



## NOTES & TRENDS

### ALTERNATIVE DISPUTE RESOLUTION

#### JUDICIAL LAW

■ **PRIOR ARBITRATION DECISION AND COLLATERAL ESTOPPEL.** A former executive director of a corporation who was removed from his position as executive director brought an action against the corporation's attorney and asserted claims for breach of fiduciary duty, negligence, and tortious interference with contract. The U.S. District Court for the District of Minnesota dismissed the claims of the former executive and the former executive appealed. The U.S. Court of Appeals for the 8th Circuit held that under Minnesota's doctrine of collateral estoppel, the tortious interference with contract claim was precluded by a prior arbitration decision that the corporation did not breach the contract when it terminated the executive director. Further, because of the prior arbitration decision, Minnesota's doctrine of collateral estoppel also precluded the former executive director from bringing a claim that he was still the rightful owner of certain preferred stock following his termination. *Manion v. Nagin*, 394 F.3d 1062 (8th Cir. 2005).

— DARIN T. ALLEN  
National Arbitration Forum

### CRIMINAL LAW

#### JUDICIAL LAW

■ **MOTION FOR JUDGMENT OF ACQUITTAL; STANDARD TO GRANT.** The court properly granted a motion for judgment of acquittal, citing favorably as a standard for review *United States v. Richards*, 967 F.2d 1189 (8th Cir. 1992): "a motion for acquittal should be granted only where the evidence, viewed in the light most favorable to the government, is such that a reasonably minded jury would have a reasonable doubt as to the existence of any of the essential elements of the crime charged." The district court was correct in denying the motion to acquit using this narrow sufficiency of the evidence standard, while recognizing that a broader standard would apply to its fact-finding function at the conclusion of the trial. Such a fact-finding function could then include weight and credibility of the evidence.

*State v. Billy Dawson Slaughter*, A03-601 (Minn. 01/27/05). [www.lawlibrary.state.mn.us/archive/supct/0501/opa030601-0127.htm](http://www.lawlibrary.state.mn.us/archive/supct/0501/opa030601-0127.htm)

■ **LESSER-INCLUDED OFFENSE; BENCH TRIAL.** In a bench trial, the district court may, over the objection of the defendant, consider an uncharged lesser-included offense where the evidence provides a rational basis to convict of the lesser offense but acquit of the charged offense. Here, based upon conflicting evidence, the trial court acquitted the appellant of the charged robbery offenses but submitted, *sua sponte*, a lesser included offense of theft from a person. *State v. Slaughter*, *supra*.

■ **DOUBLE JEOPARDY; MISTRIAL; MANIFEST NECESSITY.** In a criminal sexual conduct trial, the jury was instructed that the trial would last approximately five days. Fifteen days later, while the jury was in deliberations, one juror was excused from further service so that she could go on a scheduled vacation, which had been disclosed during *voir dire*. The remaining 11 jurors presented several difficulties to the court and counsel: one juror became ill and was sent home. The prosecution would not agree to a ten-person jury. Another juror had a vacation for the next morning, involving a \$3,400 package with her daughter. Yet another juror was concerned about a job interview scheduled for the next day. Noting its concern about the "cumulative effect" of the juror difficulties, and an apparent deadlock, the court declared a mistrial and discharged the jury.

Held, the judge did not abuse his discretion in declaring a mistrial on grounds of manifest necessity. Under such circumstances, double jeopardy does not bar a retrial. While a hung jury is the "prototypical example" of manifest necessity, the court was also faced with "what fairly can be characterized as a disintegrating jury." No other available solution could have protected or ensured the integrity of the jury in this situation other than to declare a mistrial. *State v. Cofie Yeboah*, A04-1031 (Minn. App. 01/25/05).

[www.lawlibrary.state.mn.us/archive/ctappub/0501/opa041031-0125.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0501/opa041031-0125.htm)

■ **EVIDENCE: NICKNAME "KILL"; BODY TATTOO.** The appellant was on trial for first-degree murder. In a telephone recording made to a friend incarcerated in jail, appellant stated: "man, it's Kill. Remember that robbery that I was talking about? You know, where the shit just gets crazy. Yeah, Kill lived up to his name. Ha!" Appellant also has a tattoo of the word "Kill" on his stomach. Both the voicemail recording and photograph of the tattoo were admitted, over the appellant's objection, at trial.

Held, the probative value of the voicemail recording, while devastating, greatly outweighs undue prejudice, and does not give unfair advantage to the prosecution. Next, the tattoo is relevant because it helps to identify the individual whose voice is heard on the tape.

*State v. Morgan Michael Schulz*, A03-1883 (Minn. 02/03/05). [www.lawlibrary.state.mn.us/archive/supct/0502/opa0318830203.htm](http://www.lawlibrary.state.mn.us/archive/supct/0502/opa0318830203.htm)

■ **THEFT: TRUSTEE V. PARENT.** Appellant received an \$18,000 check from the State of Minnesota. These funds came from the estate of the child's father, and were payable to "Franklin Barbara for Delphina Griffin Minor." Probate court ordered appellant to establish a trust account within 30 days of receiving money from the estate, and not to withdraw any funds from the trust account without "authorization." Appellant was a parent of the child. Instead of using the money for the child's benefit, appellant lost most of the \$18,000 gambling at casinos.

Held, the appellant was properly convicted of theft. Even though Minn. Stat. §501B.81 allows a trustee to pay a sum distributable to a minor beneficiary, without liability to trustee, to a parent beneficiary, appellant's acts as trustee are severable from her acts as an individual. Therefore, appellant may be held liable for breaching her duty as a trustee. **State v. Barbara Ann Franklin**, A04-411 (Minn. App. 01/31/05). [www.lawlibrary.state.mn.us/archive/ctappub/0501/opa040411-0131.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0501/opa040411-0131.htm)

■ **SCALES: WAIVER BY NOT RAISING AN OMNIBUS ISSUE; REQUEST TO TURN OFF TAPE RECORDER.** Appellant was arrested on suspicion of manufacturing methamphetamine. Once at the jail, the deputy had a tape recorder, but did not turn it on during the interview of the appellant for the reason that the appellant told him he did not wish to have his statements recorded, but that he would give the deputy some information. It was not disputed at the omnibus hearing that the deputy did, in fact, administer the *Miranda* warnings. During the unrecorded interview, appellant confessed to "cooking meth."

Held, there was a violation of *Scales*: that case mandates that all custodial interviews that are placed in detention be recorded, and the defendant's request to turn the tape recorder off is apparently irrelevant to this requirement. Next, *Scales* requires the court to decide whether the violation of *Scales* is substantial. Among the factors in determining this substantiality of a *Scales* violation is whether the violation is prejudicial to the accused. Here, it is undisputed that the *Miranda* warning was administered, and that the appellant waived his right to remain silent: the lack of a recording, hence, creates no prejudice. Furthermore, the appellant failed to establish at the omnibus hearing that the violation was substantial. Had he claimed that a warning was not given, or there was no waiver, this dispute would have created a factual issue for the determination of substantiality. By failing to create a factual dispute at the omnibus hearing level, the appellant waived his right to claim a substantial violation of the *Scales* recording requirement. **State v. Daniel Greg Inman**, A03-80 (Minn. 02/17/05). [www.lawlibrary.state.mn.us/archive/supct/0502/opa030080-0217.htm](http://www.lawlibrary.state.mn.us/archive/supct/0502/opa030080-0217.htm)

■ **CONTROLLED SUBSTANCES: MANUFACTURER OF METHAMPHETAMINE; POSSESSION; SAME BEHAVIORAL INCIDENT.** In executing a search warrant, police found an apparent methamphetamine lab, along with a one-liter soda bottle containing layered liquid, testing positive for methamphetamine. At trial, an expert testified that the methamphetamine was not yet in usable form: it had to be mixed with pseudoephedrine and water, separated, filtered using a baster, then mixed with hydrogen chloride gas, filtered again, and dried. Upon conviction for possession and manufacture, appellant was given two concurrent sentences, one for 98 months for the manufacture, and the second for 122 months, using the first conviction toward his criminal history score.

Held, under these facts, the manufacture and possession were part of the same behavioral incident: sentencing appellant twice was not permissible. This case is distinguished from *State v. Heath*, 685 N.W.2d 48 (Minn. App. 2004), review denied 11/16/04, where the methamphetamine was already in a useable powder form, and defendant had been charged with conspiracy to manufacture, as well as aiding and abetting the possession of methamphetamine with intent to sell. In this case, the methamphetamine in the appellant's possession was in an unusable liquid form, and still involved in the manufacturing process. Taking into account the time, place and objective of the appellant's conduct, the manufacture and possession were part of the same behavioral incident. **State v. James Edward Carr, Jr.**, A04-338 (Minn. App. 02/15/05). [www.lawlibrary.state.mn.us/archive/ctappub/0502/opa040338-0215.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0502/opa040338-0215.htm)

■ **DISCOVERY: SUMMARY FOR WITNESS PREPARED BY STATE; BRADY.** The State did not disclose the fact that it had prepared a seven-page document for a key witness against the appellant in a murder trial. The summary was written in a "script" format and represented five conversations that the witness had with appellant and a codefendant. Held, the first two prongs of *Brady* have been met, namely, the evidence was favorable to the accused because it was impeaching and it was suppressed by the State. The third prong, however, prejudice to the accused, has not been shown. There is no reasonable probability that the result of the trial would have been different had the State disclosed the use of the summary. The recollection of the witness could have been refreshed in other ways, and the witness testified in detail about other aspects of the events in question. **Ryan Michael Pederson v. State of Minnesota**, A04-63 (Minn. 02/24/05). [www.lawlibrary.state.mn.us/archive/supct/0502/opa040063-0224.htm](http://www.lawlibrary.state.mn.us/archive/supct/0502/opa040063-0224.htm)

■ **EXPERT TESTIMONY: MEDICAL RECORDS; DRUG USE; CREDIBILITY OPINION NOT ALLOWED.** The sole witness to a murder had a history of drug use and paint sniffing. The defense requested all medical records for the victim, which apparently included the results of several neurological and psychological tests performed on her prior to the incident. The state filed a motion *in limine* to request exclusion of all the victim's prior medical records based on privilege. The defense requested, in a counter motion, an *in camera* review and a determination that the records could be admitted as relevant to the victim's competence and ability to testify. The defense also sought permission to have his medical expert review the victim's prior medical records for the purpose of giving an opinion whether her drug use may have affected her memory and reliability. The victim did not consent to the evidentiary use of her prior medical records (that is, prior to the injuries sustained in the incident). The trial court ruled that the defense expert could testify generally about the physiological effects of drug use and paint sniffing on the brain, but prohibited him from testifying in particular about the effects of the drug use on the victim, on the basis that such an opinion would invade the province of the jury.

