Notice No. 04-07, Minnesota Department of Revenue, August 16, 2004-08-25.

■ **BOND FACTOR AMOUNTS FOR DISPOSITIONS OF LOW-INCOME BUILDINGS.** A taxpayer that disposes of a qualified low-income building or interest therein can defer or avoid recapture of the low-income housing credit by furnishing a bond to the IRS. The IRS has pub-

lished a table that provides the bond factor amounts for calculating the amount of bond considered satisfactory under Code Sec. 42(j) (6) or the amount of U.S. Treasury securities to pledge in a Treasury Direct Account under Rev. Proc. 99-11. These amounts are meant to be used by taxpayers that disposed of qualified low-income buildings or interests therein during the months of July, August and September 2004. Rev. Rul. 2004-89

■ **UNUSED HOUSING CREDIT CARRYOVER AMOUNTS FOR 2004:** The IRS has published the total amounts of unused housing credit carryovers allocated from the national pool to qualified states under Code §42(h)(3)(D) for calendar year 2004. Rev. Proc. 2004-52.

■ **PAPER SUBSTITUTE FORMS W-2 AND W-3.** The IRS has released the general rules for filing, and IRS and Social Security Administration requirements for reproducing, paper substitutes of Form W-2, Wage and Tax Statement, and Form W-3, Transmittal of Wage and Tax Statements, for wages paid during the 2004 calendar year. Copies and substitutes must conform to the specifications in the newly released procedure to be acceptable to the IRS and the SSA. Rev. Proc. 2004-54

■ **BANKS' INTEREST EXPENSE ALLOCATIONS; SUBSIDIARIES' TAX-EXEMPT INTEREST.** Banks that created wholly-owned subsidiaries to hold, service, invest and reinvest the parent banks' investment assets must treat all of the subsidiaries' assets, including tax-exempt obligations, and interest expenses and belonging to the parent banks for purposes of Code §§265(b), 291(a)(3) and 291(e)(1)(B). While these Code provisions are usually applied separately to each financial institution, in situations where the taxpayers are under common control and one or more related taxpayers are financial institutions, the IRS may require a determination of interest expenses allocable to tax-exempt interest of the banks as a group to prevent tax avoidance or evasion. Technical Advice Memorandum 200434021.

■ **EXCLUSION OF GAIN FROM SALE OR EXCHANGE OF PRINCIPAL RESIDENCE.** The IRS has issued final regulations regarding the exclusion of gain from the sale or exchange of a taxpayer's principal residence. These regulations apply to a taxpayer who has not owned and used the property as his/her principal residence for two of the preceding five years or who has excluded gain from the sale or exchange of a principal residence within the preceding two years. T.D. 9152

■ **TAX TREATMENT OF FOREIGN CURRENCY CONTINGENT PAYMENT DEBT INSTRUMENTS.** New final regulations under Code §988 provide detailed rules regarding the tax treatment of contingent payment debt instruments that are denominated in foreign currency. The final regulations fill the regulatory gap between the two current sets of rules which govern noncontingent debt instruments denominated in foreign currency and contingent payment debt instruments that are not denominated in foreign currency. The final regulations are effective August 30, 2004 and apply to debt instruments issued on or after October 29, 2004. TDNR JS-1878, T.D. 9157

■ **EFFECT OF CERTAIN TRANSFERS ON REORGANIZATIONS.** The IRS has issued proposed regulations that address whether a transaction that otherwise qualifies as a reorganization under Code §368(a) continues to qualify when assets or stock of the acquired corporation is distributed to a corporation or partnership following the reorganization. The proposed regulations also provide guidance on the continuity of business enterprise requirement and the definition of a party to reorganization. The proposed regulations state that a transaction otherwise qualifying as a reorganization will not be disqualified as a result of a subsequent distribution of the acquired assets or stock under certain circumstances. NPRM REG-130863

■ **COMPENSATION FOR SERVICES PERFORMED PARTLY OUTSIDE THE UNITED STATES.** The IRS has issued proposed regulations amending Reg. §1.861-4(b) that address the proper basis for determining the source of compensation from labor or personal services performed partly within and partly without the United States. In addition to the guidance of the regulations already in place, the new regulations also provide that, when appropriate, a unit of time less than a day may be used when applying the time basis of sourcing compensation. They also provide that multiyear compensation is generally sourced on a time basis over the period to which the compensation is attributable. A determination of the period to which the compensation is attributable is based upon the facts and circumstances of each case. TDNR JS-1839.

