

IRS CREATES SAFE-HARBOR FOR THE DEDUCTION OF M&A SUCCESS BASED FEES



The Internal Revenue Service has created a safe-harbor election under Revenue Procedure 2011-29 to allow taxpayers to allocate seventy percent (70%) of the success-based fees paid in business acquisitions or reorganization as a deduction against current ordinary income. If the election is made, the remaining thirty percent (30%) must be capitalized. This election can be made for success-based fees incurred in years ending on or after April 8, 2011. This Revenue Procedure clears up the uncertainty that has existed in how to allocate these fees.

COURT RULES THAT DEBTOR'S INHERITED IRA QUALIFIED FOR BANKRUPTCY EXEMPTION



In *Chilton v. Moser*, a Texas Federal District Court overturned a Bankruptcy Court and ruled that an inherited IRA owned by a debtor is an exempt asset and protected under the Bankruptcy Code. This is an important decision. As more and more wealth is accumulated in 401(k)'s and rolled over into IRA's, these IRA's are often the most significant assets heirs inherit from decedents. To have these inherited IRA assets protected from the Bankruptcy process, is an enormous benefit for heirs who may be in financial trouble. One cautionary note, although this court decision is persuasive for Bankruptcy Courts in Wisconsin, it is not binding. Nevertheless, the decision should provide some comfort to heirs owning inherited IRA's who may be subject to creditor concerns.

BAN ON TEXTING AND E-MAILING WHILE DRIVING



Wis. Stat. § 346.89(1) states “[n]o person while driving a motor vehicle shall be so engaged or occupied as to interfere with the safe driving of such vehicle.”

Until December 1, 2010 that was the major focus of the “inattentive driving” statute. On December 1, pursuant to 2009 Wisconsin Act 220, subsections (3)a-b were added to the statute stating that “[n]o person may drive, as defined in s. 343.305(1)(b), any motor vehicle while composing or sending an electronic text message or an electronic mail message.” Exceptions to the statute include (1) operators of emergency vehicles, (2) certain in-vehicle systems (On-Star) that transmit and receive emergency alert messages and messages related to the operation of the vehicle, including global positioning devices, (3) amateur radio operators who hold a valid license issued by the federal communication commission when using dedicated amateur radio 2-way equipment and observing proper operating procedures, and (4) users of voice-operated or hands-free devices if the driver of the motor vehicle does not use his or her hands to operate the device, except to activate or deactivate a feature or function of the device. The penalty for violating Wis. Stat. § 346.89(3) is a fine of not less than \$20 nor more than \$400, and, because it is a moving violation, 4 points on your drivers license.

What does that mean? It means that a person, while driving, cannot compose (write) or send text messages or e-mails while their car, van, truck, motorcycle, bus or any other motor vehicle is in motion. The focus of this new law has been on the texting aspect of it, but it does include a prohibition against composing and sending e-mails. However, it excludes times when the vehicle is stopped at a traffic light, a stop sign or in traffic due to congestion. It does not prohibit reading messages, or using or surfing the internet. Further, it does not prohibit dialing a phone number, making or receiving phone calls, scrolling through contacts, checking one’s electronic calendar, etc.

Of course, this does not permit inattentive driving. Captain Tim Carnahan of the Wisconsin State Patrol believes that driving distractions, such as texting, are simply dangerous and irresponsible. While state troopers usually give drivers 30 days before enforcing a new law, it will not be the case with the texting or e-mailing while driving ban. Carnahan stated “[t]he law becomes effective on [December 1] and it is entirely possible that someone who is violating that law and is witnessed by our law enforcement would be stopped for that

violation.” However, State Patrol Superintendent David Collins noted that the state also has a law against inattentive driving, and that drivers could be ticketed under that law if they are distracted by reading text messages or talking on their cell phones. Collins stated “[t]o be very simple, it’s not illegal to read. But we’re not recommending that. We’re not saying that’s a flaw in the law. We’re just saying use common sense.”

As part of 2009 Wisconsin Act 220, the Legislature added requirements to the driving curriculum for Technical College Systems, Wisconsin public schools, and Driving Schools that they “[a]cquaint[] each student with the hazards posed by composing or sending electronic text messages or electronic mail messages while driving and with the provisions of s. 346.89(3).”

NEW WISCONSIN RULES OF CIVIL PROCEDURE GOVERNING E-DISCOVERY AND ELECTRONICALLY STORED INFORMATION



It is estimated that more than 90% of all information created today is stored electronically.

The Federal Rules of Civil Procedure were amended in 2006 to address such electronically stored information, or “ESI”. Effective January 1, 2011, the Wisconsin Rules of Civil Procedures also are being amended to address ESI and confirm that discovery of ESI stands on equal footing with discovery of paper documents.

The Wisconsin rules have been changed to parallel the federal e-discovery rules and make it easier to utilize existing federal authority in discovery disputes in the Wisconsin courts. But Wisconsin did not adopt the 2006 federal amendments in their entirety. The new Wisconsin rules take a slightly different approach than the federal amendments in two ways: First, some federal rules do not have Wisconsin counterparts. For example, unlike FRCP Rule 26(a), Wisconsin’s new rules make no provision for mandatory disclosure. Second, the drafters of the new Wisconsin rules thought some portions of the federal amendments should be addressed by substantive Wisconsin law, rather than by a procedural rules change.