Held, in this case of first impression: an expert witness may not give an opinion that a victim's drug use has affected that victim's ability to give reliable testimony, absent unusual circumstances. Indeed, in only one case has such expert testimony been allowed. In *State v. Myers*, 359 N.W.2d 604 (Minn. 1984), the Supreme Court held that an expert could offer an opinion that a specific minor complainant's allegations about sexual abuse were not fabricated, in addition to testifying about the behavior and symptoms typically exhibited by sexually abused children. While *Myers* noted the possibility that the jury may be unduly influenced by such an expert opinion, it was the defendant who had called into question the child complainant's credibility, and therefore opened the door to the expert's testimony as to the child's truthfulness.

The Court also upholds the trial court's decision to limit the disclosure of the victim's prior medical records based on privilege. Noting

that the medical privilege, like other privileges, sometimes must give way to the defendant's right to confront his accusers, *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn. 1984), the Court did follow the *in-camera* approach prescribed by *State v. Parade*, 403 N.W.2d 640, 642 (Minn. 1987). It was not error to allow the defense expert access to the prior records because the court had prohibited the expert from basing an opinion on such records. ***State v. Lashazo Reese, Jr.***, A03-1887 (Minn. 03/03/05). [www.lawlibrary.state.mn.us/archive/supct/0503/opa031887-0303.htm](http://www.lawlibrary.state.mn.us/archive/supct/0503/opa031887-0303.htm)

■ **PROSTITUTION: MOVING VEHICLE NOT A "PUBLIC PLACE"**. An undercover police officer drove an unmarked vehicle up to a prostitute standing by the street, and pulled his car over to the curb. The respondent walked to the car and entered it without invitation. As the officer drove, oral sex was negotiated, at which time the respondent was arrested.

Held, the district court was correct that the definition of "public place," as defined in the gross misdemeanor prostitution statute, 609.321, subd. 12 (2002) does not encompass, as a "public place," the interior of a moving vehicle on a public street. The court concluded that the statute is ambiguous, and applied the rule of lenity to construe the statute in favor of the defendant. ***State v. Jessica Rae White***, A04-1518 (Minn. 03/01/05). [www.lawlibrary.state.mn.us/archive/ctappub/0503/opa041518-0301.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0503/opa041518-0301.htm)

■ **SENTENCE: BLAKELY; CONSECUTIVE SENTENCES PERMISSIBLE**. The appellant was charged with two counts of first-degree criminal sexual conduct, and pleaded guilty to two violations. There was no sentencing agreement. At the guilty plea hearing, the appellant admitted that he committed multiple acts of sexual contact and penetration against two separate children.

At sentencing, the court found that the appellant was not amenable to rehabilitation, and determined that the appellant's conduct warranted an upward durational departure based on aggravating factors including the psychological injury to the children, vulnerability due to age, manipulation including blindfolding the children, and threats to kill them and family members if they reported abuse. The court imposed consecutive sentences of 216 months for each count, representing a 50 percent upward durational departure from the presumptive sentence. The court noted that consecutive sentences were permissible because the sexual offenses are crimes against persons.

Held, although appellant admitted to the aggravating factors at sentencing, such an admission was not accompanied by a specific *Blakely* waiver of those factors by jury determination, as recorded by *State v. Fairbanks*, 688 N.W.2d 333 (Minn. App. 2004), *rev. granted* (Minn. 01/20/05) (stay pending decision in *Shattuck*). Hence, the upward durational departures must be reversed.

Consecutive sentencing however, does not violate the defendant's right to a jury trial. *Blakely* did not discuss consecutive sentencing; however, consecutive sentencing concerns the relationship between two sentences, separately imposed. The court notes that *Blakely* limited its discussion to the enhancement of a sentence for a single crime, and does not discuss the possibility that the defendant's conduct may satisfy the elements of more than one crime. Following other jurisdictions, the Supreme Court declines to extend *Blakely* to consecutive sentencing based on judicial findings. The holding is then, that *Blakely* does not apply to permissible consecutive sentencing based on a finding by the court that the offenses are "crimes against the person." Consecutive sentencing involves separate punishments for discrete crimes. "We conclude that *Blakely* does not require the jury to determine the relationship between multiple sentences any more than it would require a jury determination that multiple sentences are permissible." ***State v. William Senske***, A03-1677 (Minn. 03/01/05). [www.lawlibrary.state.mn.us/archive/ctappub/0503/opa031677-0301.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0503/opa031677-0301.htm)

■ **SENTENCE: BLAKELY; STAY OF ADJUDICATION; STATE APPEAL OF MISDEMEANOR DISMISSED**. The respondent was convicted of driving after revocation and no insurance. A pre-sentence investigation (PSI) was ordered and a date set for sentencing. The PSI noted that if the respondent were to be adjudicated, he would lose his license for another year. The court stayed adjudication, noting that the respondent was a full-time employed person, currently with a driver's license, with insurance, and a child support obligation. The court felt that terminating that status would not serve the public's interest. Accordingly, a stay of adjudication was ordered, over objection of the prosecution. Conditions of the stay included \$500 fines on each count, 45 days jail to actually serve, and other conditions.

Held, the prosecution's appeal of the stay of adjudication must be dismissed. Rule 28.04 of the Rules of Criminal Procedure, subd. 1 (2), prohibits the state from appealing a sentence, except in a felony case. Here, the stay of adjudication can only be characterized as a sentence, and not a "pretrial order" as in *State v. Thoma*, 569 N.W.2d 205 (Minn. App. 1997). In *Thoma*, the Court of Appeals considered the state's appeal to be, effectively, one from a pretrial order. In this case, because a sentence was actually imposed, with jail time to be served, the state's appeal can only be characterized as an appeal of the sentence, which is prohibited by the Rules. In none of the prior cases, examining misdemeanor stays of adjudication, did the Supreme Court decide the precise issue presented in this case. ***State v. Dennis Gordon Lee***, A04-1402 (Minn. App. 03/07/05). [www.lawlibrary.state.mn.us/archive/ctappub/0503/opa041402-0307.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0503/opa041402-0307.htm)

— FREDERIC BRUNO  
Frederic Bruno & Associates

## EMPLOYMENT & LABOR LAW

### JUDICIAL LAW

■ **RETALIATION CLAIMS**. A pair of discharged employees recently lost retaliation claims, one arising under the Constitution and one arising out of a work-related injury. In the first, an Arkansas case, the 8th Circuit held that an employee of a government agency whose planned departure from office was expedited by the governor could not assert a claim for retaliatory termination under the 1st Amendment. After the executive announced his plan to resign in two weeks, the governor accepted the resignation effective immediately due to the executive's announced intention to criticize the governor's administration to the media and the Legislature before leaving office. Viewing the matter as a "not uncommon executive branch power struggle," the court rejected the claimant's assertion that expediting his resignation constituted a "constructive discharge." He lacked a viable retaliation claim because he resigned due to a policy dispute,

not because he had been punished for exercising or attempting to exercise his public employee's 1st Amendment right to speak out on matters of "public concern." *Bradford v. Huckabee*, 2005 WL 36814 (8th Cir. 2005).

In the second case, a chronically absent employee, who was fired after he left work to see the dentist in violation of a "last chance" agreement, was not entitled to pursue a claim for retaliatory discharge under the Minnesota Workers Compensation Act. The employee could not sue for violation of Minn. Stat. §175.82, which prohibits discouraging an employee from seeking workers compensation benefits, because he never sought workers compensation benefits. Therefore, his conduct was not "protected" by the statute. But Judge Gerald Heaney of Minnesota dissented, viewing the issue as whether the employee was discharged "because of his perceived intent to seek workers compensation benefits, regardless of whether he actually sought the benefits or not." *Tupper v. Boise Cascade Corporation*, 394 F.3d 622 (8th Cir. 2005).

■ **DISCRIMINATION.** Two discrimination claimants recently lost their cases before the 8th Circuit Court of Appeals.

In the first, the 8th Circuit upheld dismissal of a sexual harassment claim brought by an employee who asserted that her supervisor consistently made loud noises that constituted a "pattern of intimidation" and was sexual harassment in violation of Title VII of the Federal Civil Rights Act. The behavior, which was directed to both male and female employees, was not sufficiently severe or pervasive to constitute sexual harassment. Moreover, the company took appropriate action to address the employee's concerns, including sending her supervisor to management class, and the unwelcome behavior diminished after human resources personnel intervened. *Hesse v. Avis Rent-A-Car System, Inc.*, 394 F.3d 624 (8th Cir. 2005)

Reversing the decision of the trial court, the 8th Circuit held that an employer did not violate the "perception" of disability version of the Americans with Disability Act (ADA) when it removed an employee from a position and assigned him to other work at identical pay. The claimant had his job duties switched from boiler operator to less intense duties after he complained that it was painful for him to do his boiler work. Switching his job duties did not constitute violation of the provision of the ADA that bars an employer from discriminating against someone who is regarded as "being disabled." To establish a "regarded as" claim, an employee must show that the employer viewed the employee as "unable to perform a class of jobs or broad range of jobs." Since that type of evidence was lacking, the lawsuit was dismissed. *Knutson v. Ag Processing, Inc.*, 2005 WL 53304 (8th Cir. 2005).

