TAX AND WEALTH ADVISOR ALERT: WHY I WOULD RATHER BE A BENEFICIARY… PART TWO: MIMICKING OWNERSHIP

Part one of this blog post focused on why trusts protect people from themselves and others. But, will our client's children be as happy being a beneficiary of a trust as they would be if they owned property? The critical questions that need to be answered are what does it mean to own property and what is different with a trust? If people own property, they have the right to make decisions about that property. For example, if they own a house, they can decide what color to paint it. If they own a car, they can decide who drives it. If they own a race horse, they can decide what races to enter the horse in. In other words, they can control the property. Also, if people own property, they have the right to enjoy it. They can sit on their beach house patio and watch the sunset; they can drive their Ferrari fast down a deserted road; they can eat their chocolate ice cream cone. And finally, if people own property, they can transfer that property to others. They can convert it to cash through a sale; they can give it to a loved one or a charity.

So, the essence of ownership is control, enjoyment, and power to transfer. If Mom and Dad leave their property to a trust for a child who is financially mature, solely to protect that child from others, can we design the trust to mimic outright ownership? The first goal the trust needs to accomplish is to give the child control over the trust property. In the trust context, the trustee has control. Can the child be trustee and still be protected from creditors, predators, and divorcing spouses? The answer is an absolute and unequivocal, yes.

The trust beneficiaries have the ability to enjoy trust property. Who are the trust beneficiaries? The child and the child's children. So yes, the child can enjoy the trust property.

Finally, can the child transfer the trust property to others? We can design a protective trust that allows the child to transfer trust property to other people. This right is known as a "power of appointment" and allows the child to transfer the trust property to people other than creditors, the exact people we do not want the child to be able to transfer property to.

So, that is why the best estate plans do not leave property outright to the people our clients care about. Instead, these plans leave property in a trust that does everything our clients want: it mimics their ownership while protecting them from others.

If you want to learn more about this perfect estate plan, O'Neil, Cannon, Hollman, DeJong and Laing's Tax and Estate Group would love to hear from you.

TAX AND WEALTH ADVISOR ALERT: WHY I WOULD RATHER BE A BENEFICIARY… PART ONE: TRUSTS PROTECT PEOPLE FROM THEMSELVES AND OTHERS

As a management tool, trusts accomplish two goals. One, they protect people from their own financial immaturity. For example, about a month ago, I met with a wonderful woman with four children. As we discussed her strategy to take care of the people she cared about, she began to violently weep. You see, before meeting with me, she had come to the difficult decision to write one of her children out of her estate plan; a son with terrible spending habits linked primarily to a substance abuse problem. Her quote: “Everything I leave him puts him in greater danger.” I then proceeded to explain how a trust could accomplish her goals; she could leave 25% of her wealth to a trust to benefit her son, yet have someone whose financial wisdom she trusted to oversee how those funds are used to benefit him.

But protecting people from themselves is only one reason to leave property to a trust rather than outright to the children. The other is to protect them not from themselves, but from others. If Mom and Dad design their estate plan to leave 1/3 of a child’s share outright at 25, 30, and 35 years of age (a classic design in my area of the world), those distributed assets are exposed. If they, the children, get into an automobile accident or sign a poorly thought through personal guarantee, the assets Mom and Dad wanted to take care of the person they cared about will instead be diverted to an undesirable creditor. But the main reason to use a trust is not to protect your assets from some amorphous, unknown creditor but rather a known one; a creditor that 51% of married people deal with that takes 50% of their worth. That creditor, of course, is a divorcing spouse. If Mom and Dad leave property outright to their child, unless careful accounting is done (which in my world is rarely the case), Mom and Dad’s ex-son or daughter-in-law end up with half. If they leave the property in a well-designed trust, that is not the case.

So, a well-constructed estate plan leaves property to the children in trust rather than outright. The trust protects those children from themselves (if they need that protection) and from others. But what about those children’s enjoyment? Isn’t it better to own property? If the children owned the assets directly, wouldn’t they have more freedom and control? Not so—and those points will be addressed in part two of this blog post.