LOOKING AHEAD

■ **PRESIDENT OPEN TO NATIONAL SALES TAX.** Recent congressional debate has included a discussion of whether to push forward with legislation to enact a value-added, consumption or national sales tax system. President Bush has indicated that he is open to exploring such a system in the interest of simplifying the tax code. Some congressional officials have indicated that a consumption or national sales tax may save taxpayers significant amounts in compliance costs and would potentially reduce the necessity of the existence of the Internal Revenue Service. TAXDAY 2004/08/12 Paula Cruickshank, CCH News Staff

■ **STATES STILL LOSING REVENUE TO E-COMMERCE.** A recent report by the University of Tennessee Center for Business and Economic Research indicated that sales and use tax revenue erosion from e-commerce continues to represent a significant loss to state and local governments. Remote transactions through online sales make it increasingly difficult for states to effectively collect sales and use tax resulting in an erosion of the sales tax base. Initiatives such as the Streamlined Sales Tax Project may mitigate some of the erosion by simplifying the collection and payment of sales tax. According to the report, the survival of sales and use tax as a viable revenue collection instrument depends upon the involvement of state and local governments, retailers, and other businesses. Furthermore, the report predicted that the biggest revenue losses for states will be attributable to business-to-business sales due to the significant amount of businesses that engage in transactions with remote vendors where taxes are not collected, such as purchase of large quantities of office supplies and computers. *State and Local Sales Tax Revenue Losses from E-Commerce: Estimates*, University of Tennessee Center for Business and Economic Research, July 2004; Interview, Prof. William Fox, August 17, 2004.

— KATHRYN SEDO

TORTS & INSURANCE

JUDICIAL LAW

■ **RECREATIONAL USE IMMUNITY — NOT THE LAST WORD.** A municipal golf course clubhouse is “recreational property” entitled to immunity under Minn. Stat. §406.03 subd. 6e (2002). Notwithstanding this, the municipality is still liable for “conduct that would entitle a trespasser to damages against a private person.” *Id.*; *Fear v. Ind. Sch. Dist. 911*, 634 N.W.2d 204, 215 (Minn. App. 2001), *review denied* (Minn. 12/11/01). Minnesota has adopted the trespasser standard of care as set forth in the Restatement (Second) of Torts §335 (1965). The plaintiff fell down the stairs at a municipal golf course and claimed that under the Restatement, the condition of the stairs was a “hidden, artificial danger created or maintained by the landowner,” thus giving rise to a duty to warn on behalf of the golf course. The Court of Appeals agreed, and thus determined that recreational use immunity did not insulate the golf course from liability.

The golf course was not entitled to discretionary immunity (which does *not* contain the same trespasser-standard-of-care exception) because the failure to warn (as opposed to the failure to timely repair) is an “operational-level” decision, rather than a policy decision. Failure to repair may involve policy-level decisions when a municipality has over 300 properties, a limited budget, and must prioritize its projects to address those which pose imminent hazards. A simple warning of a dangerous condition does not rise to the level of a policy-making decision. *Unzen, et. al. v. City of Duluth*, A04-80, A04-81 (Minn. App. 08/03/04).

■ **PRESUMPTION OF VEHICLE OWNERSHIP NOT REBUTTABLE.** Reaffirming the holding in the earlier case of *American Nat'l General Ins. v. Solum*, 641 N.W.2d 891 (Minn. 2002), the Minnesota Supreme Court held that the presumption of ownership established by a vehicle's Certificate of Title is not rebuttable except in very limited circumstances.