■ **UNEMPLOYMENT COMPENSATION.** Relying upon inaccurate information from a receptionist at the Unemployment Compensation Office did not justify a claimant's failure to call in for continuing eligibility in a recent unpublished decision by the Minnesota Court of Appeals. The employee was off work for a week because of a plant shut-down. He failed to call in to request benefits and provide information regarding his ongoing eligibility because he claimed he was told by a receptionist at the unemployment office that he did not have to do so after initially filing his claim. This information was inaccurate and contradicted written instructions provided to the claimant. Therefore, he was not entitled to rely upon the inaccurate oral information and was ineligible for unemployment benefits for the week. *Morden v. Commissioner of Employment and Economic Development*, 2005 WL 44912 (Minn. App. 2005) (unpublished).

A dispute regarding whether an employee was told not to report to work for a single day, or was terminated, was resolved in the employee's favor by the Minnesota intermediate appellate court in another unpublished decision. The employee maintained that she was terminated while the employer took the position that she was simply told not to come in for a particular day and return to work the next week. The determination by the Commissioner of Employment and Economic Development that the employee's version was "less credible" supported a determination that the employee had not been terminated, but had voluntarily resigned, which was further corroborated by a letter she wrote stating that she had resigned in order to obtain her profit sharing. *Galindo v. Excel Temp, Inc.*, 2005 WL 44464 (Minn. App. 2005) (unpublished).

— MARSHALL H. TANICK  
Mansfield, Tanick & Cohen, PA

## FEDERAL PRACTICE

### JUDICIAL LAW

■ **SANCTIONS IMPOSED BY MAGISTRATE JUDGES; STANDARD OF REVIEW.** In September, 2004, this column discussed Magistrate Judge Nelson's then-order awarding more than \$60,000 in sanctions to the plaintiffs in *Rottlund Co. v. Pinnacle Corp.* Defendants and their counsel subsequently filed objections to that order with Judge Doty.

While Judge Doty affirmed most of Magistrate Judge Nelson's ruling, his decision is most notable for its discussion of the standard of review applicable to awards of sanctions by magistrate judges. Judge Doty noted "some disagreement among federal courts" as to whether sanctions imposed by magistrates are considered to be "dispositive" or "non-dispositive," but noted that "the cases seem to favor *de novo* review," particularly in cases where sanctions are premised on the inherent power of the court. Accordingly, Judge Doty construed Magistrate Judge Nelson's "order" as a report and recommendation, and reviewed the entirety of the "order" *de novo*.

While it would appear that monetary sanctions are seldom imposed by the magistrate judges in this district, Judge Doty's opinion is important as it appears to clarify the standard of review in those seemingly rare cases. *Rottlund Co. v. Pinnacle Corp.*, 2005 WL 407860 (D. Minn. 02/17/05).

■ **CLASS ACTION OBJECTORS; APPEAL ABSENT INTERVENTION.** A settlement was reached in a multi-district class action. One group of objectors sought to intervene, but the district court denied their motion for intervention, as well as their two subsequent motions for reconsideration. The objectors then appealed to the 8th Circuit.

Identifying themselves as "objector-appellants," and no longer objecting to any part of the settlement, this group of appellants asked the

court to clarify whether intervention in the district court is a prerequisite to appeal. (The 8th Circuit previously had declined to decide this question in *Snell v. Allianz Life Ins. Co.*, 327 F.3d 665 (8th Cir. 2003).) However, the 8th Circuit held that absent any stake in the outcome of the appeal, the objector-appellants were in fact seeking an advisory opinion (a request that ran afoul of Article III), and that it lacked jurisdiction to consider the objector-appellants' appeal.

With the 8th Circuit twice having failed to decide this issue, litigants are still waiting for a definitive answer to the issue of whether non-intervening objectors to a settlement can appeal. *In Re Wireless Telephone Federal Cost Recovery Fees Lit.*, 396 F.3d 922 (8th Cir. 2005).

■ **OTHER NOTEWORTHY DECISIONS.** Judge Magnuson denied a defendant's motion to dismiss pursuant to Fed. R. Civ. P. 4(m) despite a finding that the plaintiff had not offered any "good cause" for his failure to effect service within 120 days of filing, finding that the statute of limitations would bar a refiled action, and that the defendant had not been prejudiced by the delay in service. *Hustad v. Mitsubishi Heavy Indus. America, Inc.*, 2005 WL 348298 (D. Minn. 02/10/05).

The 8th Circuit dismissed an appeal from a case that had been remanded due to the absence of diversity following removal, rejecting the defendants' argument that this case fell outside the usual limitations on appeals from remand orders because the district court had failed to properly consider their fraudulent joinder argument. *Whittle v. Burlington Northern & Santa Fe RR Co.*, 395 F.3d 829 (8th Cir. 2005).

The 8th Circuit awarded the prevailing plaintiff-appellant more than \$19,000 in attorney's fees and expenses on appeal in a Section 1983 case, rejecting the defendants' argument that a request for attorney's fees on appeal must be brought in the district court. *Warnock v. Archer*, 397 F.3d 1024 (8th Cir. 02/04/05).

— JOSH JACOBSON  
Law Office of Josh Jacobson

## INTELLECTUAL PROPERTY

### JUDICIAL LAW

■ **TRADEMARK; DOMAIN NAMES; INTERNET.** In January Judge Montgomery revisited the actions of a cyber defendant — Purdy — as they related to several high-profile corporations. The court addressed whether Purdy's registration of domain names using the plaintiffs' well-known trademarks created a likelihood of confusion. The 8th Circuit has articulated six factors to determine whether there is a likelihood of confusion: (1) the strength of the earlier mark; (2) similarity between the mark and the alleged infringer's mark; (3) the degree to which the products compete with each other; (4) the alleged infringer's intent to pass off his own goods as those of the mark owner; (5) incidents of actual confusion; and (6) whether purchaser care can eliminate any existing likelihood of confusion. The court found the first three factors easily satisfied. The fourth factor was satisfied because Purdy registered domain names identical to or confusingly similar with plaintiffs' trademarks and used those domain names as sites to promote anti-abortion views — seen as a bad faith intent to profit from plaintiffs' good names. Finally, with regard to the sixth factor, the court cited case law finding that the nature of Internet "surfing" makes it unlikely that a consumer can avoid confusion through their own due care. Following this analysis the court enjoined Purdy from registering, using, owning or trafficking any domain name that incorporates and is identical or confusingly similar to plaintiffs' trademarks. *The Coca-Cola Co., et al. v. Purdy*, Civ. No. 02-1782 (D. Minn. 01/28/05).

■ **PATENTS; ABANDONED APPLICATION; FILING DATE.** Ruling in an infringement case, Judge Montgomery held that Field Hybrids had abandoned an earlier patent application resulting in the invalidity of the two asserted patents. The case involved Field Hybrids' allegation of infringement of two patents, the '516 and '954 patents, against Toyota. Field Hybrids claimed the two asserted patents were entitled to a filing date in 1992 based on the filing dates of earlier patent applications. Defendants argued, and the court agreed, that Field Hybrids abandoned one of those earlier applications necessary for the 1992 date. Patent Office rules provide that a patent applicant has three months, extendable to six months, to respond to an Office Action from the Patent Office, before the application is deemed to have been abandoned. Writing that "a course of conduct resulting in delay that is purposefully chosen does not qualify as an unintentional delay," the court found that not only did Field Hybrids miss a six-month deadline in an earlier application, it did so with knowledge of the deadline. Its attorneys informed Field Hybrids of the deadline by letter and stated that the earlier application was in danger of being abandoned. Although that earlier application was revived by Field Hybrids, the court found that the revival was erroneously granted by the Patent Office. Because both of the asserted patents were linked to the earlier abandoned application, the abandonment of that application caused the asserted patents to lose the 1992 date. Instead, they had a 1996 filing date, which the court found was after a prior publication and public use, thus invalidating the two asserted patents. *Field Hybrids, LLC v. Toyota Motor Corp., et al.*, Civ. No. 03-4121 (D. Minn. 01/27/05),

— TONY ZEULI  
— JOEL "BERGIE" BERGSTROM  
Merchant & Gould

## JUVENILE LAW

### JUDICIAL LAW

■ **TERMINATION OF PARENTAL RIGHTS; EVIDENCE.** In an unpublished case where the appellant asserted that the juvenile court's erroneous evidentiary ruling deprived her of a fair trial and that the order terminating her parental rights was not supported by clear and convincing admissible evidence, the Court of Appeals affirmed the juvenile court. Mother also asserted that the juvenile court erred by failing to separately consider the best interest of each child and by refusing to consider post-hearing evidence of her case plan compliance.

The juvenile court had admitted a certified police report about an incident in which the mother's ex-boyfriend assaulted her. In light

of the assault, the juvenile court expanded the case plan to address domestic abuse and suspended the mother's visitation with the children. The record implicitly linked the mother's abrupt departure from the state to the assault, and this departure was viewed as a major set back in her compliance with the case plan. Therefore, the Court of Appeals concluded that the juvenile court did not abuse its discretion by concluding that the assault was relevant or that the probative value of this evidence outweighed any danger of unfair prejudice.

The appellant mother also objected to the admission into evidence of court orders denying her petitions for an order for protection, together with the attached petitions. The county argued that the exhibits were relevant to the mother's compliance with the case plan, and that the juvenile court could properly take judicial notice of the orders. The Court of Appeals agreed, and further found that the mother failed to demonstrate how she was prejudiced by the admission of the petitions.

Although the appellant mother failed to preserve her objection, the Court of Appeals took the opportunity to address a long-standing issue in juvenile court practice, namely, the proper scope of judicial notice. The Court first noted that the juvenile protection rules specifically permit judicial notice of court orders in the juvenile court protection court file. However, the Court of Appeals referred to a prior decision where taking judicial notice of testimony or written reports contained in a court file was deemed inappropriate because judicial notice under the Minnesota Rules of Evidence does not extend to matters in dispute and, more significantly, because such evidence involves an important distinction between judicial notice law and the law governing the use of hearsay reports and personal welfare cases. The Court further noted that the trial court has discretion in such cases to admit written materials as hearsay evidence, provided that the affected parties have an opportunity to dispute the material. The Court had previously held that it was a mistake for a trial court to take judicial notice of the entire file, noting that a considerable part of the file and records are well beyond the reach of judicial notice.