EMPLOYMENT LAWSCENE ALERT: IRS DELAYS AFFORDABLE CARE ACT REPORTING

On December 28, 2015, the IRS extended the deadlines for insurers, self-insuring employers, other coverage providers, and applicable large employers to file reports regarding health care information required by the Affordable Care Act. The information required to be reported relates to whether and what health insurance was offered to full-time employees to determine whether the employer met its shared responsibility requirements under the Affordable Care Act and whether employees are eligible for the premium tax credit. For each month, applicable large employers must report certain information, including, but not limited to, how many employees they had, whether the employees were offered health coverage, and the cost of that coverage. The IRS determined that covered entities needed additional time to "adapt and implement systems and procedures to gather, analyze, and report this information." The applicable forms must now be furnished to individuals by March 31, 2016 and to the IRS by May 31, 2016 (or June 30, 2016, if filing electronically). If these forms have already been prepared, the IRS is ready to receive them in January 2016 and encourages providers to file them now instead of waiting for the new due dates.

EMPLOYMENT LAWSCENE ALERT: SEVENTH CIRCUIT RULES THAT EEOC MUST TRY TO RESOLVE DISPUTES THROUGH CONCILIATION BEFORE FILING SUIT

On December 17, 2015, the Seventh Circuit held in *EEOC v. CVS Pharmacy Inc.* that the EEOC was required to first attempt to resolve its dispute with CVS through conciliation before bringing suit over whether CVS's language in its severance agreements constituted a "pattern or practice of resistance to the full enjoyment" of rights secured by Title VII. The EEOC alleged that CVS's standard severance agreement was overly broad, misleading, and intended to deter terminated employees from filing charges with the EEOC even though the agreement provided a carve-out recognizing the employee's right to "participate with any appropriate federal, state or local government agency enforcing discrimination laws."

We have previously blogged about this specific case here and other attempts by the EEOC to broaden their enforcement powers by skirting its conciliation duties here, here, and here.

In February 2014, the EEOC filed suit in federal district court in Illinois alleging that CVS's severance agreements constituted a "pattern or practice" in violation of Section 707(a) of Title VII by interfering with an employee's full enjoyment of the rights afforded by Title VII. In granting CVS's motion to dismiss the complaint, the district court determined that the EEOC was first required to conciliate its claim before bringing a civil suit—a prerequisite that the EEOC claimed it did not have to meet because "pattern or practice" claims brought under Section 707(a) authorizes the agency to bring such actions without following the pre-suit procedures in Section 706—including conciliation. The district court granted CVS summary judgment dismissing the EEOC's suit finding that the agency was required to conciliate its claims before filing its civil suit. In dismissing the EEOC's suit, the district court also questioned whether or not an employer's decision to offer a severance agreement could be the basis for a "pattern or practice" discrimination suit without any allegation that the employer had actually engaged in retaliatory or discriminatory employment practices—an allegation that was missing from the EEOC's complaint.

On appeal, the Seventh Circuit rejected the EEOC's position that Section 707(a) relieved it from any obligation to follow the pre-suit procedures found in Section 706. In addition, the Seventh Circuit held that the prohibition against "pattern or practice" discrimination found in Section 707(a) did not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes but, rather, simply permits the EEOC to pursue multiple violations of Title VII. Because several circuits, including the Seventh Circuit, have found that conditioning benefits on a promise not to file charges with the EEOC is not, in itself, retaliation under Title VII, the court found that simply offering the severance agreement was not discrimination, and therefore, the EEOC failed to state a claim under Title VII. The Seventh Circuit's holding is in line with the recent Supreme Court decision in *Mach Mining, LLC v. EEOC*, which found that the EEOC can only resort to litigation when informal methods of dispute resolution fail because conciliation is a "key component of the statutory scheme" of Title VII.

Although this case was decided in the employer's favor regarding the waivers contained in its severance agreement, it is still recommended that employers include explicit and express provisions in their severance agreements that make clear: (i) that even though a severance agreement may provide that an employee may waive his or her right to sue in any court or agency, an employee should still be permitted by the express language of the agreement to participate in agency proceedings that enforce discrimination laws; (ii) that the waivers and releases are not to be construed to interfere with the EEOC's rights and responsibilities to enforce federal anti-discrimination statutes under its jurisdiction or those rights of any state administrative agency; and (iii) that the employee has the protected right to file a charge or participate in an investigation or proceeding conducted by the EEOC or any state administrative agency charged with the authority to enforce anti-discrimination laws. Until the U.S. Supreme Court ultimately rules on the issues presented in the CVS case, employers should expect that the EEOC will continue to be aggressive on these issues regarding whether the use of covenants not to sue under Title VII violate an employee's rights to the full enjoyment of protections afforded by Title VII. Including the above recommended carve-out language in severance agreements places an employer on defensible ground against any EEOC attack regarding the lawfulness of covenants not to sue used in severance agreements. For now, the Seventh Circuit's recent decision is an important victory for employers in Illinois, Indiana, and Wisconsin with regard to their ability to effectively use severance agreements to protect themselves from future suits by terminated employees without fear that such agreements may be considered retaliatory by the EEOC.