The new Wisconsin ESI rules are:

- Wis. Stat. § 802.10(3)(jm) (the Wisconsin counterpart to FRCP 16)

This rule is being enacted to encourage courts to be more active in managing electronic discovery. It adds the need for discovery of electronically stored information to the issues that a trial court may address in issuing a scheduling order.

- Wis. Stat. § 804.01(2)(e) (the Wisconsin counterpart to FRCP 26)

This rule is being enacted to help manage the costs of discovery of ESI. It creates a “meet and confer” obligation, and states that no requests for production or inspection of ESI under Wis. Stat. § 804.09 (or responses to interrogatories by production of ESI under Wis. Stat. § 804.08(3)) can be issued until after the parties confer on a number of discovery issues. However, it does not require parties to confer before commencing other types of discovery.

- Wis. Stat. § 804.08(3) (the Wisconsin counterpart to FRCP 33(d))

This rule gives parties the option to produce electronic business records in lieu of an answer to an interrogatory. It specifies that ESI is among the types of business records that a business may provide in response to an interrogatory. But, this is an option; it is not mandatory.

- Wis. Stat. §§ 804.09(1) and (2) (the Wisconsin counterpart to FRCP 34)

These rules are the heart of the new electronic discovery rules. They govern the formulation of electronic discovery requests and responses and establish the scope and procedures regarding the discovery of ESI. They treat ESI the same as paper documents.

- Wis. Stat. § 804.12(4m) (the Wisconsin counterpart to FRCP 37)

This rule provides a “safe harbor” for the good faith, routine deletion of ESI and gives limited “immunity” from certain spoliation sanctions.

- Wis. Stat. § 805.06 (the Wisconsin counterpart to FRCP 53)

This is not a new rule, but rather its use in ESI matters is suggested by the comments to the new Wisconsin rules. It allows for the use of discovery referees or “special masters” to handle complex and/or expensive discovery issues, including those involving ESI.

- Wis. Stat. § 805.07 (the Wisconsin counterpart to FRCP 45)

This rule adds ESI to the types of materials which may be discovered by subpoena.

For more information about these new amendments to the Wisconsin Rules of Civil

Procedure, contact Grant Killoran at O'Neil, Cannon, Hollman, DeJong & Laing S.C. at 414.291.4733 or grant.killoran@www.wilaw.com.

NEW TAX LEGISLATION ALLOWS FOR ENHANCED ESTATE PLANNING



The President has signed into law the new tax legislation which recently passed through Congress. Generally, the new tax law extends the existing tax rates for two more years, provides a two percent reduction in the payroll tax, and increases the estate tax exemption to \$5 million. An additional provision in the legislation, which has been given very little attention in the public media, increases the gift tax exemption to \$5 million beginning in 2011. Prior to this, the gift tax exemption was \$1 million. This change will give individuals significantly greater flexibility in their estate planning. The \$1 million gift ceiling was a hindrance to many individuals who wished to do comprehensive estate planning. With this exemption raised to \$5 million, \$10 million per couple, the estate planning options become much more diverse and will allow significantly more freedom to individuals to do planning.

WHY ARE BUY-SELL AGREEMENTS IMPORTANT?



The term "buy-sell agreement" means any legally enforceable arrangement by and among a business entity or its owners prescribing limitations on the ability to own and to transfer equity interests. It is the linchpin between a business succession plan and the estate plans of the owners in determining the future ownership and control of a business. The terms of a buy-sell agreement can be included in an operating agreement of a limited liability company, a partnership agreement for general and limited partnerships, or in a close corporation

agreement for corporate entities.

Most often the terms of a buy-sell agreement are set forth in a separate written document by and among the shareholders of a corporation and the corporation itself. This article focuses on separate written buy-sell agreements involving corporations, even though many of the concepts apply to other types of business entities.

When entrepreneurs are forming a business entity, or a new investor becomes a shareholder, the parties are optimistic that they will all benefit from the financial success of the enterprise. Introducing the topics of death, disability, termination of employment, and other negative possibilities is comparable to negotiating a prenuptial agreement for a couple about to be wed. Unfortunate but foreseeable events need to be addressed as soon as possible before irreversible commitments are made.

A buy-sell agreement is an integral part of a shareholder's personal estate plan. The creation of a market to liquidate an otherwise nonmarketable asset is crucial to many estate plans. The shareholder's will and trust must contain directions to the fiduciary to comply with and to implement the terms of the agreement. These documents may also direct the fiduciary to accept the provisions of the agreement (such as the valuation methods) without the necessity or duty to inquire as to the validity of the data on which the sale is based or the process by which it is made.

Control and ownership

In discussing business succession planning, it is advisable to focus on three separate elements:

- (1) Income
- (2) Control
- (3) Equity ownership

While a buy-sell agreement may indirectly affect the income from a business entity, the arrangement more directly affects control and equity ownership.

The company's capital structure and organizational documents determine the control of the enterprise through the election of the board of directors. The managers of the business and perhaps the other shareholders, however, do not want family members who happen to inherit stock to be involved in the management of the business. The separation of control from the equity ownership of the business and the extraction of the value of the equity ownership of the business should be agreed on in writing by the shareholders.

Who is the purchaser?