In this case, the Court of Appeals held that while it was a mistake for the juvenile court to take judicial notice of exhibits in the CHIPS files, the appellant mother failed to establish that any of the exhibits were prejudicial. The mother had more than sufficient notice and ample opportunity to dispute any of the exhibits at trial.

After reviewing the sufficiency of the evidence, the best interests of each child, as well as the claim that the juvenile court abused its discretion, the Court of Appeals affirmed termination of the mother's parental rights. *In the Matter of the Welfare of the Children of L.D., Parent*, A04-1187 (Minn. App. 02/01/05).

■ **TERMINATION OF PARENTAL RIGHTS; EVIDENCE.** In another unpublished decision, the appellant mother argued that the record lacked sufficient evidence to support the trial court's finding that the state made reasonable efforts towards reunification of her family, and also, that the record lacked sufficient evidence to support the trial court's termination of her parental rights. The Court of Appeals concluded that the evidence was indeed insufficient to support the trial court's finding and reversed the termination of parental rights.

In this case, the crux of the trial court's decision was its determination that the mother had not satisfied the portions of her case plan requiring her to not abuse chemicals. Because the focus of the termination was the mother's abuse of chemicals, for the county's reunification efforts to be reasonable, those efforts had to address her chemical abuse. The Court of Appeals was satisfied that the mother's chemical abuse pervaded her parenting deficiencies, and as a result, the district court's reason for terminating her parental rights.

However, because of the importance of the chemical abuse problems in this termination proceeding, the Court of Appeals observed that the county's efforts to reunite the family, to be reasonable, had to give the mother an adequate opportunity to address those chemical abuse problems. Because of the defects in the county's treatment of the mother's chemical abuse problems, the Court of Appeals concluded that the record failed to adequately support the finding that the county made reasonable efforts to reunite the mother with her children and reasoned that such deficiencies in the county's performance should not be visited upon the mother in the form of termination of her parental rights. *In the Matter of the Children of T.A.A.*, A04-1345 (Minn. App. 02/02/05).

■ **TERMINATION OF PARENTAL RIGHTS; BEST INTERESTS.** In a third unpublished decision, the Minnesota Court of Appeals reviewed termination of parental rights after juvenile court found that the mother was an unfit parent, that she failed to correct conditions leading to the child's out-of-home placement, and that termination of parental rights would be in the child's best interest. The juvenile court had found that the appellant mother had known about an injury that resulted in child protection becoming involved, but that she did not disclose the injury to child protection workers or to her case worker. Even after two serious injuries to the child, this mother was unable to protect the child and claimed not to know the cause of the injury. The juvenile court found that the mother seemed more concerned about what was going to happen to the child's father, whose parental rights had been terminated and who had acknowledged responsibility for one of the child's prior injuries, than about the child's maltreatment. The juvenile court also found that the mother failed to show how she would handle the parenting in support of the child on her own.

Ultimately, the Court of Appeals affirmed the termination decision, concluding that the district court's findings were supported by its particular findings and by the evidence. *In the Matter of the Child of: C.A.B, Parent*, A04-1597 (Minn. App. 02/01/05).

■ **DELINQUENCY; CERTIFICATION AS ADULT.** In an unpublished Court of Appeals delinquency decision, a 17-year-old participated in a robbery in which a five-year-old child was accidentally killed by one of the juvenile's five accomplices. On an appeal from an order certifying her to stand trial as an adult, this juvenile argued that the district court abused its discretion because she claims to have rebutted the presumption of certification with clear and convincing evidence that retaining the preceding in the juvenile system would serve public safety.

Held, because this juvenile acted with full awareness of the possible consequences of her acts, the accidental nature of the shooting did not decrease the seriousness of the offense or establish clearly and convincingly that the juvenile did not pose a risk to public safety. Further, evidence showed that this juvenile helped with the planning, gave the group directions to the apartment, and knocked on the door. Expert testimony established that there were no mitigating circumstances. The fact that the juvenile did not pull the trigger herself did not preclude certification. Further, the Court of Appeals concluded that the juvenile's lack of an extensive record of delinquency does

not, by itself, preclude certification. Nor does the fact that the juvenile had no programming history.

The Court of Appeals observed that with the exception of one 15-year-old accomplice, all of the juvenile's accomplices were sentenced to prison terms. In light of the punishment of her accomplices, retaining this juvenile in the juvenile system for a maximum of three years was found to be insufficient. Therefore, the certification was affirmed. *In the Matter of the Welfare of S.J.R.*, A04-773 (Minn. App. 02/15/05).

■ **ADOPTION; CHILDREN OF SURROGATE MOTHER; NEW YORK.** A New York appellate court recently addressed whether a settlor's exclusion of "adoptions" in creating an *inter vivos* trust for the issue of his children covered his twin grandchildren born to a surrogate mother by *in vitro* fertilization. In this case, the settlor's married daughter had arranged for an unrelated surrogate in California to be impregnated with an anonymous egg fertilized *in vitro* by her husband's sperm. After the resulting twins' birth, the daughter and her husband obtained a judgment of parental relationship from a California court to establish themselves as the twins' sole legal parents. The settlor's other grandchildren contended that the "adoption exclusion" barred the twins from benefiting from the trust, which had been created before the development of the reproductive technologies at issue. The appellate court rejected the argument that the settlor's exclusion of adoptees meant that he intended to exclude all non-blood relations. The court noted that the settlor had made a contingent provision for his grandchildren's future spouses, and thus there was a possibility of a non-blood relation being a beneficiary.

Furthermore, the New York appellate court found that the California judgment should not be considered an adoption, because under California law a gestational surrogacy arrangement is not subject to California adoption statutes. The court found no reason justifying a denial of full faith and credit to the California judgment, and while New York does not recognize surrogacy contracts, the Legislature does not punish or prejudice the rights of children born from such arrangements. Therefore, the settlor's exclusion of adoptions did not cover grandchildren born to a surrogate mother by *in vitro* fertilization. *Matter of Doe*, 3013-1980, (N.Y. Surr. Ct. 01/25/05).

■ **ASSISTED REPRODUCTIVE TECHNOLOGY; CHILD SUPPORT; ARKANSAS.** The Arkansas Court of Appeals held that a divorced man, who was ordered to pay support for twins born to his wife during their marriage by artificial insemination, may not seek reimbursement of such payments from the doctor who performed the procedure without first obtaining his statutorily required written consent. The court said that the man's tort action for negligence and outrage was in effect a suit for wrongful birth, which was not actionable in the state of Arkansas. *Brown v. Wyatt*, No. 04-487 (Ark. Ct. App. 02/09/05).

— GARY A. DEBELE  
Walling, Berg & Debele PA

## REAL PROPERTY

### JUDICIAL LAW

■ **STATUTE OF LIMITATIONS FOR SURVEY.** In 1980, landowners purchased land on Crystal Lake and subsequently built a boathouse and installed a septic drain field on the western side of their property. In 1996, landowners and their neighbors each obtained a survey to determine the boundary line between their properties. Both surveys showed that the property line was located 30 feet east of the place landowners believed it to be. After failing to prevail in their adverse-possession action, landowners were forced to relocate their boathouse. In April 2002, landowners retained a second surveyor to resurvey their property. This surveyor determined that the prior surveyor made several errors causing him to incorrectly locate the western boundary line of the landowner's property 30 feet east of its true location. Landowners brought this action for damages against the first surveyor, alleging negligence and intentional misrepresentation. The district court granted the surveyor's summary judgment motion concluding that the statute of limitations barred landowner's claims.

Reversing the district court decision, the Court of Appeals found that under Minn. Stat. §514.052, subd. 1, landowners properly filed their lawsuit within two years of discovering the error in the survey and within ten years after the date of the survey. Even though landowners believed the first survey was incorrect, they did not "discover the error" that triggered the running of the statute of limitations until they obtained the second survey from a professional surveyor, who substantiated their claim. This matter was remanded to district court for a determination of damages suffered by landowners for having to relocate their boathouse and defend legal actions brought against them by the local government and their neighbors as a result of the erroneous first survey. *Willhite, et al. vs. Cass County Board of Supervisors, et al.* A04-660 (Minn. App. 02/15/05). [www.lawlibrary.state.mn.us/archive/ctappub/0502/opa040660-0215.htm](http://www.lawlibrary.state.mn.us/archive/ctappub/0502/opa040660-0215.htm)

■ **ADVERSE POSSESSION.** The Guyses own land along Lake Zumbro. The neighbors own land adjacent to the Guyse land. Both properties are used as seasonal residences. In 2000, the neighbors filed this lawsuit to establish their right to a portion of the Guyse land, which includes a vacated township road. Affirming the district court decision, the Court of Appeals held that the neighbors established their right to the disputed land by adverse possession by showing that "the property was used in an actual, continuous, exclusive, and hostile manner for at least 15 years" pursuant to Minn. Stat. §541.02. The district court found that since 1956 the neighbors and their predecessors in interest have openly possessed the disputed land to the exclusion of others, treating it as their own and using it in the same manner as their other property. The fact that the property is used seasonally does not prevent a finding of adverse possession provided the use is exclusive. The neighbors also adversely possessed the vacated road because the road was effectively vacated in 1979 when the resolution was adopted, regardless that the resolution was not recorded until 1986. Lastly, the Court of Appeals found that this action involved a boundary-line dispute because the disputed land consisted of less than 14 percent of the Guyses' property. Therefore Minn. Stat. §541.02, which requires the adverse possessor to pay the real estate taxes on the disputed land at least five consecutive years during the adverse-possession period, does not apply. *Houdek, et al. vs. Guyse, et al.* A04-711 (Minn. App. 02/22/05).