IS YOUR COMPANY'S WEBSITE COMPLIANT WITH THE AMERICANS WITH DISABILITIES ACT (ADA)?

Recently, class action lawyers around the country have filed lawsuits against businesses and organizations (even the National Basketball Association) alleging that their websites are not compliant with the ADA. Attorneys on behalf of vision or hearing impaired individuals are alleging that websites available for use by the public must conform to certain standards of accessibility. These claims are based on the ADA's general prohibition that "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment… of any place of public accommodation…." Although initially thought to cover only physical locations, plaintiffs' lawyers have argued that the changing technology landscape has modified the definition of "places of public accommodation" over the last twenty years or so. Courts around the country have disagreed as to whether websites constitute a "place of public accommodation," but litigation under the statute continues.

Part of this recent push may come from the Department of Justice's changed stance on accessibility standards for websites. In 2010, the DOJ stated that covered entities could comply with the ADA's requirements regarding websites by providing an accessible alternative, such as a staffed telephone line. However, in June 2015, the DOJ filed statements of interests in at least two lawsuits in support of claims that the defendants needed to make their websites immediately accessible. The DOJ was expected to issue proposed rules in spring 2016, but now it seems as though the DOJ will not complete rulemaking until 2017 or 2018.

If you own a business, you will want to speak with your website developer about these issues. Moreover, if your company has been the target of a letter or lawsuit threatening legal action based on your website, you should contact an attorney to discuss your options before agreeing to any settlement demands.

If you have any questions, please contact Attorney Erica N. Reib at O'Neil Cannon at 414-276-5000.

RECOGNIZED AS ONE OF THE TOP LAW FIRMS IN WISCONSIN BY SUPER LAWYERS

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to be selected for inclusion in the 2015 *Super Lawyers Business Edition*. The Top firms were chosen based on the number of attorneys within the firm who were selected to the 2014 or 2015 Super Lawyers list in business practice areas, as well as a combination of metrics indicating the quality of those attorneys. Quality factors that were considered included the number of years selected to the list, inclusion on a top list, and their average blue ribbon panel scores.

The following attorneys recognized by Super Lawyers and featured in the *2015 Annual Directory* of the nation's top attorneys in business and transactions practice areas include:

- James G. DeJong – Mergers and Acquisitions
- Seth E. Dizard – Creditor Debtor Rights
- Peter J. Faust – Mergers and Acquisitions
- John G. Gehringer – Real Estate
- Joseph E. Gumina – Employment and Labor
- Gregory W. Lyons – Business Litigation
- Patrick G. McBride – Business Litigation
- Joseph D. Newbold – Business Litigation
- Chad J. Richter – Business/Corporate
- John R. Schreiber – Creditor Debtor Rights
- Jason R. Scoby – Mergers and Acquisitions

EMPLOYMENT LAWSCENE ALERT: OSHA PENALTIES TO DRAMATICALLY INCREASE IN

2016

In early November, President Obama signed the Bipartisan Budget Act of 2015. One item that should be of particular note to employers is that, under the Act, OSHA penalties will rise significantly.

Because OSHA penalties have been consistent for over two decades, once the Act goes into place on July 1, 2016, there is an immediate "catch-up" provision that will adjust the penalties as much as 150%. However, OSHA is also required to adjust the penalties on January 15 every year based on the Consumer Price Index ("CPI"). Because the CPI has increased 82% since the OSHA penalties were set in 1990, there is a possibility that the fines could be raised by that amount. The below chart shows the current penalty amounts and the amounts that they may be increased to:

Type of Violation	**Current Maximum Penalty**	**Adjusted Maximum (150%)**	**Adjusted Maximum (182%)**
Willful Violation	$70,000	$105,000	$127,400
Serious Violation	$7,000	$10,500	$12,740
Other-The-Serious Violation	$7,000	$10,500	$12,740
De Minimis Violation	$7,000	$10,500	$12,740
Failure to Abate Violation	$7,000	$10,500	$12,740
Repeat Violation	$70,000	$105,000	$127,400

These new fines will go into place August 1, 2016. Therefore, employers must keep a keen eye on safety now more than ever because OSHA has increased enforcement and now will increase its monetary penalties.

