ATTORNEY MCBRIDE SECURES APPELLATE COURT VICTORY

On May 4, 2010, the Wisconsin Court of Appeals affirmed a lower court ruling dismissing a series of claims against the defendants for lack of personal jurisdiction under Wisconsin's long-arm statute, Wis. Stat. § 801.05 and held that, as Attorney McBride had argued, personal jurisdiction over the corporation cannot be the sole basis for personal jurisdiction over an officer. Attorney McBride's argument enabled the appellate court to differentiate between the business contacts of the corporation with Wisconsin and the lack of specific contacts within the state by the individual defendants, former officers of the corporation.

While the appellate court noted that the business contacts of the corporation in Wisconsin were sufficient to impose jurisdiction over the corporation, it agreed with Attorney McBride's argument that the individual defendant's work on behalf of the corporation, all performed outside Wisconsin, was not sufficient to constitute "substantial and not isolated activities within this state" sufficient to impose personal jurisdiction over the former officers. As a result, the court of appeals determined that the exercise of personal jurisdiction over the individual defendants was not permissible under the long-arm statute.

Attorney McBride is a former law clerk to Wisconsin Supreme Court Justice Jon P. Wilcox (ret.) and provides counsel to clients dealing with appellate issues in both state and federal court. A full copy of the opinion can be found here.

PETER WALSH WRITES AND SPEAKS ON SPECIALIZED ESTATE PLANNING TECHNIQUE

Attorney Peter Walsh of O'Neil Cannon, has recently published an article and is a frequent speaker on the topic of formula adjustment clauses in estate planning to mitigate the valuation risk inherent in the gift of hard to value assets. Such hard to value assets include closely held business interests and real estate. The risk sought to be reduced by this technique is that of substantial additional gift tax plus interest resulting from an increase to the value of a gifted assets through an IRS audit. For example, a gift of hard to value stock in the family business in 2008 could result in additional gift tax plus interest in 2010, if the IRS successfully challenges the value of the gifted stock. Estate planners have employed various means to mitigate this valuation risk.

In two recent taxpayer victories, the Tax Court gave its blessing to the evolving use of

formula adjustment clauses to eliminate the valuation risk. For instance, the Tax Court, in Estate of Petter, allowed a taxpayer to avoid substantial gift tax through a "charitable cap adjustment clause" which allocated any increase in value to public charities. When the taxpayer in Petter conceded to an IRS demand for a substantial increase in the value of property given as a gift, the taxpayer was able to avoid additional gift tax through the adjustment clause that allocated the entire increase to donor advised funds offered by public charities. In this manner, the taxpayer traded a taxable gift for a charitable deduction.

Peter's article on this subject titled "Formula Clause Changes Taxable Gift into Charitable Donation," appeared in the April issue of the national tax magazine Practical Tax Strategies. Peter presented a seminar on this subject to the Milwaukee Estate Planning Forum, LTD, on May 5, 2010, and will present at the Milwaukee Bar Association, on May 20, 2010. Click here to view a copy of Peter's presentation materials or to register click here.

Peter is a member of the Tax, Estate and Succession Planning practice of the downtown Milwaukee law firm and assists clients with all areas of tax and estate planning. He is licensed in Wisconsin, Illinois, and Florida and has a master's degree in taxation.

WISCONSIN REPEALS BULK TRANSFER LAW

Wisconsin has finally joined the vast majority of states who have repealed bulk transfer laws. The repeal of Wisconsin's bulk transfer law, Chapter 406 of the Wisconsin statutes, became effective February 5, 2010. Forty-five states have now dropped their bulk transfer requirements, according to the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). Wisconsin was late to join the club. The NCCUSL and the American Law Institute initially recommended repeal or revision of the bulk transfers law in 1989.

Chapter 406 of the Wisconsin Statutes required a business to notify all creditors before transferring a major part of the business's inventory outside of the ordinary course of business. Chapter 406 applied only to sellers whose primary business was the sale of inventory, such as convenience store and liquor store retailers.

Wisconsin's bulk transfer law, initially enacted in 1901, had become obsolete. Bulk transfer laws were intended to address concerns near the end of the 19th century that merchants would frequently buy inventory on credit, sell the entire bulk of inventory and disappear with the proceeds of the sale, leaving creditors with little recourse. The NCCUSL, recommended that Wisconsin repeal its bulk transfer law because today creditors can better assess the creditworthiness of a buyer and can obtain a security interest in the assets of a buyer, which was not an option for creditors when Wisconsin's bulk transfer law was enacted. In addition,

creditors are better positioned today to collect amounts owed to them, including through fraudulent transfer laws and state long-arm jurisdiction statutes.

Wisconsin's bulk transfer law was also impractical. Buyers and sellers of businesses often waived compliance with the bulk transfer law and relied upon the indemnification provisions in the purchase agreement. Neither party wanted notice of the proposed sale of the business to be sent to third parties weeks before the transaction had closed and been announced.