— MELISSA BAER  
Lindquist & Venum PLLP

## TAX

### JUDICIAL LAW

■ **INCOME TAX: PURPORTED SOCIAL SECURITY TRUST DID NOT AVOID PERSONAL TAX LIABILITY.** The Minnesota Supreme Court affirmed the Minnesota Tax Court and rejected a taxpayer's claim that the Social Security Administration established trusts with individual taxpayers; and therefore the taxpayer could not deduct his wages as fiduciary fees paid to the trust. The Court ruled that there were no material facts at issue and, therefore the Tax Court did not err when it ruled that the Social Security law did not create a trust for individual taxpayers. Moreover, the Social Security Administration was not collaterally estopped from denying the existence of the purported trust because it failed to respond to his attempts to establish the agreement. Equitable estoppel against a government agency such as the Social Security Administration acting in its sovereign capacity puts a heavy burden on the taxpayer, who here failed to show that the government's conduct was wrongful and induced his detrimental reliance. The fact that the IRS granted him refunds was not binding for Minnesota taxes since Minnesota independently retains the right to make state assessments and adjustments. Lastly, the frivolous return penalty of \$500.00 imposed under Minn. Stat. §289A.60, Subd. 7 was sustained. Frivolousness is determined under an objective standard and is established if the return has no basis in law or fact, which was the case here. *Bond v. Commissioner of Revenue*, A04-564, 691 N.W. 2d 831 (Minn. 02/10/05),

■ **INCOME TAX: GAMBLING INCOME SUBJECT TO AMT IN MINNESOTA.** The Minnesota Tax Court held that for purpose of computing the state alternative minimum tax under Minn. Stat. §290.091, Subd. 2, the gambling losses of the taxpayer were not incurred in a trade or business of gambling during the year 1999. The Court found that the taxpayer had failed in his burden of proving that gambling was his trade or business, rather it was a recreational activity. Therefore, the gambling income was taxable without the benefit of the gambling losses. *Steven A. Schleif v. Commissioner of Revenue*, No. 7539-R, 2005 Minn. Tax LEXIS 10 (Minn. T. Ct. 02/16/05).

■ **REAL PROPERTY: DETERMINATION OF FAIR MARKET VALUE AND DISCRIMINATION.** The Minnesota Tax Court determined the fair market value of a Kmart store in Detroit Lakes for assessment periods 2000 through 2002. The building was in a commercial development and improved for a single tenant Big Box discount retailer. The assessor had valued the property for the years 2001 through and including 2003 at \$2.8 million, while the expert for Kmart testified the values were \$2.3 million. At the trial, the county produced an appraisal for the value of the property at \$3.3 million. The court looked at the three methods of valuing the building and dismissed the cost approach since the building was 11 years old but did utilize the sales and income approaches to determine that the fair market value was approximately \$2.7 million. The level of assessment for commercial property in Becker County was approximately 82.8 percent of market value for the 2003 assessment year; the property therefore qualified for a 12.2 percent reduction based on discrimination for tax year 2003. *Kmart Corporation v. County of Becker*, CX 02 410, CX 03 563, C8 04 328, (Minn. T. Ct. 12/01/04).

■ **PROPERTY TAX: VALUATION.** Where the assessor and the taxpayer's expert valued the taxpayer's property differently, the Minnesota Tax Court lowered the property value for a 35-year-old automotive service center. The assessor placed the value as of January 2, 2001 at \$537,700, while the taxpayer's expert valued the same property at \$410,000. The county's expert at trial opined that the value was \$535,000. The court found the value to be \$475,000. The court found the property's highest and best use was as an automotive service facility but did not use the cost approach due to the age of the property and the difficulty of measuring depreciation. Moreover, the court did not place a lot of weight on the income valuation method because automotive centers are owner-occupied and not purchased as an investment for their income potential. Using the market approach, the court put the most weight on the taxpayer's valuation because of the similarity between the comparables and the property. *Peter R. Houser v. County of Hennepin*, No. 29232, 2005 WL 3053217 (Minn. T. Ct. 12/30/04).

■ **PROPERTY TAX: DISCRIMINATION IN VALUATION.** The Minnesota Tax Court denied a discrimination objection because of a failure of proof. The Minnesota Department of Revenue's Sales Ratio Study for similar apartment buildings for the nine-month and the twelve-month studies had only two sales. The court held that the sample size for apartment sales was inadequate. The court could not average sales from other property tax classifications since Minn. Stat. §278.05 provides that the sales tax study has to be for the same classification of property. Therefore, since the taxpayer failed to submit any independent proof other than the Sales Ratio Studies, the claim was denied. *Mark Court, LLC v. County of Washington*, C4-03-2946, 2004 Minn. Tax LEXIS 57 (Minn. T. Ct. 12/22/04),

■ **PROPERTY TAX: 60-DAY RULE VIOLATED.** The Minnesota Tax Court granted Stearns County's motion to dismiss for failure to turn over tenant-paid real estate expenses in a case involving KMart. The court indicated that the 60-Day Rule does not require disclosure of information on the income and expense figures of the *business* operating in or on the subject property; however, such was not the case here, as the income and expense figures were for the operation of the real estate. The court also dismissed the taxpayer's contention that information on the tenant-paid real estate expenses was "unavailable." *Kmart Corporation v. County of Stearns*, CX 00 404, CX 01 1465, and C2 02 1387, 2005 WL 94810 (Minn. T. Ct. 01/04/05).

■ **REAL PROPERTY; MEMBER OF INDIAN TRIBE SUBJECT TO REAL PROPERTY TAXATION ON MANUFACTURED HOME.** The Minnesota Supreme Court affirmed a 2004 decision of the Minnesota Tax Court, holding that real estate owned by Indian members at a reservation and on which a manufactured home and other items of property were located are real property and subject to taxation by the county. Under the U.S. Supreme Court case of *County of Yakima*, 502 U.S. 251 (1992), Congress intended to grant the states authority to assess *ad valorem* taxes on real property owned by Indians in fee title on Indian land. In addition, Congress did not define real or personal property in its grant of tax authority and therefore, Minnesota had the authority to determine under its property tax statutes its definition of real property to include manufactured homes as real property. *Cogger v. County of Becker*, A0 713, 690 N.W.2d 739 (Minn. 01/20/05).

■ **REAL PROPERTY: CLASSIFICATION TO AGRICULTURAL.** The Minnesota Tax Court held that even though a purchaser had filled out the

certificate of value indicating residential/homestead, the property qualified for an agricultural classification. The court held that the raising of horses and the growing and selling of hay constituted “agricultural products” for the purposes of the agricultural exemption found in Minn. Stat. §273.13 (23)(c). Therefore, the land was reclassified from residential to farming. **James G. and Janice L. Mowry v. The County of Kanabec**, C5 04 299, 2005 WL 94824 (Minn. T. Ct. 01/12/05),

■ **REAL PROPERTY — VALUATION.** The Minnesota Tax Court reduced the value of a 100-year-old, two-room schoolhouse located on one acre of land from \$50,000 to \$40,000. The court made this determination after using the three approaches to valuation: cost, income, and sales. **Juris Curiskis v. County of Todd**, C4 04 186, 2005 Minn. Tax LEXIS 5 (Minn. T. Ct. 01/14/05),

■ **REAL PROPERTY: VALUATION UPHeld.** The Minnesota Tax Court ruled in favor of the city of Minneapolis in a real estate tax valuation appeal of an assessment on the U.S. Bancorp Center. The assessor’s valuation for January, 2000 and January, 2001 was \$114.8 million and \$132.6 million. The owner’s valuation for 2000 was \$86.3 million and in 2001 \$105.6 million. The court determined that the actual value for 2000 was \$114 million and in 2001 \$127 million. Although the property was sold in April, 2003 for \$174 million, the price was not regarded as the best indicator of value because the building wasn’t completed at the time of the disputed assessments. Further, the building got long-term leases from two anchor tenants in the late 1990s, when the market was more favorable to landlords than it was during the time of the contested assessments. The court gave little weight to the sales valuation approach since there were few comparable sales and gave little weight to the income approach, which is normally the preferred method for income-producing properties, because at the time of the assessments the buildings were not operational. The court principally focused on the cost approach and the core issue in the case involved external obsolescence, which is an incurable loss in value caused by negative influences outside the property itself, such as general economic conditions, availability of financing, or inharmonious property uses. Here the economic obsolescence occurred because an overbuilt commercial rental market, although temporary, put a glut of rental buildings on the market in the years 2000 and 2001. **EOP — Nicollet Mall, L.L.C. v. County of Hennepin**, No. 28793, 29743, 2005 WL 443844 (Minn. T. Ct. 02/11/05),

■ **REAL PROPERTY: CLINIC NOT EXEMPT AS HOSPITAL OR CHARITY.** The Minnesota Tax Court held the medical clinic was not exempt from property taxation as a public hospital and/or an institution of purely public charity. The clinic was not exempt as a public hospital pursuant to Minn. Stat. §272.02, Subd. 1 and 4, since it did not perform hospital functions or perform the activities that are necessary as an auxiliary to a hospital in order for the hospital to function. The clinic also failed under the purely public charity exemption of Minn. Stat. §272.02, Subd. 7 since the *North Star Research Inst. v. County of Hennepin*, 236 N.W.2d 754 (Minn. 1975) six-factor test was not met. Although organized as a charitable institution and supported by donations, the clinic failed to show that charity care was generally available since the majority of the patients paid for their services and all patients were required and requested to pay. Moreover, the clinic failed the fourth factor since the income received from gifts and donations combined with its charges to patients produced a profit to the charitable institution. Lastly, the court found that the fifth factor was flunked since free care was available to a patient only after exhausting any other means of payment. Therefore, the class of beneficiaries was too restrictive and was limited to those that were willing to pay but could not pay and who only comprised 21 patients per year. **Allina Medical Clinics v. County of Meeker**, C0-02-256, C9-03-363, and C7-04-288, 2005 WL 473908 (Minn. T. Ct. 02/18/05),

■ **TAX COURTS COMPLIANCE WITH DISCOVERY.** The Minnesota Tax Court ordered compliance with discovery requested by Dakota County against the taxpayer, Kmart. The court ordered that discovery responses be notarized with signatures of the appropriate officer or managing agent, cost of improvements for various stores be disclosed unless there were no improvements, materials in the bankruptcy filing by Kmart and in the hands of their New York counsel be turned over and provided to the county, and lease information of other Kmart stores be disclosed. Further, requests for the net profits for each store location and compliance with the 60-Day Rule must be honored. **Kmart Corporation v. County of Dakota**, CX 00 7261 et al., 2004 WL 3021366 (Minn. T. Ct. 12/01/04),

■ **PROCEDURE: FAILURE TO SERVE NOTICE OF APPEAL FOR PROPERTY TAX ACTION.** The Minnesota Tax Court dismissed the notice of appeal of Kmart because of failure to personally serve the county attorney and county assessor by April 30, 2003. The court rejected the taxpayer’s arguments that the county officials evaded service. Service by fax is permissible under Minnesota Rules of Civil Procedure 5.01 but the rule specifically refers to pleadings “subsequent to the original complaint.” **Kmart Corporation v. County of Clay**, No. C8-03-764, 2005 WL 195480 (Minn. T. Ct. 01/27/05).