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LOCAL COURT RULES IN WISCONSIN

While litigators most likely are familiar with the various state and federal local court rules impacting courtroom practice in their geographic areas, they may not be as familiar with the local rules for courts in other areas in which they do not usually practice but have a case.

Wisconsin's state courts have various different sets of local rules. To assist attorneys in complying with these differing local rules, the State Bar of Wisconsin maintains a page on its website—www.wisbar.org—with links to them.

Milwaukee County is the most populous county in Wisconsin, and its Circuit Court has its own local rules which can be found here:

The Circuit Courts for the various counties outside Milwaukee comprising the greater Milwaukee metropolitan area also have their own local rules, including:

- The Kenosha County Circuit Court which can be found here.
- The Ozaukee County Circuit Court which can be found here.
- The Racine County Circuit Court which can be found here.
- The Sheboygan County Circuit Court which can be found here.
- The Washington County Circuit Court which can be found here.
- The Waukesha County Circuit Court which can be found here.

Wisconsin's federal courts also have their own local rules.

- The local rules for the United States District Court for the Eastern District of Wisconsin can be found here.
- The local rules for the United States District Court for the Western District of Wisconsin can be found here.
- The local rules for the Wisconsin Bankruptcy Courts can be found:
    - Here for the U.S. Bankruptcy Court for the Eastern District of Wisconsin;
    - Here for the U.S. Bankruptcy Court for the Western District of Wisconsin.

In addition, various Wisconsin federal court judges, particularly those in the Eastern District of Wisconsin, have their own practice preferences, some of which can be found:

- Here for the U.S. District Court for the Eastern District of Wisconsin; and
- Here for the U.S. Bankruptcy Court for the Eastern District of Wisconsin.

Local rules are subject to periodic modification, so it is advisable to review the local rules at the beginning of each case and thereafter as necessary.

For more information about Wisconsin's state or federal local court rules, please contact Grant Killoran at 414.291.4733

TWENTY ATTORNEYS ELECTED TO THE

WISCONSIN SUPER LAWYERS LISTS

O'Neil Cannon is proud to announce that the following sixteen attorneys were selected for inclusion on the Super Lawyers list, which is limited to 5% of all Wisconsin attorneys, as published in the December 2015 Edition of *Milwaukee Magazine and the* Wisconsin *Super Lawyers Magazine*:

- Douglas P. Dehler
- James G. DeJong
- Seth E. Dizard
- Peter J. Faust
- John G. Gehringer
- Joseph E. Gumina
- Dean P. Laing
- Gregory W. Lyons
- Gregory S. Mager
- Patrick G. McBride
- Joseph D. Newbold
- Chad J. Richter
- John R. Schreiber
- Jason R. Scoby

In addition, the following four attorneys were selected for inclusion on the Super Lawyers "Rising Stars" list, which "recognize[s] the top up-and-coming attorneys in the state—those who are 40 years old or younger, or who have been practicing for 10 years or less:"

- Melissa S. Blair
- Megan O. Harried
- Erica N. Reib
- Timothy M. Van de Kamp

The Firm is proud to further announce that Dean Laing, Seth Dizard, and Peter Faust were selected by Super Lawyers as "Top 50 Attorneys" in Wisconsin and "Top 25 Attorneys" in the Milwaukee Area. Dean is one of only 10 attorneys out of over 15,000 attorneys in Wisconsin—and the only commercial litigator—to be selected to The Top 50 list for all 10 years.

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process is multi-phased and includes independent research, peer nominations, and peer evaluations. As part of its process, Super Lawyers surveyed more than 15,000 attorneys and judges in Wisconsin, looking for the best attorneys in the State.

The New Jersey Supreme Court recently upheld the findings of a Special Master who made the following determinations about Super Lawyers:

> “[T]he selection procedures employed by [Super Lawyers] are very sophisticated, comprehensive and complex.
>
> It is absolutely clear… that [Super Lawyers does] not permit a lawyer to buy one’s way onto the list, nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one’s inclusion in the lists.”

THE WILAW CONNECTION QUARTERLY NEWSLETTER

- Trusts as Parties to Business Agreements
- New Changes to Obtaining Discovery in Wisconsin for Use in Other States
- Limitation of Liability
- Time for the Income Tax Tail to Start Wagging the Estate Planning Dog
- Can Employees Use FMLA to Avoid Overtime?
- Welcome
    - Samantha M. Amore
- Pleased to Announce
    - Congratulations to Our Attorneys Listed in *The Best Lawyers in America*® 2016
    - Attorneys Grant Killoran and Patrick McBride Selected to the 2015 Irish Legal 100