

THE WILAW QUARTERLY NEWSLETTER

Newsletter Article Highlights:

- Protecting the Elderly from Fraud by Caregivers
- Debt Collection Safe Harbor May Not Be So Safe
- Mental Capacity Issues in Estate Planning Litigation
- Employers Should Review Their Employee Non-Solicitation Agreements
- What Should Businesses Know About the Tax Plan?

Pleased to Announce:

- Steve Slawinski Elected to the ABC of Wisconsin Board of Directors
- Gregory Mager Moderates for the AAML

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GREGORY MAGER MODERATES FOR THE AAML

Attorney Gregory S. Mager recently moderated the Family Court Commissioners' Panel at the 36th Annual Midwinter Seminar for the Wisconsin Chapter of the American Academy of Matrimonial Lawyers.

The American Academy of Matrimonial Lawyers (AAML) was founded to provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law, including divorce and child custody decisions.

The AAML focuses on generating assistance, support, and growth for education, mediation, and arbitration in matrimonial law. The organization makes resources available to its members, including news, publications and other information on important sociological and psychological research concerning marriage breakdown, with particular attention on the consequences for the children of separated and divorced parents.

Greg has been a fellow in the AAML since 2012. He is recognized by judges and peers as one of Wisconsin's premier family law attorneys. He uses his extensive skill, training, and experience to help his clients achieve successful resolutions of their divorce, paternity, custody, placement, and support matters. Greg is uniquely positioned to successfully represent clients in their family law matters, including those involving complex business,

financial, and child related issues.

For additional information, please contact Greg at Gregory.Mager@wilaw.com or 414-276-5000.

TAX AND WEALTH ADVISOR ALERT: WHAT SHOULD BUSINESSES KNOW ABOUT THE TAX PLAN?

If you've been following our posts, this is the third installment in our series on the Tax Cuts and Jobs Act, the tax-legislation overhaul passed by Congress and the President at the end of 2017. Previously, we highlighted the most important changes affecting [individuals](#) and [non-profits](#). This week, we're discussing big changes affecting businesses claiming deductions. Most people have heard that Congress reduced the corporate tax rate, but people may not realize that Congress paid for that reduction by changing how businesses claim deductions. We'll discuss some of those changes here.

To start, net operating losses (NOLs) can no longer be carried back to prior tax years, and taxpayers must limit their deduction to 80% of their taxable income instead of 100%. These changes may increase taxable income for businesses each year (relative to what taxable income would have been without this change). The good news is that NOLs may now be carried forward to future tax years indefinitely. So, businesses won't lose the benefit of their NOLs, they just lose the benefit of timing.

For businesses claiming research and development expenditures, they can no longer immediately deduct them. Instead, businesses have to capitalize these costs and deduct them over five years. This means businesses have to reduce their taxable income slowly over time instead of claiming a larger deduction immediately. This will increase taxable income; however, businesses have until 2022 before this rule takes effect.

The Act reduced some businesses' ability to deduct interest expenses. Starting in 2018, businesses must determine the amount of interest they can deduct based on a formula. Luckily for small businesses, Congress created an exception to this limitation. "Small businesses" are those with average annual gross receipts of \$25 million or less. You might wonder if partners and S corporation shareholders get around this rule because their businesses pass through taxation—they do not; however partners and S corporation shareholders may be able to carry forward interest expense unused by the partnership or S corporation to future years.

Although not great news, the Act explained the above-mentioned changes relatively clearly. Congress explained another change less clearly, and it's causing disagreement among tax practitioners. Previously, businesses could claim a deduction for meal and entertainment expenses, ranging from 50-100% of those expenses. The Tax Cuts and Jobs Act made several changes to the rules governing this deduction, including eliminating the deduction for entertainment expenses (yes, this means those company Brewers tickets are no longer deductible), reducing the deduction for meals provided to employees at the employer's convenience from 100% to 50%, and *potentially* eliminating the deduction for meals with clients, referral sources, and business prospects. For relationship-based businesses, this latter change may be substantial. Tax practitioners interpreting the plain meaning of the law say those meals with clients, referral sources, and business prospects will not be deductible. Tax practitioners interpreting the intent of the law say those meals will still be deductible because Congress didn't eliminate this deduction on purpose. At this point, the confusion makes it nearly impossible for these businesses to plan for their tax liability in 2018.