■ **PROCEDURE: MOTION DISMISSED TO COMPEL DISCOVERY.** The Minnesota Tax Court dismissed Kmart’s motion to compel answers to discovery. The motion was untimely under the cutoff established by the scheduling order. Moreover, the county’s initial response was made in good faith and the records were accessible to Kmart in a timely manner. Therefore, the county was not prohibited from using or relying on any of the requested interrogatory information at trial as there had been no wrongful withholding by it. **Kmart Corporation v. County of Dakota**, Nos. CX-00-7261 et al., 2005 WL 195486 (Minn. T. Ct. 01/27/05),

■ **PROPERTY TAX: 60-DAY RULE AND MOTION TO COMPEL DISCOVERY.** The Minnesota Tax Court dismissed a motion made by the county to dismiss the action based on a violation of the 60-Day Rule. The county’s motion was two months delinquent from the cutoff established by the scheduling order and the county was put on notice by counsel for Kmart when supplying certain expense data for one of the locations. **Kmart Corporation v. County of Dakota**, Nos. CX-00-7261 et al., 2005 WL 195486 (Minn. T. Ct. 01/27/05).

■ **INCOME TAX: RETIRED DOCTOR RETAINS MINNESOTA DOMICILE AND RESIDENCY.** The Minnesota Tax Court determined that a retired doctor did not establish his domicile in Alaska, and violated the 183-day residency test because his abode was in Minnesota. The retired doctor was also subject to penalties for fraud and substantial underpayment. For the tax years 1998 and 1999, the taxpayer contended that the “20-factor” test on domicile under Minnesota Rules 8001.0300, Subdp. 2 was met. The commissioner argued that the center of his family, business, and social life remained in Minnesota, principally because he conceded that his wife remained a Minnesota resi-

dent for the years at issue. The court applied the common law test of domicile found in the regulation, using the case of *Manthey v. Commissioner of Revenue*, 468 N.W.2d 548 (Minn. 1991) as precedent. The court agreed with the commissioner that the taxpayer had not overcome the presumption in Minnesota Rule 8001.0300, Subp. 2 that he was domiciled where his wife maintained her home, which was Minnesota. The court specifically found there was no evidence of the doctor's intention to move to Alaska, principally because he periodically returned to Minnesota, maintained his Minnesota medical and driver's licenses, had only temporary quarters in Alaska, and the physician's wife claimed a Minnesota homestead exemption. Further, the court held that even if he had the requisite intent of changing his domicile from Minnesota to Alaska, the retired physician ran afoul of the 183-day rule, since he failed to keep adequate records to substantiate his claim that he spent 183 days outside the state. Lastly, the court held that the taxpayer was liable for the 50 percent fraud penalty and a 20 percent penalty for substantial underpayment of income taxes under Minn. Stat. §289A.60, Subd. 4 because he intentionally misallocated a portion of his taxable income to Alaska, and a person's "domicile remains that of his or her spouse and family." *Carol Dreyling and Roger A. Dreyling v. Commission of Revenue*, No. 7622-R, 2005 WL 473893 (Minn. T. Ct. 02/25/05).

■ **TREASURER WITH CHECK SIGNING AUTHORITY RESPONSIBLE PERSON FOR WITHHOLDING TAXES.** An individual, who was both treasurer and chief financial officer of a company that did not pay federal withholding taxes for six quarters from July 1, 1996, to December 31, 1997, is the responsible person. He was required but willfully failed to pay over taxes pursuant to I.R.C. §6672. *Lubetzky v. United States*, 393 F.3d 76 (1st Cir. 2004).

■ **NO "REASONABLE CAUSE" FOR ABATEMENT OF PENALTIES.** A construction company fails to demonstrate "reasonable cause" for abatement of withholding tax penalties based on financial distress. *Francis P. Harvey & Sons, Inc. v. IRS*, No. 03-40097-FDS, 94 AFTR 2d ¶2004-7258 (D. Mass. 12/02/04).

■ **BURDEN OF PROOF; IRC §7491.** The U.S. Tax Court did not err in not shifting the burden of proof to the commissioner, pursuant to IRC §7491, with respect to a deduction claimed by a taxpayer for various items of business losses arising from the liquidation of her exhusband's business. *Blodgett v. Commissioner*, No. 03-3917, 95 AFTR 2d ¶2005-446 (8th Cir. 01/12/05).

■ **JOINT RETURN IN SAME-SEX MARRIAGE BARRED.** Doctrine of claim preclusion bars plaintiff from relitigating his claim that he is entitled to file as "married filing jointly" with his partner in a same-sex marriage that Minnesota Supreme Court later declared invalid. *McConnell v. United States*, No. 04-2711 (JNE/JGL), 95 AFTR 2d ¶ 2005-568 (D. Minn. 01/03/05).

■ **FEDERAL SUIT ASSERTING STATE LAW CLAIM NOT TIME-BARRED.** IRS tax collection action, which asserts a claim of fraudulent transfer by taxpayer under state law, is not subject to the shorter limitations period set out in the state law, but to the ten-year limitations period set out in IRC Code §6502(a)(1). This result is supported by *United States v. Summerlin*, 310 U.S. 414 (1940), which holds that the federal government is not bound by the state statute of limitations or subject to the defense of laches in enforcing its rights. *United States v. Gaona*, No. SA-04-CA-00151-RE, 95 AFTR 2d ¶2005-618 (W.D. Tex. 12/22/04).

■ **REFUSAL TO ACCEPT AMENDED RETURNS; IRS DISCRETION.** U.S. Tax Court properly upheld IRS's refusal to accept taxpayer's amended returns. Amended returns' acceptance was completely within IRS's discretion, and not matter of taxpayer right under IRS Code §6011. *Colvin v. Comm.*, 95 AFTR 2d ¶2005-1079 (5th Cir. 2005).

■ **HOSPITAL TAX EXEMPTION; NO CONTRACT BASIS FOR CLAIMS BY UNINSURED.** Grant of federal tax-exempt status to hospitals under IRC Code §501(c)(3) does not create a contract that can provide a basis for a claim of breach of contract and other claims against hospitals by uninsured patients, who were billed the full, undiscounted costs of medical care. Minnesota joined other federal courts around the U.S.A. that have similarly so held. The Mississippi lawyer, who is directing the national suits, intended to shift the litigations from federal to state courts. *Peterson v. Fairview Health Services*, No. 04-2973 ADM/AJB, 95 AFTR 2d ¶2005-1005 (D. Minn. 02/01/05).

■ **TRANSFER OF NONSTATUTORY STOCK OPTIONS; COMPENSATION UPON EXERCISE.** Taxpayer/ex-employee's option to purchase stock of company that purchased his company gave rise to income when option was exercised, not when it was granted. Assuming option was nonstatutory, taxpayer realized compensation at time of exercise where option's value wasn't "readily ascertainable" at time of grant under Regulation §1.83-7. The record showed there was no established market for options that purchasing company granted to its employees; and option at time of grant was nontransferable, not immediately exercisable, and there was no way to readily ascertain value of option privilege inherent in taxpayer's option. Also, taxpayer's reliance on Tax Court and district court case law, which failed to apply regulation's predecessor, was misplaced. Even if option, which was granted before taxpayer's termination, converted to nonstatutory stock option after his termination under stock option agreement, the Code required that it retain its character on grant date and thus continue to be treated as without readily ascertainable value when it vested. *Hubbard v. U.S.*, 95 AFTR 2d ¶2005-562 (W.D. Wa. 2005).

■ **SETTLEMENT NOT VITIATED BY COUNSEL'S UNRELATED WORK FOR IRS.** Estate that was represented by an attorney in a dispute with IRS and entered into a stipulated decision on the attorney's advice is not entitled to vacate the judgment simply because attorney acted as a consultant for the IRS during the same period in an entirely unrelated tax case. There was "no credible evidence" that attorney failed to properly represent her. *Abbott v. United States*, No. 03-71908, 95 AFTR 2d ¶2005-631 (9th Cir. 03/11/05).

■ **LOTTERY WINNINGS NOT "CONSTRUCTIVELY RECEIVED" IN FIRST YEAR.** Lottery winnings payable in annual installments over 20 years are not constructively received in their entirety in the first year. Therefore, taxpayer may not claim exemption for payments in subsequent years based on his diplomatic status in the first year. *Jombo v. Commissioner*, No. 03-1355, 95 AFTR 2d ¶2005-590 (D.C. Col. 02/22/05).