TIM CAPREZ NAMED AMERICAN BAR ASSOCIATION OUTSTANDING SUBCOMMITTEE CHAIR

On April 23, 2010, the American Bar Association ("ABA") Section of Litigation awarded Attorney Tim Caprez "Outstanding Subcommittee Chair for the 2009-2010 Bar Year" honors at the 2010 ABA Section Annual Conference in New York City. The Section of Litigation, which first appointed Attorney Caprez as the Section's Health Law Litigation Committee Newsletter Editor in 2009, honored him for his success in furthering the Health Law Litigation Committee's efforts to be "the premier resource for healthcare litigators nationwide who wish to become informed of and engage in discussion and debate regarding current and emerging issues and trends in healthcare litigation."

The ABA Section of Litigation, the largest specialty section of the ABA, aims to help litigators become more effective advocates for their clients and is a legal publisher and source of news and analysis by way of publications such as the Health Law Litigation Committee Newsletter. That newsletter provides in-depth examinations of diverse topics within the broad range of health law litigation to which the Health Law Litigation Committee is dedicated through its individual subcommittees, which include: Antitrust and Consumer Protection, False Claims and Qui Tam, Fraud and Abuse, Licensing and Peer Review, Managed Care, Medical Ethics, Medical Malpractice and Nursing Home.

Health law litigation is a substantial part of Attorney Caprez's practice at O'Neil Cannon, as he counsels and represents clients with respect to compliance and dispute resolution efforts in heavily-regulated industries and occupations. Licensed in Wisconsin and Illinois, Attorney Caprez advises and litigates on behalf of entities and individuals in relation to a wide variety of corporate governance, transactional and employment and personnel management matters.

ATTORNEY JOE MAIER PRESENTS AT THE SOCIETY OF FINANCIAL SERVICE PROFESSIONALS ON MAY 12TH, 2010

Attorney Maier will speak at the upcoming “Key Planning Issues for Financial Professionals” seminar hosted by the Milwaukee Chapter of the Society of Financial Service Professionals. His talk is entitled “What Do We Do Now? – A practical guide to adding clarity and flexibility to our client’s strategic property and family protection plan.”

The Milwaukee Chapter of the Society of Financial Service Professionals is organized to provide continuing education, professional networking, and to enhance public recognition and trust of credentialed financial service professionals.

To register visit here.

U.S. SUPREME COURT TO DECIDE WHETHER EMPLOYEES’ VERBAL COMPLAINTS ARE PROTECTED UNDER FLSA

The United States Supreme Court has decided to review a Fair Labor Standards Act (“FLSA”) case in which the U.S Court of Appeals for the Seventh Circuit held that an employee could not maintain an action for retaliation under the FLSA for his termination based upon his verbal complaints to his employer that the time clock was improperly placed to provide for accurate punch-ins and punch-outs. The U.S. Court of Appeals for the Seventh Circuit oversees the federal district courts in Illinois, Indiana, and Wisconsin.

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, an employee alleged that his employer violated the FLSA’s anti-retaliation provisions when it terminated his employment following verbal complaints to his supervisors that the location of the time clock was illegal because it did not allow workers to be paid for time spent putting on and removing protective clothing needed for duties of their jobs. The employer, on the other hand, maintained that the employee’s termination was based upon the employee’s repeated failure to comply with the company’s time clock policies.

The U.S. Court of Appeals for the Seventh Circuit agreed with the lower federal district court that the FLSA does not protect against retaliation for employees' verbal complaints. The district court ruled that an employee's oral complaint is not protected activity under the FLSA's anti-retaliation provision as the FLSA only protects an employee who has "filed any complaint or instituted or caused to be instituted any proceeding." Given the specific language of the statute, the federal district court held that a verbal complaint does not fall within the FLSA's anti-retaliation protections. While the federal district court noted that a complaint need not necessarily be filed with a labor agency or court in order to fall under the FLSA's "protected activity" purview, it concluded that the FLSA still requires that a complaint be "committed to document form" in order to garner such FLSA protections.

If the U.S. Court of Appeals for the Seventh Circuit's decision is upheld, it affords employers some protections against retaliatory discharge claims under the FLSA based solely on verbal complaints. However, if the Supreme Court reverses this decision, it will signal a need for employers to train their supervisors to be very sensitive to all complaints levied by their employees in any form. Employers must always be mindful of an employee's recent complaints that might qualify as "protected activity" when making any disciplinary or discharge decision and make sure that any such decision is based upon legitimate and articulable business interests.

COBRA PREMIUM SUBSIDY EXTENDED TO MAY 31, 2010

On April 15, 2010, President Obama signed into law the Continuing Extension Act of 2010, which has once again extended the COBRA premium subsidy as provided for in the American Recovery and Reinvestment Act of 2009 ("ARRA"); this time the subsidy has been extended from March 31, 2010 to May 31, 2010. This new law provides retroactive eligibility for individuals who involuntarily lost their employment after the prior COBRA subsidy extension expired on March 31, 2010. Under the ARRA, "assistance eligible individuals" pay only 35 percent of their COBRA premiums and the remaining 65 percent is reimbursed to the coverage provider through a payroll tax credit. An "assistance eligible individual" is the employee or a member of his/her family who timely elects COBRA coverage following a qualifying event related to an involuntary termination of employment that occurs at any point in time from September 1, 2008 through May 31, 2010. In addition, an involuntary termination of employment that occurs on or after March 2, 2010 but by May 31, 2010 and follows a qualifying event that was a reduction of hours that occurred at anytime from September 1, 2008 through May 31, 2010 is also a qualifying event for purposes of the ARRA.