On April 2, 2018, the American Institute of CPAs (the AICPA) asked the U.S. Treasury Department and IRS to issue guidance on this issue immediately. Until the Treasury or the IRS speaks up, businesses taking a conservative approach to tax planning might assume these expenses will not be deductible. As with all changes to the tax code, we will keep an eye out for updates and advise our clients as guidance is released.

MENTAL CAPACITY ISSUES IN ESTATE PLANNING LITIGATION

The United States Census Bureau projects that by 2050, the 65 and older population will nearly double that of 2012. Along with this increasing older population comes an increase in the potential for estate litigation based on mental capacity issues.

These types of claims often arise where the testator suffers from a mental or physical condition, such as Alzheimer's disease or Parkinson's disease, that could compromise a testator's ability to have an understanding necessary to execute a valid will or trust or which may make him or her susceptible to being influenced by another person while making decisions about his or her estate. Advanced age, an inability to handle financial affairs, and the testator's personality may be other relevant factors when a challenge to a person's mental capacity arises.

In Wisconsin, any person 18 years or older and of sound mind may make, amend, or revoke a will or trust. Testamentary capacity is presumed, but interested parties, including disinherited

heirs, may assert that a will or trust does not reflect the true wishes of the testator. The two main ways to challenge testamentary capacity are through claims that the testator lacked legal capacity or that someone exercised “undue influence” over the testator.

The test for legal capacity in Wisconsin is quite specific and requires that a testator have the mental ability to understand the nature and extent of his or her property and his or her relationship to the beneficiaries. A testator must also be able to appreciate the scope and general effect of the provisions of his or her will or trust in relation to the beneficiaries. The testator needs to be able to contemplate these elements together for a sufficient period of time, without prompting, to form a rational judgment in relation to them, the result of which is expressed in the will or trust.

Generally, the testator must have a reasonable understanding of the terms of the will or trust, though a complete understanding of legal terms is not necessary.

A claim of undue influence is essentially one of diminished testamentary capacity, and a person challenging a will or trust may prove it by satisfying the following elements:

1. Susceptibility of the testator to undue influence;
2. Opportunity to influence the testator;
3. Disposition to influence the testator; and
4. Coveted or desired result.

As you can see, estate and probate cases involving mental capacity issues are highly fact specific. A precise application of these factors will depend on the circumstances of each case. Court decisions will depend largely on particular circumstances, which makes choosing an experienced estate planning litigation attorney to develop your case crucial.

If you have any question, please contact Greg Lyons at Greg.Lyons@wilaw.com or 414-276-5000.

TRENDS IN ARBITRATION IN THE UNITED STATES

Businesses in the United States have used arbitration clauses in contracts for many years. The purpose of these clauses is to encourage (or require) that contract disputes be settled in arbitration rather than by litigation and trial. Consumer and employment contracts frequently include arbitration clauses.

As Internet-based businesses have exploded over the past fifteen years, so have the number and types of business contracts containing arbitration clauses. Businesses frequently include mandatory arbitration provisions in their online “terms and conditions” for use of their sites, products or services. Businesses engaging in international transactions, whether online or offline, also may include arbitration provisions in their agreements to limit litigation in countries throughout the world.

While business contracts have changed to reflect changes in alternative dispute resolution, litigation, and the business environment, the arbitration process in the United States also has changed to reflect a more technologically-interconnected world in which arbitration, not litigation, is being used to resolve many types of business disputes.

As a result, arbitration proceedings now often include many of the rules for the handling of electronically stored information (ESI) that U.S. courts already have enacted. Due to its “electronic” nature, ESI can present challenges involving discovery, security, and authentication that traditional paper-based recordkeeping does not.