The tortfeasor in this case, Heath, drove an automobile owned by a third person, Dennis. Heath had no personal automobile insurance, and resided with his grandmother, who was insured by Auto-Owners. Auto-Owners' policy provided coverage for relatives living with her so long as the motor vehicle the relative was driving was not available for her or the relative's regular use and only if the relative did not own an automobile.

Auto-Owners took the position that coverage was excluded because Heath owned a vehicle. The deposition evidence was that Heath “had” a 1991 Cutlass, which was inoperable and uninsured, and which was titled in the name of his parents. Heath was in the process of purchasing the vehicle from his parents.

The Supreme Court held that the district court and the Court of Appeals were correct when they precluded the introduction of extrinsic evidence to rebut the presumption that the 1991 Cutlass was owned by Heath's father. Under *Solum*, the presumption of ownership established by the Certificate of Title became for the most part conclusive. The ability to rebut ownership was available only to prove the identity of the true owner in cases where the seller-transferor failed to comply with the transfer requirements of the act and sought to avoid liability under the Safety Responsibility Act or to determine the rights and responsibilities relating to uninsured motorist coverage. Since Auto-Owners' defense did not fall within these narrow confines, extrinsic evidence was not available to rebut the presumption of ownership as contained on the Certificate of Title. *Auto-Owners Insurance Company v. Forstrom, Heath, et al.*, C8-03-296 (Minn. 08/05/04).

■ **WORKER'S COMP SUBROGATION.** Following the plane crash which killed Senator Paul Wellstone, his wife Sheila, and four employees of the Wellstone for Senate campaign, trustees for the families of the employees pursued wrongful death claims against the charter company. Settlements were reached on a *Pierringer* basis with the charter company, and the trustees filed a petition for approval of the settlement and to distribute the proceeds.

Because the campaign failed to carry worker's compensation insurance, the responsibility for providing benefits to the dependents of the four employees was assumed by the Special Compensation Fund. An employer, in this case the Fund, is subrogated to the employee's rights against a third-party tortfeasor if the employee receives worker's compensation benefits. The amount of the subrogation claim is determined under Minn. Stat. §176.061, subd. 6, which generally allows the employee to receive one-third of the settlement after costs.

The employee, however, has the option to petition the district court to allocate the proceeds between recoverable and nonrecoverable damages and then to apply the statutory framework only to recoverable damages. This procedure is called a *Henning* allocation after the case of *Henning v. Wineman*, 306 N.W.2d 550 (Minn. 1981). The purpose of allocating damages under *Henning* is to limit a subrogation claim to recoverable damages only. The error in this case was that after the trustees opted for a *Henning* allocation, the district court first calculated the value of the Fund subrogation claim and then reduced that claim by a percentage to reflect consideration of nonrecoverable damages. The proper procedure would be for a district court to first allocate the proceeds of a settlement between recoverable and nonrecoverable damages, and then apply the statutory formula to that part of the settlement allocated to recoverable damages.

A second issue concerned how much of the settlement would be reduced, before allocation, due to “reasonable costs” of collection as allowed under Minn. Stat. §176.061, subd. 6 (a). In this case, attorneys for the trustees agreed to a reduced fee of 17 percent of the settlement, instead of the customary one-third of the settlement, due to their close relationship with the Wellstone family. The trustees presented evidence that attorney's fees of one-third of a settlement are standard and reasonable. The trustees argued that the Fund had

no relationship with the trustees and should not benefit from the desire of the trustees' attorneys to maximize the proceeds available to the families. The district court agreed, and deducted one-third of the recovery for "reasonable" costs of collection. Because the statute allows deduction for the "reasonable" costs of collection, rather than "actual" costs, as in Minn. Stat. §548.36, subd. 4, the district court's decision on this was upheld. ***In the Matter of the Petitions for Approval of Settlement and Distribution of Wrongful Death Proceeds for the Next of Kin of Marsha Wellstone Markuson, et. al.***, A04-185 (Minn. App. 08/24/04).

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