UNMARRIED COUPLES TAKING ADVANTAGE OF THE HOMEBUYER TAX CREDIT SHOULD UNDERSTAND THEIR RIGHTS

The Homebuyer Tax Credit is scheduled to expire soon. To take advantage of the tax credit, homebuyers must enter into a binding contract to purchase a home before May 1, 2010, and they must close on the home before July 1, 2010.

Not surprisingly, many unmarried couples have sought to take advantage of the tax credit by purchasing a home together. Those unmarried couples doing so should consider the following issues:

- Will each person pay an equal amount for the down payment and closing costs?
- If not, will each person own an equal share of the home?
- Will each person be responsible for an equal share of the monthly mortgage payment?
- What happens if one person is unable to make a timely monthly mortgage payment? If the other person makes up the difference, is this treated as a loan, a gift, or does it affect the ownership percentage in the home?
- Who gets to decide on necessary repairs/maintenance for the house, and who must pay for them? Similarly, who gets to decide on unnecessary repairs/maintenance for the house, and who must pay for them?
- Will anyone else be permitted to live in the house? For example, a friend, sibling, or parent in need of a place to stay? If so, will they pay rent?
- Will either person be compensated for labor expended on or around the home (e.g. lawn work, painting, cooking, laundry, etc.)?
- What happens if one person can no longer afford the home and wants to sell? If one person dies?

While the blissful couple may believe that a spoken agreement will suffice, they should be mindful of the potential pitfalls of such an arrangement, especially if the relationship falters. For this reason, it can be very beneficial to obtain a Home Purchase and Co-Tenancy Agreement to ensure each party is aware of their rights and responsibilities, both during and after the relationship.

ESTATE PLANNING FOR MARRIED INDIVIDUALS

WITH CHILDREN FROM A PRIOR MARRIAGE

Effectively drafting estate plans for married individuals with children from a prior marriage can be a challenge. Failure to properly plan can cause divisive family disputes. There are many variables to be considered and competing interests that need to be balanced when preparing an appropriate plan. A common concern is that the spouses want to take care of each other during their lives, but also want their children from a prior marriage to receive some inheritance. There are generally two techniques to address this concern: 1) an immediate division of assets between the surviving spouse and the children from the prior marriage, or 2) the creation of a trust upon death where the surviving spouse has an interest in the trust for his or her lifetime, and the children receive the remainder upon the death of the surviving spouse. Often a combination of these two techniques is employed.

The advantage to an immediate division of assets is simplicity and certainty. The client identifies which assets are to be distributed to the surviving spouse and which assets are to be distributed to their children. The assets may be divided equally or on some percentage basis among the children and the surviving spouse. Most often, certain assets may be distributed to the spouse and certain assets may be distributed to the children. For example, the surviving spouse may receive the residence and a 401(k) retirement account, and the children from the prior marriage may receive the proceeds of a life insurance policy and an investment account. A drawback to this technique is that there may not be enough assets to provide a lifetime benefit for the surviving spouse. Also, it is important to monitor the basket of assets that is to go to the spouse and children as the asset values will change. The residence may increase in value where the investment account may be used and have a reduced value.

The use of a trust provides more flexibility, allows for the maximum assets for the surviving spouse, and allows for the assets to be divided over time. The surviving spouse receives distributions from the trust assets (either a fixed amount, all of the income, or based upon his or her need) for his or her lifetime. The children from the prior marriage then receive the assets remaining upon the death of the surviving spouse. A key to trust planning such as this is to effectively manage the investment to make the asset last for the life of the surviving spouse, and still provide some assets for the children. Also, a trustee needs to be selected that manages the trust for the benefit of all beneficiaries. A drawback to this technique is that the children from the prior marriage would not receive an inheritance until the death of the surviving spouse.

There are many, many other legal and tax issues that must be considered in this planning. Certain assets have significant tax advantages if given to the surviving spouse, and other assets cannot be given to anyone but the surviving spouse without consent. Also, in Wisconsin, the rules of Marital Property need to be considered in all estate plans for married

people. Estate planning for married couples with children from a prior marriage requires careful, thoughtful planning. The two general techniques summarized in this article are often used in tandem to provide an effective comprehensive plan. The key is to establish a comprehensive plan to avoid significant divisive disputes upon the death of a spouse.

ATTORNEY CHAD RICHTER PRESENTS AT LEE HECHT HARRISON SEMINAR

Attorney Chad J. Richter will be giving a presentation on Monday, April 12th at Lee Hecht Harrison located at 10000 Innovation Drive, Suite 100, in Milwaukee. The seminar is for displaced senior executives interested in getting into their own venture by purchasing a business or franchise, and discusses the various issues they may encounter along the way. Chad will be presenting with a group of panelists, in other professional services areas, and will focus on some of the key legal issues one faces when purchasing a business or franchise.