Courts have addressed these challenges by creating specific rules addressing ESI issues, as well as by adapting existing rules for paper-based documentation to try to accommodate ESI. Since arbitration proceedings frequently handle disputes involving businesses that create, store, and use large quantities of electronic information, many arbitrators have adopted similar rules. But the rules governing ESI usually differ between litigation and arbitration and one potential advantage of arbitration therefore is the possibility of a limited discovery process. Arbitration often can reduce the amount of “big data” a party must parse in order to find what is relevant to the proceeding at hand.

Arbitration remains the second most popular form of alternative dispute resolution in the United States, after mediation. The formal and binding nature of most arbitration – along with the fact that parties can choose arbitrators with specialized technical knowledge helpful to understand the details of the dispute – makes arbitration an appealing alternative to litigation (and trial), particularly when international jurisdictions may be in play.

If you have any question, please contact Grant Killoran at grant.killoran@wilaw.com or 414-276-5000.

EMPLOYMENT LAWSCENE ALERT: RECENT LEGISLATION IMPACTS QUALIFIED RETIREMENT

PLAN HARDSHIP WITHDRAWAL AND PLAN ROLLOVER RULES

The two-year budget agreement passed by Congress on Friday, February 9th, and signed by President Trump later that day, includes tax policy changes that affect qualified retirement plans. Specifically, qualified retirement plan hardship withdrawal operations will be impacted by the Bipartisan Budget Act of 2018 (the Budget Act) as follows:

- **Removal of the six-month prohibition on deferrals following a hardship withdrawal.** Section 41113 of the Budget Act directs the IRS to issue updated guidance to permit 401(k) and 403(b) plan participants who have taken a hardship distribution from a retirement plan to continue contributing to the plan, even immediately following the hardship distribution. Under current rules, once a participant elects to take a hardship distribution, no elective deferrals are permitted to be made until six months have passed from the date of the distribution. The revised rule will take effect on January 1, 2019 for plans that have a calendar-year plan year.
- **Inclusion of QNECs, QMACs, and profit-sharing contributions in hardship withdrawals.** Under current regulations, a plan sponsor may specify the sources of a participant's plan assets eligible for a hardship withdrawal, but such assets may in no event include certain employer contributions. Beginning on January 1, 2019 (for calendar-year plans), the Budget Act rules will permit a participant's 401(k) or 403(b) plan assets deriving from employer profit-sharing contributions, as well as from employer corrective contributions known as Qualified Nonelective Employer Contributions (QNECs) and Qualified Matching Contributions (QMACs), to be included in sources from which a hardship withdrawal may be taken. The earnings on such contributions will also be included among the assets available for withdrawal. Section 41114 of the Budget Act not only expands the potential sources of a hardship withdrawal, but also eliminates the requirement (previously elected by some employers) that a participant must have taken a plan loan before qualifying to take a hardship withdrawal.

The Tax Cuts and Jobs Act of 2017 (the Tax Act), signed into law by President Trump on December 22, 2017, affects certain plan loan distributions. Specifically, for all tax-qualified retirement plans that offer loans, including 401(k), 401(a), 403(b), and governmental 457(b) plans, the Tax Act provides for an:

- **Extended Deadline for Rolling Over Certain Plan Loan Offsets.**
 - **Background and prior law:** A plan loan "offset" occurs when an individual owes an outstanding loan to a qualified retirement plan, but then experiences a distribution event that is either (1) a termination of employment; or (2) the termination of the plan. If the plan, in such situation, permits a participant's account balance to be paid out in full, minus the loan amount, then a plan loan offset occurs. A Form 1099-R is issued, indicating that the offset amount is an actual distribution. If a participant receiving a loan offset takes no action, the offset loan amount is

considered or “deemed” to be a distribution, and is subject to taxation. Under these facts, taxation of the offset amount can be avoided if: (1) the distribution is otherwise eligible to be rolled over; and (2) the participant rolls the full amount of the distribution, including the amount of the offset, into an IRA. To include the offset amount in the rollover, the participant will need to contribute personal (or borrowed) funds to the rollover amount. Previously, offset loans could only avoid taxation if such a rollover occurred within the 60-day period beginning on the date of offset distribution.