■ **FUNDS REMITTED BUT LATER FORFEITED NOT BASIS FOR CHALLENGE TO LIEN.** IRS Appeals Office did not err in determining that commissioner was warranted in filing a notice of federal tax lien against taxpayer, despite having surrendered to the Marshals Service funds that the taxpayer had remitted to IRS in compliance with a district court forfeiture order. Remitted funds were found to have been the pro-

ceeds of fraud and money laundering of which the taxpayer had been convicted. The commissioner was duty-bound to comply with the district court's order, which is not subject to collateral attack in the U.S. Tax Court. The commissioner had no duty to defend against the forfeiture order and thus is not barred from collecting the 1996 tax liability on account of his failure to petition the district court.

**McCorkle v. Commissioner**, 124 T.C. No. 5 (2005).

■ **PREJUDGMENT INTEREST COMPONENT OF PERSONAL INJURY AWARD TAXABLE.** Prejudgment interest component of an award recovered in a personal injury lawsuit is *not* excluded from taxation as damages received on account of personal injuries under IRS Code §104(a)(2). Citing *United States v. O'Gilvie*, 519 U.S. 79 (1996), the court emphasized that the award must have more than a "but for" connection to the personal injury. "Unlike damages paid to compensate an individual for the loss of normally untaxed human or financial capital, prejudgment interest compensates an individual for his lost time value of money." The court observed that the exclusion of prejudgment interest was inconsistent with "the tax-quality objective underpinning §104(a)(2)." **Chamberlin v. United States**, No. 03-31136 (5th Cir. 02/18/05).

■ **PROPER DISTRICT FOR FILING ADJUSTMENT PETITION IS ISSUE OF VENUE, NOT JURISDICTION.** IRS Code §6226, allowing the filing of petition for readjustment of partnership items in the district court "for the district in which the partnership's principal place of business is located," is a venue provision rather than a jurisdictional provision. Thus it permits a notice partner to file a petition in the district of its place of business on behalf of a dissolved partnership. **TransCapital Leasing Associates 1990-II LP v. United States**, No. 04-1172, 95 AFTR 2d ¶ 2005-556 (Fed. Cir. February 16, 2005).

■ **NO LIKE-KIND TREATMENT FOR EXCHANGE INVOLVING RELATED PARTY.** The U.S. Tax Court held that a company couldn't defer gain on its exchange of properties through a qualified intermediary that sold them and bought replacement properties from a party related to the company that were then transferred to the company. **Teruya Brothers Ltd. et al. v. Commissioner**, 124 T.C. No. 4 (2005).

■ **"REASONABLE DILIGENCE"; NOTICE OF IMPENDING DEPRIVATION OF PROPERTY.** "Reasonable diligence" standard under the Due Process Clause requires a tax lien purchaser to search all publicly available county records to obtain the property owner's address when notice sent by certified mail to the owner is returned promptly as undeliverable. In a series of cases, beginning with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the U.S. Supreme Court has set out the requirements for constitutionally adequate notice of an impending deprivation of property. *Mullane* and its progeny teach that a party charged with giving notice must be reasonably diligent in doing so. In the case of a tax sale of property, diligence requires that reasonable efforts be made to identify and locate parties with an interest in the property. Once those parties are located, they must be provided notice of the impending sale using a method reasonably calculated, under all of the circumstances, to actually inform them of the sale. **Plemons v. Gale**, No. 04-1196 (4th Cir. 02/03/05).

■ **S CORP STOCK REDEMPTION; SELLER WITH COMPANY TIES.** The U.S. Tax Court has ruled that the owner of a closely held S corporation qualified for capital gain treatment when he sold his stock via installment sale to his son and two unrelated employees. The redemption was complete and the seller had no prohibited continuing interest under IRC Code §302(b)(3) even though (1) the agreements carried extensive cross-default and cross-collateralization provisions, (2) the seller and his wife leased a building they owned personally to the corporation, and (3) the owner's spouse continued on as an employee and received fringe benefits including health insurance coverage. However, the health insurance provided to the spouse, who remained as an employee, was taxable to her since she was treated as a 2 percent S shareholder. **Hurst**, 124 T.C. No. 2 (2005).

■ **ESTATE TAX COLLECTION SUIT PROPERLY FILED WITHIN LIMITATIONS PERIOD.** In suit where estate's personal representative elected under IRC Code §6166 to defer payment of estate taxes where estate was mainly closely held business, IRS properly commenced action within ten-year statute of limitations on collection. **United States v. Askegard**, No. 01-845 (RLE), 95 AFTR 2d ¶ 2005-834 (D. Minn. 01/06/05).

■ **CORPORATION'S NOLs LIMITED AFTER STOCK SALE TO SIBLING.** The U.S. Tax Court has held that a sale of stock from one sibling to another caused an ownership change under IRC Code §382. As a result, net operating losses (NOLs) of the subject corporation were limited. The court's holding was based on its interpretation of a family attribution rule under IRC Code §382(1)(3)(A)(i). IRC Code §382 limits the use of loss carry-forwards (e.g., NOLs, certain built-in losses, capital losses, and certain pre-change credits) after an ownership change (the "§382 limitation"). The "§382 limitation" for any post-change year equals the value of the loss corporation immediately before the ownership change multiplied by the long-term tax-exempt rate. Since under IRC Code §382(1)(3)(A)(i), the family attribution rules of IRC Code §318(a)(1) and IRC Code §318(a)(5)(B) don't apply to treat the parents or grandparents of the brothers as owning their stock, the stock of the brothers may not be treated as owned by a single individual. Thus, one brother's sale of his stock to the other brother resulted in an ownership change that caused the IRC Code §382 limitation to apply to limit the use of pre-change losses in post-change years. This meant that the Tax Court upheld the adjustments made by IRS to the allowable NOL carry forward. **Garber Industries Holding Co., Inc.**, 124 TC No. 1 (2005).

■ **REFUND CLAIM; DEFICIENCY INTEREST CLAIMS BARRED BY VARIANCE.** Taxpayer's interest suspension claim is barred by "doctrine of substantial variance" since the disputed interest was not set forth in the original refund claim and principle of interest netting is not applicable where plaintiff claimed it was entitled to greater amount of deficiency interest based on those claims. **Computervision Corp. v. United States**, No. 90-284T, 94 AFTR 2d ¶ 2004-6020 (Fed. Ct. 09/09/04).

■ **BANKRUPTCY COURT CANNOT DETERMINE NONDEBTOR'S TAX LIABILITY.** A company that agreed to purchase a bankrupt mining company's assets free and clear of any Minnesota taconite production tax attributable to the debtor's operations was not entitled to seek relief in the bankruptcy court in enjoining the collection of a production tax that was calculated by using a three-year average of total production at the facility. The purchasing company claimed that the average production for the years attributable to the debtor's operations

should have been zero. Since the bankruptcy court would have been forced to restrain the manner in which the state assessed and collected the tax, the substance of the relief sought triggered the Tax Injunction Act and barred the bankruptcy court from granting the relief. There is nothing in the Bankruptcy Code that provides for a specific grant of jurisdiction enabling bankruptcy courts to defeat the provisions of the Tax Injunction Act and determine the tax liability of a nondebtor. Therefore, the case will proceed in the Minnesota Tax Court. *In re Eveleth Mines, LLC*, No. 04-6045-04-6048 (U.S. B. App. Pan.) (8th Cir. 12/23/04)).