- New law, effective for plan years beginning on and after January 1, 2018: The Tax Act expressly extends the time period for avoid taxation by rolling over an offset loan until the participant’s deadline for filing a federal income tax return (taking any extensions into account). This change means that in many cases, a participant will have more time in which to effect a tax-free rollover of a loan offset occurring following termination of employment.

Caution: No Change to Basic Tax Rules

Although recent legislation is trending toward easing the rules relating to hardship withdrawals and plan loans, it is important to remember that nothing about the fundamental tax treatment of these distributions have changed.

A common misconception (especially among participants) is that if a participant qualifies for a hardship distribution, then the distribution from the plan is tax-free.

A hardship distribution is subject to the same taxation rules as other plan distributions.

Satisfying the standards for a hardship distribution simply entitles the participant to receive an in-service distribution of elective deferrals (and other contributions) from the plan, but the hardship distribution is subject to income taxes applicable to plan distributions. A hardship distribution is also generally subject to a 10% early distribution penalty, unless the participant has reached age 59-1/2. A hardship distribution is never eligible to be rolled over into an IRA.

Similarly, once a plan loan has been deemed distributed (either due to a plan loan repayment default, because a plan does not provide for an offset option upon distribution, or because an offset is not timely rolled into an IRA), the deemed distribution of a plan loan is taxed in the same manner as a regular plan distribution for purposes of determining the tax, including any early distribution penalty. A deemed distribution may never be rolled over into an IRA.

Plan Sponsor Action Items

With respect to plan hardship distributions, employer sponsors of 401(k) and 403(b) plans should prepare for the 2019 plan year by:

- Considering whether it is desirable to add a hardship distribution option to the plan (if not already permitted). If hardship distributions will be added, amend the plan and

communicate the availability of the option to participants by preparation and distribution of a Summary of Material Modification (SMM) (or other appropriate form of communication in the event of a non-ERISA plan).

- Plan documents that already provide for hardship distributions should be amended, effective for the first day of the 2019 plan year, to eliminate the 6-month restriction on elective deferrals following a hardship distribution and to expand the permitted accounts from which hardship distributions may be taken. These details should be communicated to participants in the form of an SMM.

With respect to plan loans, plan sponsors of plans that permit loans should:

- Review the plan loan policy and plan loan provisions to determine if either should be updated to reflect this rule, or consider whether to modify the loan policy to take advantage of this rule. For example, if the plan currently permits continued loan repayments following termination of employment consider whether this option should be continued or eliminated. Consider also whether a loan note should be allowed to be rolled over to a successor plan upon plan termination or if the new extended rollover period provides sufficient flexibility to participants absent a rolled over loan note.
- Consider whether plan participant communications should be revised to alert participants to the greater flexibility now allowable for rollover of loan offset amounts.
- As applicable, confer with any third-party administrator for the plan to avoid inadvertently deeming a participant's loan a deemed (taxable) distribution.

PROTECTING THE ELDERLY FROM FRAUD BY CAREGIVERS

In what has become an all-too-common story, it was recently reported that a 92 year-old Wisconsin woman suffering from dementia was defrauded by her caregiver. The caregiver, who allegedly stole \$25,000, recently pled guilty to fraud and identity theft. More details on the story, which was reported by Milwaukee WISN 12, can be found [here](#).

Like many who suffer from dementia, the victim of this crime was living in her home, with the assistance of caregivers. While most caregivers are certainly professional and trustworthy, in this case, the caregiver—Andrea Gooseberry who worked for Home Care Assistance—allegedly was not.

The criminal complaint alleges that the caregiver used Marilyn's debit card and identity to steal approximately \$25,000 through 47 separate ATM transactions, all of which occurred over the course of one month. According to victim's son, Marilyn was no longer capable of using an ATM card on her own.

The sad news does not end there, unfortunately. The police are also investigating whether four family friends stole another \$20,000 from Marilyn.

There are steps that can be taken to reduce the risk that a loved one will be defrauded. For one thing, it is important that steps be taken to monitor a loved one's bank account to identify suspicious transactions. In addition, arrangements can be made to have a financial power of attorney put in place. If necessary, court proceedings can also be filed to seek the court appointment of a representative to take charge of the finances of one who is no longer able to handle his or her finances alone.

Whenever fraudulent activity of the sort described above is discovered, it is important to contact the local authorities. In addition, depending on the circumstances, the filing of a lawsuit may be the best option to put yourself in a position to investigate suspected fraud, particularly if that fraud is not discovered until after your loved one has passed.

If you would like more information on this topic, you are welcome to call Trevor Lippman at 414-276-5000 or trevor.lippman@wilaw.com

ATTORNEY CLAUDE J. KRAWCZYK INVOLVED IN RESTORING MARQUETTE CAMPUS STATUE

The George Washington statue has returned to Wisconsin Avenue near the campus of Marquette University. The 133 year-old monument had been removed for restoration, which involved removing layers of black corrosion and the repair of splitting bronze. Attorney [Claude Krawczyk](#) currently serves as the president of The Westown Association, which raised funds for the restoration effort. In total, the restoration project cost more than \$100,000 to complete. Attorney Krawczyk had a special interest in the project, explaining "I can remember seeing [the statue] when I was a kid, it's been there all my life. I think it's an important memory for Milwaukee ... an important symbol." Read full story [here](#).

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Newsletter Article Highlights:

- What Should You Do If You are Named Trustee?
- Do Your Due Diligence
- A Deeper Dive Into the Arbitration Process and a Look at the Advantages and Disadvantages of Arbitration
- ACA Employer Payment Notices Arriving Soon
- What Should Individuals Know About the Tax Plan?

Pleased to Announce:

- OCHDL Welcomes New Attorney [Kelly M. Spott](#)
- [Scoby](#) and [Gagan](#) Elected Shareholders
- Congratulations to Our 2017 Super Lawyers

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DEBT COLLECTION SAFE HARBOR MAY NOT BE SO SAFE

Debt collectors recently received clarification on the contents of the collection letters they send on behalf of creditors: The “safe harbor” language set forth by the Seventh Circuit Court of Appeals to avoid liability under the Fair Debt Collection Practices Act is not meant to be copied and pasted into collection letters in every situation. Earlier this month, the Seventh Circuit concluded debt collectors cannot refer to late charges in collection letters sent to consumers if the creditor is prohibited from collecting late charges—even if a debt collector is quoting the safe harbor language that typically precludes FDCPA liability. Rather, debt collectors must ensure the safe harbor language is tailored to the circumstances.

The optional safe harbor language used in Wisconsin, Illinois, and Indiana includes an explanation of variable debts—that “[b]ecause of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater” than the amount listed as owed in the collection letter. This safe harbor language may allow debt collectors to avoid liability under the FDCPA because it provides a template for explaining the variable nature of some debts. In the recent case of *Boucher v. Finance System of Green Bay, Inc.*, the Seventh Circuit held that this safe harbor precludes liability for inaccurately stating the amount of a variable debt regardless of which FDCPA provision that liability is based upon. But for it to be a truly safe harbor, the debt collector must be sure that the language

accurately describes the nature of the debt. In *Boucher*, the debt collector used the safe harbor language as quoted above, even though no late charges or other charges could be added to the debt. The Seventh Circuit held this violated the FDCPA because the average unsophisticated consumer would believe late charges could be added and would thus be misled about the amount or character of the debt.

For more information on debt collection laws, contact [Christa Wittenberg](#) at 414-276-5000 or christa.wittenberg@wilaw.com