#### ADMINISTRATIVE

- **SALES AND USE TAX: CHANGE ON ISOLATED OR OCCASIONAL SALES.** The Minnesota Department of Revenue modified Revenue Notice 1991-06, relating to isolated or occasional sales. The modified notice states that generally, sales of tangible personal property primarily used in a trade or business do not qualify for the isolated or occasional sales tax exemption under Minn. Stat. §297A.68, Subd. 25. Minnesota Revenue Notice 1991-06, 12/20/04.
- **SALES TAX: EXEMPTION FOR FUND-RAISING EVENTS WITH LAWFUL GAMBLING.** In Minnesota Department of Revenue Notice No. 04-10 (12/27/04), the commissioner explained his position on Minn. Stat. §279A.70(14), which provides for an exemption from the Minnesota sales tax for sales or admission charges related to fund-raising events sponsored by nonprofit groups. The statute provides that the exemption is limited in that all gross receipts are taxable if fund-raising events exceed 24 days per year. The DOR's position is that lawful gambling activities conducted by a nonprofit group are fund-raising activities and are counted toward the 24-day limitation.
- **SALES TAX: INTERNET ACCESS CHARGES.** In Minnesota Department of Revenue Notice No. 05-01 (02/28/05), the commissioner replaced Revenue Notice No. 02-09 and indicated that when Internet access charges are combined with taxable charges, the whole amount of the bill is subject to sales and use taxation unless the Internet access provider can reasonably identify the charges for Internet access from its books and records kept in the regular course of business.
- **SALES TAX: PART GIFT AND PART PURCHASE ON NONPROFIT ADMISSIONS.** In Minnesota Department of Revenue Notice No. 05-02 (02/28/05), the commissioner announced his position regarding part gift, part purchase on admissions to events sponsored by a IRC §501(c)(3). The Revenue Notice requires that the donor "purposely contributed money or property in excess of the value of any benefit received" and the donor must have the intention of making a gift. In-kind contributions of services, such as legal, accounting and book-keeping, and entertainment services do not qualify as voluntary contributions.
- **CHARITIES ELIGIBLE FOR TAX DEDUCTIBLE CONTRIBUTIONS.** The IRS posted on its Web site a notice to help taxpayers locate charities to which they may make tax-deductible contributions. The searchable online version of Publication 78, *Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code of 1986*, has been improved to make the search for approved charities easier. Listed are the charities, their city and state location, and a code indicating the percent of the contribution that is deductible. A "help" page on Publication 78 is available on the Web at [www.irs.gov/pub/irs-pdf/p526.pdf](http://www.irs.gov/pub/irs-pdf/p526.pdf). To search Publication 78, go to [www.irs.gov/charities/page/0,,id=15053,00.html](http://www.irs.gov/charities/page/0,,id=15053,00.html), which also includes an addendum of approved charities not yet added to the database.
- **REQUIRED REPORTING OF TAXABLE ACQUISITIONS UNDER IRC CODE §6043(c).** The IRS requests comments on a new tax code provision that toughens reporting requirements for acquisitions as part of the IRC Code §6043(c) effort to stop abusive corporate transactions. Enacted under the American Jobs Creation Act, the new code provision requires information reporting by an acquiring corporation in any taxable acquisition. IRS Notice 2005-7.
- **REDESIGNED FORM 941.** The IRS has redesigned Form 941, Employer's Quarterly Federal Tax Return. The new version will be used for the first quarter of 2005 (3/31/04). To view Form 941, please visit the IRS.gov Web site at [www.irs.gov/pub/irs-dft/d941.pdf](http://www.irs.gov/pub/irs-dft/d941.pdf).
- **DISREGARDED ENTITIES SEPARATE IN DETERMINING TAX LIABILITIES.** The IRS finalized regulations to clarify that qualified real estate investment trust subsidiaries, qualified Subchapter S subsidiaries, and single owner eligible entities disregarded as separate from their owners are treated as separate entities for federal tax liability purposes. A disregarded entity generally is not liable for federal tax liabilities of its owner for periods during which it is disregarded but may be for periods when it was not disregarded or because it is the successor or transferee of a taxable entity. The regulations do not address whether a disregarded entity is liable for federal tax. They merely clarify that, if it is, the disregarded entity will be treated as an entity separate from its owner, such that assessment may be made against the disregarded entity, the assets of the disregarded entity may be subject to lien and levy, and the disregarded entity may consent to extend the period of limitations on assessment. T.D. 9183.
- **NEW SITE FOR UPDATES IN EXEMPT ORGANIZATION FIELD.** IRS invites taxpayers to join EO Update, a new subscription e-mail service from the IRS, for current news and information impacting the tax-exempt community. Subscribers receive periodic email updates and alerts about developments in exempt organizations tax law and regulations, upcoming IRS training and events, and other information. To subscribe, send a blank email to [eo-update-subscribe@lists.qai.irs.gov](mailto:eo-update-subscribe@lists.qai.irs.gov).
- **HOME EXCHANGE MAY QUALIFY FOR HOMESALE EXCLUSION AND LIKE-KIND DEFERRAL.** IRS issued Rev. Proc. 2005-14 making it clear that, in certain circumstances, an exchange of a home can qualify for both the IRC Code §121 homesale exclusion and IRC Code §1031 like-kind exchange deferral treatment. Rev. Proc. 2005-14, 2005-7IRB.
- **FILING LAST YEAR'S TAX RETURN.** The IRS hears many reasons from taxpayers for not filing a tax return. You may not have known whether you were required to file. Whatever the reason, it's best to file your return as soon as you can. The failure to file a return can be costly — whether you end up owing more or missing out on a refund. If you owe taxes, a delay in filing may result in a "failure to file" penalty and interest charges. The longer you delay, the larger these charges grow. There is no penalty for failure to file if you are due a refund. However, you cannot get a refund without filing a tax return. But if you wait too long to file, you may risk losing the refund alto-

gether. The deadline for claiming refunds is three years after the return due date. For more information on how to file a tax return for a prior year, call the IRS toll-free Tax Help Line for Individuals at 1-800-829-1040 or visit your local IRS office.

#### LEGISLATION

■ **2004 DEDUCTION FOR JANUARY TSUNAMI DONATIONS.** President Bush signed a bill that entitles taxpayers to a deduction on their 2004 tax returns for donations made in January, 2005 to groups that aid the victims of the Indian Ocean tsunami. H.R. 241. The Minnesota Legislature also passed and the governor signed a state counterpart for charitable contributions for tsunami relief. S.F. 218.

#### LOOKING AHEAD

■ **ARTHUR ANDERSEN CONVICTION TO BE REVIEWED.** The U.S. Supreme Court agreed to review a federal appeals court ruling upholding Arthur Andersen LLP's conviction on obstruction charges. The former Big Five accounting firm was charged with altering and shredding audit documents related to the SEC's investigation of its energy trading client Enron Corp. *Arthur Andersen LLP v. U.S.*, U.S. No. 04-368 (01/07/05).

■ **MISCELLANEOUS ITEMS.** Significant proposals are being discussed at the federal and state level such as:

- Social Security reform
- Federal tax reform
- Bankruptcy reform: S.256 "The Bankruptcy Abuse Prevention and Consumer Protection Bill of 2005"
- Transportation needs, education spending, and an increase in tobacco taxes at the Minnesota level.

The following reports on a wide variety of tax topics may be of interest:

- The president's revenue proposals in the fiscal year 2006 budget are covered at the Web site [www.whitehouse.gov/omb/budget/fy2006](http://www.whitehouse.gov/omb/budget/fy2006).
- The National Taxpayer Advocate released a report summarizing the need for simplification. The report specifically identified the complexity of the IRC Code including the lurking alternative minimum tax catastrophe. IRS News Release 2005-7 (01/11/05)
- Citizens for Tax Justice, in conjunction with its sister organization, the Institute on Taxation and Economic Policy, released in February, 2005 an analysis claiming that over 200 of America's largest and most profitable corporations failed to include two-thirds of their actual U.S. pretax profits on their state returns. To take a look: [www.ctj.org](http://www.ctj.org).
- The Joint Committee on Taxation released an exhaustive list of potential federal revenue raisers, giving Congress a \$400 billion belated Christmas gift in January, 2005. For a copy of the report: *Tax Notes*, January 23, 2005, pages 5-9 and DOC 205-1714; 2005 TNT 18-18 and DOC 205-1764; 2005 TNT 1839. Or go to [www.house.gov/jct](http://www.house.gov/jct).
- Report by the Minnesota Center for Public Finance Research: "Hidden Funds: An Analysis of Special Fund Activity in Minnesota," stating that 40 percent of Minnesota's operating budget and revenues are tied-up in special funds and are not visible to the public. For a copy, visit [www.mntax.org](http://www.mntax.org).
- Council On State Taxation ("COST") report: "Sales Taxation of Business Inputs — Existing Tax Distortions and the Consequences of Extending the Sales Tax to Business Services", prepared by Robert Cline, John Mikesell, Tom Neubig, and Andrew Phillips (01/25/05).
- Citizen's League Transportation Study Committee report: "Driving Blind: Minnesota Needs a More Transparent Transportation Policy that Connects Prices to Cost and Benefits to Investments". The report is available online at [www.citizensleague.net](http://www.citizensleague.net).

— JERRY GEIS  
Briggs & Morgan

## TORTS & INSURANCE

### JUDICIAL LAW

■ **WORKERS' COMPENSATION — INTERVENTION RIGHTS.** While working in the course of his employment, plaintiff was injured in a motor-vehicle accident caused by defendant. Plaintiff initiated a workers' compensation claim against his employer and a personal-injury claim against defendant. Plaintiff secured a settlement offer from defendant for his adjusted policy limit and moved for approval of the settlement in district court. The workers' compensation insurer moved to intervene to block approval of the settlement, and the potential exhaustion of its subrogation interest, asserting defendant had other financial resources not yet disclosed. Plaintiff objected to the intervention. The district court found the intervention to be unreasonable because it was for the primary purpose of blocking settlement and held that the motion to intervene was premature because the court had not yet ruled on the settlement motion.

The Court of Appeals reversed, holding that the workers' compensation insurer must be given the right to intervene before approval or disapproval of the settlement motion in order to protect its subrogation interest. The insurer proved it had an interest in the action and that its interest would be impaired by not participating in the litigation. Thus, the court reasoned, if the insurer was not allowed to intervene and the settlement motion was approved, the insurer's subrogation rights would be compromised without its input and its only recourse would be in the division of the settlement proceeds. *State Fund Mut. Ins. Co. v. Mead*, A04-561 (Minn. App. 02/01/05).

■ **FDCPA — DEBTOR/COLLECTOR COMMUNICATION.** Defendant collection agency was assigned to collect a debt for a creditor client who had been earlier contacted by the debtor's lawyer. Plaintiff debtor sued, alleging that the federal Debt Collection Practices Act ("FDCPA") requires collectors to communicate only with the debtor's lawyer when it knows the consumer is represented, and that even though the agency was not given direct notice, its client's knowledge of the representation should be imputed to the agency. The United States District Court for the District of Minnesota held, based on the plain language of the statute as well as established common law, that the creditor's knowledge may not be imputed to the collector, and dismissed the case in its entirety.

Plaintiff appealed to the United States Court of Appeals for the 8th Circuit, which affirmed the district court's dismissal based on the same reasoning. *Schmitt v. FMA Alliance*, No. 03-4057, (8th Cir. 02/09/05), 2005 WL 292446. [The author's law firm, Bassford Remele, A Professional Association, successfully represented the defendant collection agency in this matter.]

■ **PROFESSIONAL NEGLIGENCE — EXPERT IDENTIFICATION AFFIDAVITS.** A dispute arose over a floodwater impoundment system. Defendant filed counterclaims against plaintiff and impleaded the contract engineer. Defendant properly submitted the necessary expert review affidavit, but failed to serve the expert identification affidavit within 180 days after the first affidavit. The trial court granted the contract engineer's motion for summary judgment based on the failure to submit the proper expert-identification affidavit.

The Court of Appeals affirmed, holding that Minn. Stat. §544.42 requires service of two separate expert affidavits in professional negligence claims. First, the plaintiff must serve an affidavit of expert review with the pleadings. Second, within 180 days after the first affidavit, the plaintiff must serve an affidavit identifying the expert, the substance of the opinion, and a summary of the grounds for every opinion. The statute provides a 60-day cure period for deficient affidavits. The 60-day cure period is not available when no expert-identification affidavit is filed within the original 180 days. *Middle River-Snake River Watershed District v. Dennis Drewes, Inc. v. J.O.R. Engineering Inc.*, A04-825 (Minn. App. 02/15/05).

— MICHAEL KLUTHO  
Bassford Remele, A Professional Association